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PAYMENT OF TAXES AS A CONDITION OF TITLE BY ADVERSE POSSESSION:
A NINETEENTH CENTURY ANACHRONISM

In California the basic statute governing the obtaining of title to land by adverse possession is section 325 of the Code of Civil Procedure. The statute places California with the small minority of states that unconditionally require payment of taxes as a prerequisite to obtaining such title. The logic of this requirement has been under continual attack almost from its inception. Some of its defenders state, however, that it serves to give the true owner notice of an attempt to claim his land adversely. Superficially, the law in California today appears to be well settled, but litigation in which the tax payment requirement is a prominent issue continues to arise. With the present rapid urbanization of California, further litigation attempting to quiet titles obtained by adverse possession will undoubtedly appear. This comment will explore the historical development of the tax payment doctrine and the problems it poses, using as an illustration the recent case of Schoenfeld v. Pritzker, and will advance possible solutions to the conflicting points of view.

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1 "For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only:
   First—Where it has been protected by a substantial inclosure.
   Second—Where it has been usually cultivated or improved.
   "Provided, however, that in no case shall adverse possession be considered established under the provision of any section or sections of this code, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, State, county, or municipal, which have been levied and assessed upon such land." CAL. CODE CIV. PROC. § 325 (West 1954).

See generally CAL. CODE CIV. PROC. §§ 318-19, 322-24, 326-28 (West 1954); CAL. CIV. CODE § 1006 (West 1954); CAL. CIV. CODE § 1007 (West Supp. 1968). As a rule, the courts hold that all applicable statutes must be read together. Comment, Adverse Possession: Limitation of Actions: Operation of Section 318, Civil Code in Barring Right as Well as Remedy, 17 CALIF. L. REV. 390, 391 n.2 (1929).

2 See notes 96 and 97 infra.


4 For example, an adverse claimant, contemplating sale, must first sue to quiet title because the courts do not consider a title obtained by adverse possession to be marketable. Gwin v. Calegaris, 139 Cal. 384, 73 P. 851 (1903).

5 257 Cal. App. 2d 117, 64 Cal. Rptr. 592 (1967).

6 For a general discussion of adverse possession in the United States, see Taylor, Titles to Land by Adverse Possession, 20 IOWA L. REV. 551 (1935).
HISTORICAL BACKGROUND

Among all the states California is unique in the derivation of its land titles. The Treaty of Guadalupe Hidalgo of 1848\(^7\) adopted existing Spanish and Mexican land grants as the basis for real property ownership in California. These grants encompassed extremely large areas, sometimes over 100,000 acres. Due to the lack of adequate maps, boundaries of grants were often vague or ill-defined; at the time of the California gold rush it was almost impossible to be certain of the true ownership of any particular piece of unsettled property.\(^8\) But, nearly all desirable land was either included or claimed as part of a Mexican or Spanish grant.

The immigrants who came into California from other parts of the West had been accustomed to look upon all unoccupied land as government property. These immigrant settlers believed they had an interest in the public domain, since it was the policy of the government to invite settlement of unoccupied land. Consequently, a very large squatter interest developed. Many of these squatters organized into associations which had a great influence on the political, legislative, and judicial history of the state. Squatters also predominated on many juries, and judges depended heavily upon squatter votes. In practice, therefore, large landholders found it impossible to obtain a favorable judgment in an action of ejectment against a squatter. Both sides ultimately resorted to force, and during the 1850's there were numerous squatter riots.\(^9\)

To further complicate this uncertain situation, the Pacific Railroad Bill of 1862\(^10\) authorized the Union Pacific and Central Pacific Railroad Companies to construct the first transcontinental railroad. In accordance with established practice, large areas of the public domain were promised to the railroads as an incentive. As the railroads planned their routes, the United States Land Office reserved lands along the routes for grant to the railroads upon completion of construction. However, settlers continued to move onto such lands because they could not see the justice of being prohibited from settling on vacant land that they considered to be the public domain.\(^11\)

Actually, the railroads wanted settlers along their rights-of-way in order to provide customers for their services. For this reason they


\(^8\) See generally 6 H. BANCROFT, HISTORY OF CALIFORNIA 529-81 (1888) (Bancroft's Works, v. 23). For a complete history of California land development from the Indian period through World War II, see W. ROBINSON, LAND IN CALIFORNIA (1948).

