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## New York's Adverse Possession Law: An Abdication of Personal Responsibility

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## NEW YORK'S ADVERSE POSSESSION LAW: AN ABDICATION OF PERSONAL RESPONSIBILITY

*Jonathan M. Vecchi*\*

### I. INTRODUCTION

Throughout American history, the doctrine of adverse possession has played a role in ensuring the possession of land by those who recognized its potential and used it productively. At the same time, the doctrine penalized those who neglected their property and allowed it to fall into disrepair. However, some recent trends have limited the ability to acquire land by adverse possession. In 2008, New York joined this movement when the legislature significantly modified the adverse possession law.<sup>1</sup>

This article discusses the injustice that will result from the New York changes and the decline in personal responsibility of landowners. Part II explains the historical purposes of adverse possession. Part III discusses how New York's prior law furthered these legitimate goals. Part IV analyzes how New Jersey's changes in adverse possession law departed from the doctrine's traditional principles and produced inequitable outcomes. Part V focuses on how the New York statutory changes similarly lessen landowner responsibility and industrious land uses. Part VI briefly concludes with a recommendation that New York return to its prior approach. This article demonstrates that the original purposes of adverse possession remain relevant in today's society and that the new changes are detrimental to land productivity and use.

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<sup>1</sup> See generally N.Y. REAL PROP. ACTS LAW §§ 501-543 (McKinney 2008); Estate of Becker v. Murtagh, 968 N.E.2d 433, 437 n.4 (N.Y. 2012).

## II. THE PURPOSES OF ADVERSE POSSESSION

Most legal scholars agree that adverse possession dates back to the thirteenth century;<sup>2</sup> however, some evidence suggests that the principle originated in Roman times.<sup>3</sup> Regardless of its origins, adverse possession has been part of American law since its founding.<sup>4</sup> For a successful claim of adverse possession, the adverse user must typically show that the occupation is hostile, actual, open and notorious, exclusive, and continuous for the statutory period.<sup>5</sup> The law of adverse possession is the culmination of a number of concerns and theories about land use and ownership.

A primary reason for the development of adverse possession law was to promote the productive use of property.<sup>6</sup> Adverse possession law allows the person in long-term possession to improve and make investments in property without the fear that the fruits of his labor will be enjoyed by the lazy title owner.<sup>7</sup> This theory derives from the view that society should support “the industrious user rather than the idle claimant.”<sup>8</sup>

Another theory is that adverse possession creates an incentive for the landowner to be proactive.<sup>9</sup> To prevent an adverse possession claim, an owner should regularly inspect, maintain, and control his own land. While this can be done simply by scanning one’s own property, it is certainly more constructive to put that land into production<sup>10</sup> before a non-owner seizes the opportunity. In sum, this theory

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<sup>2</sup> Jeffery Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2421-22 (2001); Lawrence Berger, *Unification of the Doctrines of Adverse Possession & Practical Location in the Establishment of Boundaries*, 78 NEB. L. REV. 1, 2 (1999).

<sup>3</sup> Carol Necole Brown & Serena M. Williams, *Rethinking Adverse Possession: An Essay on Ownership & Possession*, 60 SYRACUSE L. REV. 583, 584 (2010).

<sup>4</sup> John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519, 521-23 (1996).

<sup>5</sup> *Estate of Becker*, 968 N.E.2d at 437.

<sup>6</sup> *Van Ness v. Pacard*, 27 U.S. 137, 145 (1829) (“[T]he universal policy was to procure [land’s] cultivation and improvement.”).

<sup>7</sup> Lee Anne Fennell, *Efficient Trespass: The Case for “Bad Faith” Adverse Possession*, 100 NW. U.L. REV. 1037, 1040 (2006) (“[T]he niche goal of adverse possession—moving land into the hands of parties who value it much more highly than do the record owners.”).

<sup>8</sup> Sprankling, *supra* note 4, at 526.

<sup>9</sup> Stake, *supra* note 2, at 2436-37.

<sup>10</sup> In the world of adverse possession, the word “production” is a loose term. It does not necessarily require farming, logging, or building upon the land; rather, reasonable maintenance or an enclosure signifying ownership historically satisfies the term. *Franza v. Olin*, 897 N.Y.S.2d 804, 807-08 (App. Div. 4th Dep’t 2010).

was meant to invoke personal responsibility in the landowner to oversee and supervise the activities on his property.

