Unification of the Doctrines of Adverse Possession and Practical Location in the Establishment of Boundaries

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I. INTRODUCTION

The central and overarching question in the law concerning boundary disputes is whether the legal outcomes should be governed by the written evidence of title or by the conflicting actual location of the parties on the ground. There is, of course, good reason for the rule, enshrined in the Statute of Frauds, that transfers of interests in land must be in writing. A land transfer system dominated by oral conveyances would be characterized by a great deal of insecurity and uncertainty about that most fundamental question of who owns exactly
what. And it has been convincingly argued that one of the main reasons for the immense productivity differences between developed and undeveloped economies lies in the fact that the title to assets, and especially to real property, is certain and secure in the former countries but not in the latter. The exceptions to a general rule favoring the written record must, therefore, be limited to those cases where there is a powerful countervailing policy.

II. ADVERSE POSSESSION

Both legislatures and courts have found that there are situations that exhibit those convincing reasons to depart from the record. The well-known doctrine of adverse possession is, of course, a creature of statute which has existed in some form at least since the thirteenth century. More particularly, adverse possession is based on a statute of limitations that bars any action of ejectment by an owner (hereinafter $O$) seeking recovery of land from a person (hereinafter $P$) who has been in possession for more than the statutory period. The policy of repose underlying all statutes of limitation also justifies adverse possession. The notion is that after some extended period of time the law must finally recognize the validity of a long continuing reality. The reason for this is clear. Picture a system where the paper title could never be varied by the facts on the ground. Imagine that in 1840, $O$ owns property to a certain line, and his neighbor $P$ owns the adjoining land. $P$ occupies a fifty foot strip of $O$’s land. The properties pass from $O$ and $P$ to the succeeding generations of each family until 1990 when $O$’s great-great-great grandchild sues $P$’s successors for the strip that

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1. Hernando de Soto, president of the Institute for Liberty and Democracy in Peru, makes the case for certain titling very strongly. He indicates that the titles to most of the land in the underdeveloped countries is very uncertain, adding:

I predict that in the next 150 years the countries in Latin America and elsewhere joining these 25 [developed market economy countries] will be those that spend their energies ensuring that property rights are widespread and protected by law, rather than those that continue to focus on macroeconomic policy.

Why? Because there is not enough property in developing countries to make markets work. The difference between developed and underdeveloped countries, after all, is not that the former have markets and the latter do not. Markets are an old and universal tradition: Christ threw merchants out of the temple 2,000 years ago, and we Peruvians were taking our products to market long before Columbus reached America. The difference between developed and underdeveloped countries is the difference between buying gold futures on the London Metal Exchange and buying gold nuggets on a pavement in Madre de Dios, Peru. In Britain the legal system has created property rights that can be exchanged in an expanded market, whereas in Peru it has not. Britain is a property economy, Peru is not.

*P*'s family has occupied for 150 years. Do we really want to litigate the "proper" boundary after such a period of time? The problems of proof and dislocation in that kind of a case would be horrendous and solving them would not be worth the candle. So the elapse of a long time, with two neighbors mutually adhering to a certain line, must eventually cause the law to recognize that it is no longer appropriate to look back to determine whether their paper titles dictate a different outcome. If that is so, then the only question is how long a waiting period should the law require before it refuses to countenance that kind of retrospective. The statutes on adverse possession across the United States generally provide for periods of five to forty years.\(^2\)

It is interesting that there is a conflict between the rules governing adverse possession and the widely recognized policy of repose that is said to underlie it. This is so because, though the original statutes of limitations that were the basis of the doctrine purported merely to bar an action of ejectment after a certain period of time, they were construed with a multi-faceted judicial gloss that to an extent defeated the policy. In time some of the states amended their statutes to include the judicial gloss as part of their statutory language.\(^3\)

Thus, as the doctrine evolved, it was required, whether by case or by statute, that *P*'s possession be actual, open and notorious, exclusive, continuous, and hostile under claim of right.\(^4\) The first four of the requirements all relate to whether the nature of *P*'s physical occupancy is such as to give *O* notice of a potential hostile claim to his property. They thus have essentially the same policy basis: viz., to assure that *O* will be in a position to understand that, unless he brings his suit in ejectment before the statute of limitations runs, he will forfeit the title to his property. Those requirements are completely defensible in that they are an attempt by the courts to define exactly the kind of physical relationship to the land that the statute of limitations contemplates before its mandated transfer of ownership can occur. The court-invented requirement of hostility under claim of right is of a different character, however; it pertains not to physical but to intangible matters, including questions concerning the possessor's intent and the nature of the relationship between the two parties. It is submitted that those courts that have invented requirements concerning possessor intent have drifted far from any defensible rule.