\(^9\) 3 T. HITTELL, HISTORY OF CALIFORNIA 667-69 (1897).

\(^10\) Act of July 1, 1862, ch. 120, 12 Stat. 489.

often contributed to their own problems by offering such inducements as land grants upon favorable terms to settlers who would move onto their lands. But sometimes they later refused to grant titles under the conditions they had implied. The Mussel Slough Tragedy of 1880 in Tulare County, California, was a result of such broken promises. Here, as elsewhere, the Southern Pacific, prior to construction of its line, had encouraged settlers to move onto land reserved by the Land Office by stating that when it obtained title, the railroad would then sell the land to these settlers on very favorable terms. The figure most commonly mentioned was $2.50 per acre with no increment for the value of improvements made by the settlers. In fact, though, the railroad later offered the lands for sale to any purchaser at their current appraised values of up to $35.00 per acre and gave no preference to the original settlers. Since the settlers occupied by permission, this was not an adverse possession situation. However, some settlers defended against ejectment suits by claiming rights of preemption and, of course, lost. 12 When the railroad made a subsequent attempt to eject them by force, the resulting battle brought about the death of seven persons. 13

Large landholders (and the railroads were the largest) therefore had good cause to worry about the security of their titles against adverse possession. Such circumstances give rise to a strong inference that railroad influence was an important or even controlling factor in legislation affecting titles to land in California. 14

12 See, e.g., Southern Pac. R.R. v. Orton, 32 F. 457 (9th Cir. 1879).
14 "The paramount position of the railroad in the seventies is not easily comprehended by the present generation. . . . In the late nineteenth century all other enterprises were so overshadowed by the railroad as to be reduced to the stature of small business. The railroad was the biggest landowner and the biggest employer of labor, its owners were the richest men in the state, its influence on government was supreme, and by arbitrary manipulation of freight rates it could make or break almost any merchant, industrialist, or agriculturist in the state. . . ."

"California state government, never a glorious achievement of probity and efficiency, sank in the seventies to the nadir of disreputableness. . . . No branch of government seemed to be exempt, neither the courts, the tax assessors, nor the executive officers; yet it was the legislature that seemed to be guilty of the most flagrant abuses." J. Caughhey, California 381 (2d ed. 1953).

"[T]here was hardly an office, from the seats in the United States Senate down through the governorship and the courts to the most inconsiderable town office, in which the right man could not do the railroad a service. . . ."

"Thrice in the eighties and nineties the railroad's willingness to influence government was exposed with unmistakable candor. . . . [T]he publication of the Colton Letters . . . contributed much to the entertainment of the railroad baiters and to the enlightenment of historians by reading into the record letter after letter in which Huntington had described with utter frankness his methods as a lobbyist." Id. at 449-50.

"Through the '70s and early '80s the fact that California's War Governor [Leland
This, then, is the atmosphere in which the tax payment amend-
ment to section 325 of the Code of Civil Procedure was introduced
and passed. Senator Bernard D. Murphy of Santa Clara County in-
roduced the Bill on February 1, 1878; it was then referred to the
Judiciary Committee and later passed by the Senate on March 26,
1878; the Assembly then concurred in final passage on March 30,
1878. There is no record of either hearings or a report by the Judi-

Stanford was its president continued to be helpful to the Central Pacific." O. Lewis, The Big Four 190 (1938).

In discussing the admission in 1874 of David D. Colton to "limited partnership" with Crocker, Hopkins, Huntington, and Stanford, Mr. Lewis goes on to say, "It grew clear that he [Colton] knew the political ropes in California, that he understood what favors the railroad needed from legislatures and from city and county lawmakers, and that he knew with certainty what steps were necessary to secure them."

Id. at 291.

And later, "By this facile transaction the partners got the services of a politician skilled in the practical phases of his art, who could do on the Coast what Huntington was skillfully doing at Washington..." Id. at 292.

"The letters of Huntington published in yesterday's Chronicle are an unexpected revelation of the greed, the assumption, the meanness and the duplicity of the managers of the Central Pacific. They contain little that we have not charged many times over, but it needed proof like this personal confession to give to what have hitherto been well-supported allegations the character of legal proof...."