A different theory rests in fairness. This theory suggests that as time progresses, the balance of justice shifts from the true owner, who failed to eject the possessor, to the person who actually possessed the land.<sup>11</sup> Similar to many other legal rules, adverse possession law subjects an owner's ability to eject a trespasser to a statute of limitations.<sup>12</sup> Once the statute of limitations has run, the possessor's occupation may have ripened into title.

### III. NEW YORK'S FORMER ADVERSE POSSESSION LAW

Prior to 2008, the New York rule allowed for a broad interpretation of the elements of a successful adverse possession claim.<sup>13</sup> New York recognized a successful claim even if the adverse possessor knew, upon occupation, that the land was another's.<sup>14</sup> Additionally, New York's former law allowed for a wide range of productive activities that would be considered adverse. A claimant only needed to show that the land was "usually cultivated or improved" or "protected by a substantial enclosure" under his direction for the ten-year statutory period.<sup>15</sup> The courts recognized that the simple acts of mowing the lawn or building and maintaining a fence for the statutory period were sufficient for successful adverse possession claims.<sup>16</sup> Even the placement of shrubs was deemed sufficient.<sup>17</sup>

Many legal scholars suggest that adverse users with intent to divest their neighbors of their property should not be rewarded for

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<sup>11</sup> Alexandra B. Klass, *Adverse Possession and Conservation: Expanding Traditional Notions of Use and Possession*, 77 U. COLO. L. REV. 283, 289-90 (2006).

<sup>12</sup> *Estate of Becker*, 968 N.E.2d at 437.

<sup>13</sup> *See, e.g.*, *Walling v. Przybylo*, 851 N.E.2d 1167 (N.Y. 2006).

<sup>14</sup> *Walling*, 851 N.E.2d at 1169 (N.Y. 2006) (stating that since 1840, New York has held that "an adverse possessor's claim . . . will not be defeated by mere knowledge that another holds legal title"), *superseded by statute*, N.Y. REAL PROP. ACTS LAW § 501(3).

<sup>15</sup> *Gaglioti v. Schneider*, 707 N.Y.S.2d 239, 241 (App. Div. 2d Dep't 2000) (citing N.Y. REAL PROP. ACTS LAW § 522 (McKinney 1962) (amended 2008)).

<sup>16</sup> *Phillips v. Sollami*, 632 N.Y.S.2d 859, 861 (App. Div. 3d Dep't 1995) (holding that mowing the lawn for the statutory period satisfied the "common-law and statutory predicates" of adverse possession); *Morris v. DeSantis*, 577 N.Y.S.2d 440, 441-42 (App. Div. 2d Dep't 1991) (holding that erecting a six-foot high fence on disputed property, which stood for seventeen years, was enough to satisfy the adverse possession requirements).

<sup>17</sup> *Gaglioti*, 707 N.Y.S.2d at 241 (holding that the placement of twelve shrubs was sufficient to adversely possess a portion of the disputed property).

their malicious purposes.<sup>18</sup> However, the intended focus of adverse possession was not on the knowledge of the industrious user, but rather on the failure of the title owner to act.<sup>19</sup> Even if the adverse user was using and maintaining the property with the subjective intent to gain title through adverse possession, his objective could not be realized without the failure of the current owner to either (1) put his own land into production or (2) thwart the adverse user's actions.<sup>20</sup> Therefore, the owner cannot blame the adverse user's occupation for his loss, but rather his own failure to be a personally responsible landowner by not regularly inspecting, maintaining, and controlling his own property.

Mowing the lawn, building a fence, and planting shrubs may be considered trivial acts at first glance, but a deeper examination reveals that these actions exemplify adverse possession's intended principles. The owner's failure to inspect, maintain, and control his property frequently prompted the adverse user to engage in these activities. Aside from the adverse user's knowledge (or lack thereof) of ownership of the disputed property, his actions put the otherwise untamed property into productive use. These actions serve the community by conserving the neighborhood standard and maintaining property values.<sup>21</sup> Furthermore, the adverse user provides this service through his own labor and expense. Therefore, when title transfers to the adverse possessor, it rewards him for picking up the slack of the now former owner.<sup>22</sup> Likewise, the prior owner is penalized for neglecting his property, which, if not for the adverse user, would have fallen into unsightly disrepair.<sup>23</sup>

Lastly, the former owner cannot claim that he is overly burdened by the requirements to inspect, maintain, and control his property. In New York, the owner could accomplish this responsibility

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<sup>18</sup> Klass, *supra* note 11, at 288-89 (equating adverse possession with obtaining "title by theft").