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2. For a complete listing of the adverse possession statutes of every state, with a summary of each statutes' contents, see 10 Buddy O.H. Herring et al., Thompson on Real Property § 87.01, at 75-81 (David A. Thomas ed., 1994) [hereinafter Thompson]. For an older compilation, see William Edwin Taylor, Titles to Land by Adverse Possession, 20 Iowa L. Rev. 551, 552-54 (1935).

3. See Thompson, supra note 2, § 87.01, at 75-81 (listing the elements of each state's adverse possession statute(s)).

There are different views in the various states on the question of what possessor intent is required. Some states mandate that she be in good faith and be unaware that she is trespassing on her neighbor's property. Other states take the opposite position that, in order for her possession to be hostile, she must intend to take the property knowing full well that she is a trespasser. And in some states if $P$ is occupying up to what she mistakenly thinks is the true line, she will get title by adverse possession, but only if she intends to claim title up to where she possesses, true line or not, while, on the other hand, if her intent is to claim only what she is legally entitled to, adverse possession will not lie. Perhaps most of the states take the position that $P$'s state of mind is irrelevant is clearly the best view. It is what $P$ is doing, not what she is thinking, that has a bearing on whether $O$'s attention has been called to the fact that he must sue promptly or lose his land. The only view requiring some form of possessor intent that has a reasonable argument in its behalf is the view demanding that she have a pure heart if she is to get title by adverse possession. The argument would, of course, be that a person should not benefit from


8. See id. Therein the court said:

Indeed, the authorities all agree that [the] intention of the occupant to claim the ownership of land not embraced in his title is a necessary element of adverse possession; and in case of occupancy by mistake beyond a line capable of being ascertained this intention to claim title to the extent of the occupancy must appear to be absolute, and not conditional; otherwise the possession will not be deemed adverse to the true owner. It must be an intention to claim title to all land within a certain boundary on the face of the earth, whether it shall eventually be found to be the correct one or not. If, for instance, one in ignorance of his actual boundaries takes and holds possession by mistake up to a certain fence beyond his limits, upon the claim and in the belief that it is the true line, with the intention to claim title, and thus, if necessary, to acquire "title by possession" up to that fence, such possession, having the requisite duration and continuity, will ripen into title . . . .

If, on the other hand, a party through ignorance, inadvertence, or mistake occupies up to a given fence beyond his actual boundary, because he believes it to be the true line, but has no intention to claim title to that extent if it should be ascertained that the fence was on his neighbor's land, an indispensable element of adverse possession is wanting. In such a case the intent to claim title exists only upon the condition that the fence is on the true line. The intention is not absolute, but provisional, and the possession is not adverse.

Id. at 150 (citations omitted).

her consciously wrongful act. But it is submitted that such a requirement universally applied would have a markedly detrimental effect on the title clearing function of the doctrine of adverse possession. As a matter of statutory interpretation, it is clear that since ejectment will lie against $P$ for her continuing trespass no matter whether her intent is innocent or wrongful, the statute of limitation barring $O$'s cause of action in ejectment should likewise apply to bar his right irrespective of her intent.

The "hostility" requirement properly interpreted should merely mean that the possession is without $O$'s permission or that of his authorized agent. Permission, in the sense used here involves a situation in which an owner expressly authorizes another person, whether she be a tenant, licensee, or contracting buyer, temporarily to use or occupy his land. The without-permission rule has been universally followed. It performs the same policy function of giving $O$ appropriate notice as has been discussed above. Thus, if $O$ gives $P$ temporary license to possess a strip of land along the border between them, it is implicit in the giving of that authorization, first, that $O$ is asserting his ownership, and second, that $P$ is acknowledging $O$'s superior position. The latter point is particularly important because $P$'s acknowledgment causes $O$ to think that $P$ is not claiming against him and, therefore, there is no necessity that he sue to protect his interest.