"It is, from a merely gymnastic standpoint, pleasant to observe how nimbly Huntington runs over the gamut of intrigue and chicanery. His feet never become entangled in any toils spread by the moral sense. From his logic conscience is conspicuously absent. He handles his soiled matter as if it were pure as snow. He proposes to subsidize newspapers and to purchase legislatures as coolly as if such acts were cardinal virtues. Like Satan, he evidently said long ago, 'Evil, be thou my good,' and he intends to live up to his sinful compact.

"He is supposed to be a Republican, yet in his first letter he coolly proposes to elect a Democrat, living on the line of the roads, to Congress, and in the second to give him 'solid reasons for helping his friends.' That is, when he takes his seat he must vote for all the corrupt schemes of those who have assisted in electing him. The 'solid reasons' are the gilded bait offered the member for violating a public trust.

"..."

"The confidential declarations to kill off the Pacific Mail and gain possession of the Union Pacific are striking for their naivete. Even more remarkable is the lofty patronage or undisguised contempt with which the tools and dupes of the corporation, whether distinguished Congressmen or eminent publishers of newspapers, are regarded. A well-known Pacific coast Senator is patted on the back and called a 'good fellow'; a member of Congress from this State is spoken of as a 'wild hog,' and two San Francisco newspaper men who executed a somersault about the date of the writing are in railroad slang to be 'caved down a bank.' It must strike the sensitive minds of the gentlemen thus elegantly designated that only a very handsome douceur in addition to past favors can salve the wounds received from kicks like these, administered while they, in the humble position of lackeys, are rendering the Central Pacific the best service in their power." Editorial, San Francisco Sunday Chronicle, December 16, 1883, at 4, col. 1.

15 S.B. 292, ch. 590, Acts Amendatory of the Codes of California, 1877-78.
16 [1877-78] Senate Jour. 22d Sess. 177.
17 Id. at 502. Among the 28 Senators voting for passage were Murphy of San Francisco, Murphy of San Luis Obispo, and Murphy of Santa Clara. The last was, of course, Bernard D. Murphy. The second was Patrick W. Murphy, brother of Bernard. Murphy of San Francisco was apparently no relation.
18 Id. at 545.
ciary Committee. The record of floor debate shows only one minor attempt to amend, which failed. 19

Whether or not Senator Murphy had any clear connection with the railroad interests is uncertain, 20 but there is no doubt that, as a large landholder, he had common cause with them. At various times subsequent to 1850, the Murphy family (Senator Murphy, his father, and brothers) acquired 51,351.40 acres in Santa Clara County, plus 61,307.98 acres in San Luis Obispo County and approximately 10,000 acres at Point Concepcion in Santa Barbara County. 21 The family utilized most of this land for agricultural or grazing purposes. It was settled either sparsely or not at all. The land was therefore in much the same condition as land belonging to the railroads.

Since Senator Murphy did not have a reputation for unselfishness or uprightness in all his business dealings, it is reasonable to infer that his sponsorship of the amendment may have been motivated by something other than considerations of public welfare. 22 He was president of the Commercial & Savings Bank of San Jose, and during his presidency the capital of the bank declined from $500,000 to $150,000 because of unwise loans to various Murphy family interests. Ultimately, the bank fell into serious financial difficulty and was finally sold to the Giannini interests in 1909. 23

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19 Id. at 503. The proposed amendment would have added the words “to him or them” at the end of the present text.
20 Senator Murphy was commonly known as “Barney.” One of the famous Colton Letters (see note 14 supra) reads as follows:

“Letter No. 466

Friend Colton: Yours of May 31st, No. 91, with copy of Barney’s letter is received; I am going to Washington to-night, and I will see what can be done in relation to the matter referred to in Barney’s letter, as I think it is of considerable importance. I have just written to Mr. Stanford in relation to some matters that I think it important to attend to at once.