<sup>19</sup> Susan Lorde Martin, *Adverse Possession: Practical Realities and an Unjust Enrichment Standard*, 37 REAL EST. L.J. 133, 137 (2008) (stating one reason for adverse possession is to "discourage landowners from sleeping on their rights").

<sup>20</sup> See generally N.Y. REAL PROP. ACTS LAW § 501 (McKinney 1962) (amended 2008).

<sup>21</sup> Scott Andrews Shepard, *Adverse Possession, Private-Zoning Waiver and Desuetude: Abandonment and Recapture of Property and Liberty Interests*, 44 U. MICH. J.L. REFORM 557, 587 (2011) ("[N]eglect of disused properties can lead to rapid diminishment of property values and safety in the surrounding communities.").

<sup>22</sup> Fennell, *supra* note 7, at 1059 (stating a purpose for adverse possession is to reward the possessor).

<sup>23</sup> Martin, *supra* note 19.

simply by walking his land once every ten years and giving permission to those engaging in activities on his property.<sup>24</sup> Failure of the owner to even engage in this simple activity clearly shows his lack of personal responsibility and care for his holdings. Once again, a primary goal of adverse possession is to award land to those “who value it much more highly than . . . the record owners.”<sup>25</sup>

#### IV. NEW JERSEY'S ADVERSE POSSESSION PRINCIPLES

In 1969, the Supreme Court of New Jersey decided *Mannillo v. Gorski*.<sup>26</sup> In that case, the adverse possessor made additions to his home, which resulted in a fifteen-inch encroachment on the neighboring title owner's property.<sup>27</sup> The title owner brought suit for trespass.<sup>28</sup> When the adverse user countersued claiming adverse possession, the title owner raised several arguments to negate the claim.<sup>29</sup>

First, the title owner asserted that New Jersey law only allowed for adverse possession when the adverse user intentionally entered land he knew belonged to another.<sup>30</sup> The title owner alleged that the adverse user in this case built the additions on the mistaken belief that he owned the property.<sup>31</sup> Overruling precedent, the New Jersey Supreme Court held that knowledge was irrelevant to an adverse possession determination,<sup>32</sup> thus following the traditional purposes of the doctrine.<sup>33</sup> The court stated that it is not the adverse user's intent that causes the title owner to forfeit ownership, but rather the owner's “neglect to seek recovery of possession.”<sup>34</sup>

The court then focused on the open and notorious element of adverse possession. While the court stated that typically clear and visible adverse possession puts the title owner on constructive notice,

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<sup>24</sup> Stake, *supra* note 2, at 2436 (“The monitoring need only occur every few years . . .”).

<sup>25</sup> Fennell, *supra* note 7.

<sup>26</sup> 255 A.2d 258 (N.J. 1969).

<sup>27</sup> *Id.* at 259-60 (acknowledging that the encroachment was due to a concrete walkway and steps leading up to a side door).

<sup>28</sup> *Id.* at 259.

<sup>29</sup> See generally *id.*

<sup>30</sup> *Id.* at 260.

<sup>31</sup> *Mannillo*, 255 A.2d at 260. The trial court held that the adverse possession claim failed because the adverse user did not knowingly encroach. *Id.*

<sup>32</sup> *Id.* at 262.

<sup>33</sup> See Fennell, *supra* note 7.

<sup>34</sup> *Mannillo*, 255 A.2d at 262.

small encroachments deserve a different analysis.<sup>35</sup> When the adverse possession is of only a small area, “not exceeding several feet,” the court articulated that a presumption of notice would “require the true owner to be on constant alert.”<sup>36</sup> The court reasoned that the title owner could only be protected by obtaining a survey of his property each time his neighbor made improvements near the boundary line.<sup>37</sup> Instead, the court held that for small encroachments, the title owner must have actual knowledge of the adverse possession.<sup>38</sup>

When analyzing the court’s reasoning, it is apparent that it ignored the historical purposes of adverse possession and instead made a series of incorrect deductions. The ruling increased the burden on people who put unused land into production to gain title to that property. The title landowner, who failed to be personally responsible by inspecting, maintaining, and controlling his own property, is thus able to reap the reward that resulted from the long-term efforts and investments of the adverse user. The fact that the encroachment is small does not negate the fact that the title owner failed to care for his property, nor should it be held against the adverse user.