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10. See Helmholz, supra note 5, at 341-49.
11. In American Law of Property, supra note 9, § 15.4, at 774, the authors state:

It is amazing that the courts in declaring these supposed requirements of adverse possession have so completely failed to consider the basic question involved in the acquisition of title by the running of the statute of limitations against the true owner's action of ejectment, viz., whether the true owner had a right of action in ejectment against the wrongful possessor continuing without interruption for the statutory period. In very few cases, in applying these supposed requirements, have the courts discussed the operation of the statute in barring the true owner's action as the sole reason why title arises by adverse possession. Do the courts mean to say in these cases that an actual wrongful possession acquired and maintained without the consent of the true owner is not wrongful and that the owner cannot maintain ejectment against the possessor unless the latter is claiming the title; that actual wrongful possession is not adverse, and not subject to the ejectment action if the possessor admits that he made no claim to the title during his years of wrongful possession? If the right of action in ejectment accrues in the owner's favor in such cases, can the courts explain why the statute of limitations restricting the time within which such actions can be brought does not apply? If the statute bars the true owner's action to recover the property can there be any question that his title is extinguished and the possessory title of the wrongful possessor becomes absolute? These are the important questions which must be kept in mind in examining the cases.

13. See id.
In summary, there is a conflict between the rules governing adverse possession and the policy of repose that underlies it. In attempting to prevent O from losing his property without being fairly apprised of P's possible claim against him, and for other less defensible reasons, the courts have required the possessor to prove some additional elements not appearing in the statute, with the consequence that not all long-standing possessions will result in the transfer of ownership that the policy of repose would seem to call for. Such transfer would not occur in those cases where P originally took possession with O's permission or, unfortunately in some states, where P does not have the particular state of mind required in that jurisdiction.  

III. THE PRACTICAL LOCATION DOCTRINES

The basic idea behind the law of adverse possession is contained in the name of the concept itself, i.e., the relationship between the parties must be adverse or hostile to each other. This leaves a huge gap to be filled: what about cases where the parties mutually consent to a certain boundary between them? If P by a boundary agreement is occupying up to a certain line, and she is thereby partly on O's property as defined in the relevant pieces of paper, she would not be a trespasser, as she has entered with O's consent. In such a case, the statute of limitations for adverse possession would never run and title never pass. Of course, if O were to revoke that consent, then P would become a trespasser, triggering the running of the statute of limitations on adverse possession against O, with title eventually passing to P. But the important point is that the doctrine of adverse possession would never allow the perfection of title in a possessor occupying under a parol or tacit understanding concerning a boundary.

To fill in the gaps created by the adversity requirement, the courts developed the practical location doctrines, which, in effect, permitted parol, consensual transfers of interests in land, in apparent violation of Statute of Frauds requirement that such transfers be in writing. The doctrines apply to those particular fact patterns in which the courts feel that it makes good policy sense to disregard the strictures of the Statute of Frauds and to supersede the written record. This generally occurs when neighboring parties have a solid reason to lo-

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14. In addition, the statutes of limitations in most states provide for the tolling of the statute for various disabilities of the owner. These often include infancy, mental incompetence, and imprisonment. These disabilities can also prevent the application of the doctrine of oral agreement or acquiescence. See, e.g., Santee v. Uhlenhopp, 169 N.W. 321 (Iowa 1918).

15. See Restatement (Second) of Torts §§ 167-75 (1965).

16. See id. § 171.

cate a boundary in a place other than that which might be found through a proper interpretation of the deeds or other documents of title. For example, it often happens that the written record is unclear or ambiguous as to where the boundary should be physically located, thus putting the neighboring parties in the position of having to deal with the uncertainty. In other cases there is not any objective uncertainty as to the true line, but the parties do not want to go to the considerable expense that it would take to determine exactly where it is, and so they set a line agreeable to both. Whatever the cause of their doubt, however, the parties often try to decide these boundary questions inexpensively and painlessly by an arrangement in which they orally or tacitly agree to a particular location on the ground and then adhere to that understanding thereafter. Indeed there are many cases in which it is doubtful whether there is between the parties any "understanding" at all in the normal sense of that word; rather without any discussion they occupy to a certain line for a long period of time without dispute or rancor. The question for the courts in all these cases then becomes whether the line adhered to for a period of time under these varying circumstances should be preferred to the boundary established in the written instruments of title, properly interpreted.

Under the general rubric of "practical location," there are three judicial doctrines that deal with these questions: parol agreement, acquiescence, and estoppel. 18 Although some courts carefully distinguish between and treat the first two of these as separate doctrines, 19 other courts seem to regard acquiescence merely as evidence establishing that an oral agreement setting a disputed boundary has been made. 20 Both of them essentially allow a long-continued, consensually-created occupancy to ripen into title. Estoppel, on the other hand, is analytically separate. It involves a representation by one owner to an adjoining owner as to the location of the boundary between them. Title passes when the representation is detrimentally relied upon by the second owner through her construction of encroaching improvements. This can occur in a relatively short period of time if the requisite elements of representation and detrimental reliance are present. In this commentary I am interested in exploring the relationships between adverse possession and the other doctrines not involving detrimental reliance and will therefore not consider the matter of estoppel any further.

18. See id.
A. Parol Agreement

The cases involving a boundary agreement generally require three elements: (1) a dispute or uncertainty regarding the location of the boundary; (2) an oral or implied agreement settling the matter; and (3) possession to or recognition of the line by the parties for some period of time. Each one of these elements requires some further explanation.

1. Dispute or Uncertainty.

Almost every case in the area requires that there be a dispute or uncertainty for the boundary agreement to be valid. The supposed justification for this requirement is that these agreements are contractual in nature and therefore require legal consideration for their validity. The argument is that, if there were no dispute or uncertainty as to where the correct line was, and the two parties agreed to modify the line, then the person surrendering some land in the agreement would be receiving no consideration for his act, since the other party would be giving up nothing in return. On the other hand, if there were such a dispute or uncertainty, the other party would be giving up her claim to the land in question, thereby suffering a detriment and conferring a benefit, which would constitute valuable consideration.

The difficulty with the consideration argument is that it neglects a very important point, viz., that it should not apply to a fully performed contract. After the understanding has been mutually adhered to by the parties for a substantial period of time, the deal has been executed and it would seem that want of consideration should be an irrelevance. The case should be analogized to the court decisions on the executed gift discharge of obligations under a contract, where consideration is unnecessary. In this case the execution consists of the delivery of the property to the other party. If consideration is unnecessary for an executed agreement, then it surely follows that the requirement of uncertainty or dispute that supposedly solves the consideration problem should be dispensed with.

22. See Cunningham et al., supra note 12, § 11.8, at 516.
23. See Staker v. Ainsworth, 785 P.2d 417, 423 (Utah 1990) (“If actual knowledge of the boundary exists, there is no consideration exchanged and the agreement fails.”).
24. See 5A Arthur Linton Corbin, Corbin on Contracts §§ 1240-1250 (1964). Suppose, for example, that a seller is under a duty to deliver a horse to a buyer that is under a duty to pay for it. If the seller says on delivering the horse but before payment that this is done as a gift, the seller’s statement will be given effect. Because there has been a delivery of the horse, the buyer’s duty to pay for it is discharged. Consideration is irrelevant.

1 E. Allen Farnsworth, Farnsworth on Contracts § 4.25, at 529 (2d ed. 1998).
The courts also inappropriately use the uncertainty rule to avoid the charge that the parol agreement doctrine circumvents the Statute of Frauds requirement that conveyances of land be in writing. They do this by engaging in the fiction that when they enforce an agreement settling a controversy over an uncertain boundary, they are not countenancing the transfer of an interest in land but are only “defining or locating on the ground the existing titles of the parties.” The sophistry of that position is apparent, for it is clear that in many cases oral settlements do result in one of the parties getting a larger piece, and the other a smaller one, than a scientific survey might call for. It would be much better to admit that a transfer of land is taking place and the parol agreement doctrine is one of some other exceptions to the operation of the Statute of Frauds.

Lastly, it can be argued that a fundamental difficulty with the uncertainty rule is that it is based upon a faulty premise: viz., that it is possible to have certainty in boundary line location. In Professor Browder’s opinion, there is no such thing:

A paper description will be enough, to be sure, to tell you in a general way where your land lies. But anyone at all familiar with litigation over boundaries will know that, for a variety of reasons, few if any of these descriptions admit of a single and precise application to the ground. It is this hiatus in our conveyancing practice between a deed describing land and the actual location on the ground of the boundaries described which causes most of our trouble over boundaries . . . . What, then, is the situation of adjoining landowners whose respective deeds are consistent on paper? Either they are left without precise knowledge of their boundaries or, what is worse, their only way to a certain resolution of their doubts is by means of litigation. And even this may not be conclusive, but only the substitution of a paper decree for a paper description, leaving the gap still unbridged. All that such parties usually want is to know their boundaries, and at the beginning of their inquiry they are usually amicably inclined. Someone may tell them to have their lands surveyed, but of course this alone settles nothing.