Additionally, the court stretched its argument too far when it claimed that title owners would have to obtain constant surveys to ensure their borders are protected.<sup>39</sup> At most, a landowner would only need to obtain a survey once every statutory period to ensure land is not adversely possessed.<sup>40</sup> Surveying every time a neighbor plants a shrub or fixes a fence is unnecessary and excessive. Furthermore, absent a successful adverse possession claim, government taking, or purchase of neighboring property, a landowner’s borders generally do not change. Receiving a single survey and placing permanent markers would eliminate the need to survey again, in contravention of the court’s claim that a landowner must always be “on constant alert” to engage in spur of the moment surveys.<sup>41</sup>

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<sup>35</sup> *Id.* at 263-64.

<sup>36</sup> *Id.* at 264.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* The case was remanded, in part, to determine whether the title owner had actual knowledge of the encroachment. *Mannillo*, 255 A.2d at 264.

<sup>39</sup> *Id.*

<sup>40</sup> *Stake*, *supra* note 2, at 2436.

<sup>41</sup> *Mannillo*, 255 A.2d at 264.

## V. NEW YORK'S DEPARTURE FROM ADVERSE POSSESSION PRINCIPLES

In 2006, the New York Court of Appeals held that a neighbor adversely possessed land after running underground pipes and regularly mowing, raking, and planting on a portion of the title owner's land.<sup>42</sup> Even though the court acknowledged that the adverse user may have intentionally trespassed on the disputed parcel, it determined that such knowledge was irrelevant based on New York precedent.<sup>43</sup> Instead, the court furthered a traditional purpose of adverse possession when it stated, "The issue is 'actual occupation,' not subjective knowledge."<sup>44</sup> The court then held that the title owner's land was adversely possessed.<sup>45</sup>

After the ruling, the legislature reacted, and amended the adverse possession law in 2008.<sup>46</sup> The legislature changed the hostility element by requiring the adverse user to have a reasonable belief that he has title to the disputed property.<sup>47</sup> In other words, the adverse user may not intentionally trespass and occupy another's land. Additionally, the legislature included a provision, which stated that "non-structural encroachments including . . . fences, hedges, shrubbery, plantings, [and] sheds" are non-adverse.<sup>48</sup> The legislature also excluded mowing and other "similar maintenance" activities from constituting adverse acts.<sup>49</sup>

When the legislature voted its emotions after the *Walling* case, it moved away from the intended purposes of adverse possession. To require good faith means that the knowledge of the adverse user becomes a more important factor than the failure of the title owner. Again, if it were not for the title owner's abdication of personal responsibility, the adverse user would be unable to maintain possession for the statutory period.<sup>50</sup> If a title owner fails to monitor and care for his property and the land falls to disrepair, the neighbor-

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<sup>42</sup> *Walling*, 851 N.E.2d at 1170.

<sup>43</sup> *Id.* ("Conduct will prevail over knowledge . . .").

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *See generally* N.Y. REAL PROP. ACTS LAW §§ 501-543.

<sup>47</sup> *Id.* at § 501.

<sup>48</sup> *Id.* at § 543.

<sup>49</sup> *Id.*

<sup>50</sup> *See id.* at § 501(2).

ing properties are bound to be affected.<sup>51</sup> Under the new rule, if a neighbor purposefully takes the initiative to regenerate and maintain that property, he would receive no more of a benefit than the other neighboring landowners. Furthermore, the title owner receives a free long-term property facelift from his neighbor at his neighbor's expense of both time and money. Thus, the landowner who fails to be personally responsible receives free maintenance, the person making productive use of the property receives no added benefit, and the landowner incentive shifts from being a proactive owner to an idle one.

Preventing non-structural encroachments from being grounds for adverse possession also defeats the purposes of the doctrine. In the past, the acts of mowing, erecting fences, and planting were frequently utilized for successful adverse possession claims.<sup>52</sup> These acts are the typical means of investing in and improving borderline property. Just as in the scenario above, the new rule allows the idle title owner to benefit from the acts of the industrious neighbor, which could result in thousands of dollars of improvements from fences and lawn care.

The statute is written so broadly that even adverse users who drastically improve the land will be negatively impacted. The statute prevents "non-structural encroachments" from being adverse.<sup>53</sup> This term easily could include farming, dog kennels, hunting grounds, and other outdoor occupational uses. Not only would these productive uses of land (neglected by the title owner) fail to support an adverse possession claim under the new rule, but a decision against the adverse possessor for this reason would hinder a business otherwise proven successful.<sup>54</sup>

These statutory changes mark the beginning of allowing the non-diligent landowner, who fails to inspect, maintain, and control his property, to reap the benefits of his neighbor's efforts in taking care of property. In effect, these changes absorb the parts of *Mannillo* that do not adhere to the intended purposes of adverse pos-

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<sup>51</sup> Shepard, *supra* note 21, at 587.

<sup>52</sup> *E.g.*, *W. Middlebury Baptist Church v. Koester*, 50 A.D.3d 1494, 1495 (N.Y. App. Div. 4th Dep't 2008) ("[M]owing, raking, and clearing the property . . . are sufficient to satisfy [adverse possession]."); *Villani v. Holton*, 50 A.D.3d 1543, 1544 (N.Y. App. Div. 4th Dep't 2008) (holding that erecting a fence and planting a garden satisfies adverse possession).

<sup>53</sup> N.Y. REAL PROP. ACTS LAW § 543(1).

<sup>54</sup> The business's success is proved by the adverse user's putting the land into such production for the statutory period.

session. At the same time, the changes do not follow *Mannillo's* reasoning for hostility, which was based on adverse possession's traditional notions. Thus, New York could be said to have left the good, while adopting and expanding on the negative portions of *Mannillo*.

In a recent decision, under New York's *prior* statute, a neighbor was found to adversely possess land.<sup>55</sup> Over the course of twenty-one years, the adverse user built, continually repaired, and painted a dock and boardwalk on the disputed parcel.<sup>56</sup> During this time, the adverse user believed he owned the property and, while he allowed friends to use the dock at their leisure, had exclusive dominion of the property.<sup>57</sup> Even after the title owner discovered that the disputed land was hers and the parties "had a good laugh about it," use of the land continued as it previously had.<sup>58</sup> In the case, the adverse user, the one who put the land into production for himself and for the benefit of his friends, was awarded the property.<sup>59</sup>

If the adverse possession claim vested after July 7, 2008, the analysis would have been made under the new statute.<sup>60</sup> Had this been the case, the adverse user would likely have lost the case because his dock is most likely a non-structural encroachment as defined by the statute.<sup>61</sup> If this outcome resulted, the adverse user's hard work and efforts in construction and maintenance of the dock for over twenty-one years would have advantaged another. Furthermore, the title owner, who failed to be personally responsible and maintain oversight over her own land, would reap the benefits despite the title owner's discovery of the adverse user's encroachment and continued neglect of her responsibilities as a landowner.

## VI. CONCLUSION

With land ownership comes great responsibility to protect that land from trespassers and to maintain the land for the benefit of the owner and surrounding community. The changes to the New York

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<sup>55</sup> *Estate of Becker*, 968 N.E.2d at 439.

<sup>56</sup> *Id.* at 435.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 435-36.

<sup>59</sup> *Id.* at 439. This result was due to the fact that title vested in the adverse possessor in the early-to-mid-1970s, before the new statute took effect. *Estate of Becker*, 968 N.E.2d at 435.

<sup>60</sup> *Franza*, 897 N.Y.S.2d at 807 ("[W]here title has vested by adverse possession, it may not be disturbed retroactively by newly-enacted or amended legislation.").

<sup>61</sup> REAL PROP. ACTS § 543(1).

adverse possession statute promote apathy in the landowner and stifle the industrious adverse possessor from picking up the slack. The new standard will allow landowners to benefit personally and financially through the hard work of others. Such a result is inequitable to the industrious users of otherwise neglected property.