Thus, it can be urged that in the ultimate sense, the requisite uncertainty is present in all cases and should be a stumbling block in none. All things considered, it would be better if the uncertainty requirement were completely eliminated as an element in practical location doctrine.

2. Oral or Implied Agreement Setting Boundary

The second requirement for a parol agreement is that there be an oral or implied agreement setting the boundary. The meaning of “oral” agreement is self-explanatory; the parties by their spoken words

25. Browder, supra note 17, at 497.
26. These would, for example, include such doctrines as adverse possession, title by estoppel, and title by accretion. See American Law of Property, supra note 9, §§ 15.1-35, at 755-875.
specifically recognize that the boundary shall be such and such. Although the cases involving such facts are relatively infrequent as compared with the total number of practical location cases, still there are an occasional few that can be found in the reports.28

The vast majority of the parol agreement cases involve what are called “implied agreements” where the courts infer the required concordance of the parties from some form of non-verbal conduct.29 The conduct typically consists of a physical marking of the boundary by the construction of a fence or planting of hedges, followed by the parties’ mutual compliance with the division line for some period of time. The overlap between these so-called implied agreements on the one hand and the doctrine of acquiescence on the other is apparent. After all, the major difference between the two sets of rules lies in the fact that the former supposedly involves an agreement as to the boundary and the latter does not. As soon as that agreement element is permitted to be inferred from the long continued silent assent, which is the heart of acquiescence, the two doctrines become functionally identical.

3. Possession or Recognition for Some Period of Time

Most of the cases require on-the-ground adherence to the agreement for some period of time after its formation, but there are a few cases that do not seem to require any post-agreement compliance at all.30 Among those that do, some of the cases are indefinite as to the time required,31 some insist that the time be sufficient to show a “settled recognition” of the boundary,32 and some demand possession for


The Florida supreme court has said:

The authorities do not fix upon any particular length of possession under the agreement as essential. In [a previous case], the period intervening between the agreement and occupation and the commencement of the action in hostility to the agreed line was very short, the agreement being in the summer of 1854, and the action having been commenced in September of the same year, while in another case the practical recognition of the line had continued as long as 30 years. It is expressly decided, and, in the nature of things, must be, that occupation for the period required by the statute of limitations to bar a recovery upon the true title is not necessary. Many other cases are conclusive of the correctness of this view. It is sufficient if the conduct of the parties shows a settled recognition of the line covered by the agreement as the permanent boundary between their lands.

Watrous v. Morrison, 14 So. 805, 808 (Fla. 1894) (citation omitted).
the statutory period for adverse possession.\textsuperscript{33} It would seem to be appropriate to require some post-agreement adherence to the understanding in order to prevent the assertion of a completely fictional story as a means of defrauding the owner of some of his land. The fact that the parties occupy to a certain line is at least evidence that an agreement between the parties had earlier actually been reached.

B. The Doctrine of Acquiescence

If neighbors $O$ and $P$ knowingly acquiesce in a boundary line by possessing up to it for some extended period of time, that in law becomes the dividing border between the two parties. First of all, to understand fully the concept of acquiescence one must carefully distinguish it from the idea of permission. A dictionary definition of "acquiesce" is "to accept or comply tacitly or passively."\textsuperscript{34} In most jurisdictions mere silence in the face of the other person's continuing possession is enough to constitute acquiescence,\textsuperscript{35} but in a few states some overt act or words are required.\textsuperscript{36} However, the words or acts in those cases are not connotative of permission, for permission involves a situation in which an owner expressly authorizes another person to temporarily use or occupy his land. As mentioned earlier, implicit in the permissive relationship is $O$'s assertion of his ownership and $P$'s acknowledgment thereof, thereby lulling the former into thinking the latter is not claiming against him. In acquiescence cases, on the other hand, there are no facts to indicate that $P$ is acknowledging that she is not herself an owner; the parties are purporting to set the boundary between them and thereafter conforming to it. Thus it follows $O$ should reasonably be on notice that: (1) $P$ is claiming the property as her own, and (2) that he must sue if he wishes to counter that claim before his rights are barred by his acquiescence for an extended period of time.\textsuperscript{37} The cases properly hold that $O$'s granting of permission to $P$ forecloses the possible application of the doctrine of acquiescence.\textsuperscript{38}

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  \item [33.] See, e.g., Bushnell v. Martin, 553 So. 2d 92 (Ala. 1989); Mehdizadeh v. Mincer, 54 Cal. Rptr. 2d 284 (Cal. Ct. App. 1996).
  \item [34.] Webster's Third New International Dictionary of the English Language, Unabridged 18 (Philip Babcock Gove ed., 1971).
  \item [37.] It is, of course, true that the statute of limitations for ejectment would not start to run unless $P$ is a trespasser. If $P$ were there by consent under some express or implied understanding as to boundaries, she would not be a trespasser. What we are suggesting here is that with the passage of time $P$ would get title by acquiescence.
  \item [38.] See Waters v. Spell, 380 S.E.2d 55, 56 (Ga. Ct. App. 1989) ("The fact that permission was granted indicates defendants claimed ownership to the property. Defendants complained to plaintiff that they believed the mobile homes were located on their land some time before 1980. Therefore, the jury could conclude from the
IV. THE REQUISITE ELEMENTS OF THE DOCTRINE OF ACQUIESCENCE AND A COMPARISON WITH THOSE OF ADVERSE POSSESSION

We analyze here the elements the courts require to make out a case of acquiescence and note the areas of conflict and overlap between that doctrine and that of adverse possession. In doing so, it is important to note that we are dealing with adverse possession only in its settlement of boundary disputes function, and not with any of its other applications.39

Both acquiescence and adverse possession doctrines require that the claimant be in “possession” for a certain period. The cases in both areas appropriately require that the possessor use and enjoy the property as a typical owner would with respect to the type of property involved in the lawsuit.40 The adverse possession cases require that the possession be exclusive,41 that is, not shared with the record owner. There is some limited authority in the acquiescence area that says exclusivity is not required,42 while other cases take the opposite position.43 It would seem that a sharing of possession of the disputed area should foreclose a finding of either adverse possession or acquiescence, as in either case O could reasonably assume P is not claiming the property as her own.44

Similarly, though the cases in adverse possession universally require that P’s possession be continuous,45 there is an apparent split of evidence that defendants had not acquiesced in establishing the newer fence as the boundary line.”.

39. Those are cases which involve: (1) a long-term trespass by a non-neighbor, resulting in a new title in him, and (2) a title clearing function for a record owner in possession, who might use adverse possession to bar an outstanding right such as, for example, a marital interest in the spouse of a former owner.


43. See, e.g., Grimes v. Armstrong, 304 S.W.2d 793 (Mo. 1957); Riter v. Cayias, 431 P.2d 788 (Utah 1967).

44. In actuality the exclusivity requirement is a redundancy, as it adds nothing to the requirement of possession itself. Traditionally an owner of an estate in land is said to have “possession” of land while the dominant tenant of an easement merely has the “use” of it. The essence of the distinction between those two terms lies in the issue of whether there is a right to exclude the rest of the world. Thus it is said, “Possession means exclusive occupation, which means that the possessor may wholly exclude all others from all parts of the land, without having to show they will actually interfere with any aspect of use and enjoyment.” Cunningham ET AL., supra note 12, § 8.1, at 437 (emphasis added).

authority on the question in the acquiescence area. Apparent, because the cases holding continuousness is not required can be read to merely say that intermittent occupancy is sufficient if it is consistent with the nature and condition of the premises—something which the adverse possession decisions tend, in appropriate cases, to categorize as continuous.

In acquiescence, most of the cases, but not all, require that the dividing line be marked in some way on the ground by a fence, bushes, or other means. In adverse possession, such is usually not stated as a requirement, but "[t]he existence of an enclosure by fences, ditches, hedges or the like, whether or not in conjunction with natural bounds . . . is very important in establishing possession, particularly in determining its extent." Certainly it makes sense to require some degree of clarity and precision as to the exact location of the boundary in the application of either doctrine.

With respect to acquiescence, some jurisdictions have statutes specifically setting the minimum necessary time of occupancy; in others the courts require the same period as the statute of limitations for adverse possession; in still others they mandate acquiescence for a "long period of years." In adverse possession matters the courts, of course, require possession for the statutory period.

The courts overwhelmingly hold that to constitute a valid acquiescence both parties must be aware that the line is being treated as a boundary; in one state it is said to be sufficient if O knew or should have known that P occupied the disputed property. In adverse possession cases, the courts require that P's possession be open and notorious, so that O can with the exercise of reasonable diligence find out about the trespass.

47. See, e.g., Ollinger v. Bennett, 562 N.W.2d 167 (Iowa 1997).
49. AMERICAN LAW OF PROPERTY, supra note 9, § 15.3, at 770.
50. See, e.g., IOWA CODE ANN. § 650.14 (West 1995) (setting the minimum time of occupancy at 10 years); NEB. REV. STAT. § 34-301 (Reissue 1998) (setting the minimum time of occupancy at 10 years).
55. See CUNNINGHAM ET AL., supra note 12, § 11.7, at 810-11.
The cases are split on the question of whether there must be a resolution of a dispute or uncertainty before the events will be recognized as involving acquiescence.\textsuperscript{56} There is, in most jurisdictions, no similar requirement in adverse possession matters, but there are a few states that seem to require that $P$ be in "good faith,"\textsuperscript{57} that is, ignorant of the fact that she is a trespasser. This would obviously involve some element of uncertainty on her part as to the proper boundary. The arguments against the uncertainty requirement were earlier stated.\textsuperscript{58}

Interestingly, if one were to adopt the most indulgent view of the cases regarding acquiescence, the rule would be that when two neighbors for a long time tacitly recognize a definite dividing line between them by their mutual possession, that demarcation would become their legal boundary.\textsuperscript{59}

V. THE RELATIONSHIP BETWEEN THE DOCTRINES OF ACQUIESCENCE AND PAROL AGREEMENTS

Having considered the relationship of acquiescence to adverse possession, we deal here with its connection to the doctrine of parol agreements. It is submitted that the doctrines of acquiescence and parol agreements should be thoroughly integrated. It has been pointed out above that many parol agreement cases involve what are called "implied agreements,"\textsuperscript{60} where the making of the deal is inferred from subsequent non-verbal conduct. In such situations there is a clear overlap between the two doctrines and the rules about them ought to be identical. But even where there is an express oral agreement, it would appear that the rules about the cases should be the same. The major differences between the court-required elements in parol agreement versus acquiescence cases lie in two areas: the requirement of uncertainty or dispute and the length of time of possession held to be necessary.


\textsuperscript{57} See supra note 5 and accompanying text.

\textsuperscript{58} See supra text accompanying notes 22-27.

\textsuperscript{59} The New York cases seem to recognize that approach, saying that simple acquiescence for a long period of time is enough to pass the title. In \textit{Katz v. Kaiser}, 48 N.E. 532, 533 (N.Y. 1897), the court of appeals said: "It is the settled rule in this state . . . that a practical location of boundaries, which has been acquiesced in for a long series of years, will not be disturbed." \textit{See also} Markowski v. Ferrari, 570 N.Y.S.2d 735, 737 (N.Y. App. Div. 1991), appeal dismissed, 582 N.E.2d 598 (N.Y. 1991) ("[A]cquiescence for a considerable period of time provides conclusive evidence as to the true location of the boundary." (quoting Sarfaty v. Evangelist, 530 N.Y.S.2d 417, 418 (N.Y. App. Div. 1988))).

\textsuperscript{60} See supra note 29 and accompanying text.
With respect to the matter of uncertainty, it was noted above that most of the parol agreement cases required it,61 while the cases on acquiescence were divided on the question.62 It is submitted that if uncertainty or dispute is not required in the case of acquiescence where there has not been an express agreement by O giving up some of his property, then *a fortiori* it should not be required where the parties have expressly agreed on the rights of the parties. If anything the formal requirements should be greater, not less, when there has not been an express understanding as to the boundary between the parties. But more importantly, as was argued above, the uncertainty requirement itself has no defensible policy justification and merely serves to frustrate the repose function of the practical location doctrines. It therefore should be eliminated.

The other major difference between the rules as to parol agreements and acquiescence lies in the time of possession required. There are some cases in the former area that do not seem to require that the possession following an agreement be for any particular length of time,63 while the cases on acquiescence require a longer period. One could argue for requiring a shorter period of time when the agreement is express, but it is submitted that the period of the statute of limitations is an indication of legislative intent that non-written transfers of interests in land should be recognized only after the passage of a substantial period of time. It seems appropriate to use that legislatively mandated period of time for all such informal transfers. With the integration of the parol agreement and acquiescence rules, it would appear one could formulate a universal rule concerning long term possessions in boundary disputes. The proposed rule follows.

VI. A SUGGESTED RULE

What is suggested by this comparative examination of the rules about acquiescence, parol agreements, and adverse possession is how unnecessarily complicated the area has become. If one were to combine the common elements of the three doctrines, at the same time excluding those that lack a strong policy justification, a simplified but sound rule of law integrating adverse possession and practical location could be stated as follows: A non-permissive, exclusive, continuous, clearly bounded possession by P of O's land for the period of the statute of limitations for an action in ejectment will result in a transfer of ownership to her. A possession is permissive if O has expressly authorized it for a temporary purpose, always intending to assert his basic ownership of the property in question; any other possession is non-

61. See supra note 22 and accompanying text.
62. See supra note 56 and accompanying text.
63. See Cunningham et al., supra note 12, § 11.8, at 817 & n.19.
permissive. The possession, therefore, could be hostile in the sense that $O$ is antagonistic to $P$'s possession and has ordered her off, with $P$ refusing to do so—the prototypical case of adverse possession. Or the possession could be based on the fact that $O$ and $P$ have orally agreed that the permanent line between them should be thus-and-so, with $P$ occupying to that line—the case of the so-called parol agreement. Or the possession could result from a long-continuing silent assent by the parties to their occupying to a certain line between them—the paradigmatic case of acquiescence. As long as $O$ has not given permission for $P$'s temporary occupancy, title would pass. The overall question to be answered in these cases should always be, “would a reasonable owner under the circumstances understand that the possessor has been claiming the disputed property as her own for the statutory period?” If the answer to that question is affirmative then title should pass to the possessor.

There are some strong arguments for the above rule allowing unwritten transfers of the title to land. First, the policy of repose—of letting the situation be—is of the greatest importance in the case of land titles where certainty is such a significant value. In boundary dispute cases the application of these doctrines of repose—i.e., of having a long-continuing situation on the ground determine ownership—serves the critical function of the clearing of land titles. Under our present system there are a series of rules—in adverse possession involving the required intent of $P$, and in practical location involving the required dispute or uncertainty—that prevent the title clearing function of these doctrines from operating. It is submitted that the elimination of these repose-defeating rules, neither of which has strong policy support, would have benefits without any accompanying detriment.

Second, a unified rule passing title to a non-permissive long-term possessor would avoid the presently existing problem of cases that fall between the cracks of the complex rules concerning adverse possession and practical location. As the law is now, the uncertain application of the various rules throttles the proper handling of cases deserving of appropriate title clearance.\textsuperscript{64} Lastly, the suggested rule furthers the policy of protecting $O$'s reasonable expectations concerning $P$'s intentions. In general we should not take title away from $O$ if he had no reason to suspect that $P$ might be intending to make an adverse claim to the land, as in the case where $O$ has given $P$ a temporary permission to occupy. $P$'s acceptance of $O$'s temporary authorization would

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\textsuperscript{64} See, e.g., Markovich v. Chambers, 857 P.2d 906 (Or. Ct. App. 1993) (refusing to quiet the title in a long term possessor up to a fence line because he had not established the requisite hostility for adverse possession purposes or the requisite uncertainty for practical location purposes); see also Wallace v. Putman, 495 So. 2d 1072 (Ala. 1986); Mehdizadeh v. Mincer, 54 Cal. Rptr. 2d 284 (Cal. Ct. App. 1996); Shultz v. Johnson, 654 So. 2d 567 (Fla. Dist. Ct. App. 1995).
be a lulling indication that she agrees the land is O's and that O need not fear an adverse claim by P. Thus, O would not have been alerted that he must sue P or lose out in a suit over title to the property. But in the above non-permissive situations—involving hostility, oral agreement or acquiescence—O should reasonably be aware that P is claiming the property as owner and that he must assert his rights against P or risk forever forfeiting title.

With the elimination of the uncertainty requirement and the use of the period of the statute of limitations for all of these kinds of informal transfers, a simple, easy to administer rule would replace the current body of law which suffers from the great disadvantages of unpredictability and uncertainty. Those are drawbacks particularly unacceptable in the area of land titles where stability and predictability are imperatives.