Yours truly,

C. P. Huntington”

New York, June 11, 1878

Unfortunately, there is no further identification of “Barney” or the matter referred to in his letter. 4 TESTIMONY. ELLEN M. COLTON v. LELAND STANFORD, ET AL. SUPERIOR COURT OF SONOMA COUNTY, CALIFORNIA, NOVEMBER 13, 1883, TO AUGUST 1, 1884, at 1832.
21 Interview with Clyde Arbuckle, Santa Clara County Historian, in San Jose, California, December 20, 1968. The Murphys’ Santa Clara County holdings consisted of Rancho Pastoria de las Borregas, 4,894.35 acres; Rancho la Polka, 4,166.78 acres; Rancho las Uvas, 11,079.93 acres; Rancho Ojo de Agua de la Coch, 8,927.10 acres; and Rancho las Llagas, 22,283.24 acres. For details of their San Luis Obispo County holdings, see note 23 infra.
22 However, the record is not entirely one-sided. Senator Murphy was also mayor of San Jose for four terms. During that period he donated his entire salary to the free public library. J. GUINN, HISTORY OF THE STATE OF CALIFORNIA 1388 (1904).
23 M. JAMES, BIOGRAPHY OF A BANK 48-52 (1954). The Commercial & Savings Bank of San Jose might be considered the cornerstone of the branch banking system of the Bank of America.
The lack of California legislative history during the period makes it all but impossible to determine the precise purpose of any particular statute.\textsuperscript{24} But the history of the period makes it appear very likely that the amendment to section 325 was pressed, in an attempt to gain notice of adverse claims, either by holders of large tracts of undeveloped land or by the railroads, or by both in common cause. The history of similar statutes in other states leads to a similar conclusion.\textsuperscript{25}

\textbf{COMPARATIVE STATUTES AND DECISIONS}

Today's statutes requiring payment of taxes for adverse possession not founded upon a written instrument stem from two major sources. Some states require payment of taxes in \textit{all} such situations; others grant certain exceptions. The former apparently take their pattern from the California statute of 1878. States with such strict statutes currently include Idaho, Indiana, Montana, Nevada, New Mexico, North Dakota, Texas, and Utah, along with California. A second group of states, granting varying exceptions from the requirement, seem to follow an Illinois statute of 1872, and include Arizona,

Murphy also apparently lacked some of the business acumen for which his father and grandfather had been noted. He regularly played cards for high stakes. One day, probably in 1893, there was a poker game at the Sainte Claire Club in San Jose, involving, among others, two regular participants: James H. Henry and former Senator Bernard D. Murphy. When all but these two had withdrawn, Henry, president of the San Jose and Santa Clara Railroad Company, offered to wager his streetcar line against Murphy's 22,000-acre Atascadero ranch. Murphy took the bet and lost. Henry later sold the ranch for $40.00 per acre, or $880,000. C. McCaleb, The San Jose Railroads 38, Winter, 1969 (Local History Studies series published by Foothill Junior College District).

There is some reason to doubt the accuracy of the 22,000-acre figure and, correspondingly, of the $880,000 selling price. Rancho Atascadero, in San Luis Obispo County, was granted by Governor Alvarado on May 6, 1842, to Trifon Garcia. It was patented on June 18, 1860, to Henry Haight and consisted of 4,348.23 acres. Haight in turn conveyed to Patrick W. Murphy (brother of Bernard Murphy) on August 31, 1868. However, interests of the Murphy family in San Luis Obispo County also included Rancho Santa Margarita, 17,734.94 acres, and Rancho Asuncion, 39,224.81 acres. The reference may be to one of the latter ranchos. See W. Robinson, The Story of San Luis Obispo County 51-55, 1957 (pamphlet distributed by Title Insurance and Trust Company, Los Angeles, California).

\textsuperscript{24} For a discussion of the limitations on research into legislative history in California, see Van Alstyne & Ezer, \textit{Legislative Research in California: The Uncharted Wilderness} (pts. 1, 2), 35 \textit{Los Angeles Bar Bull.} 116, 145 (1960).

\textsuperscript{25} "[T]he political activities of the 'Big Four' were no more reprehensible, though vastly more reprehensible, than those of thousands of other business and financial leaders of their time. National and state governments alike were then honeycombed with the dry rot of cynicism, rascality, brazen dishonesty, and strangely confused and distorted ethical conceptions. . . . The mischievous activities of the agents of the Central and Southern Pacific railroads, and the stranglehold the 'Big Four' gradually established over state, county, and local governments, were thus not isolated phenomena, but had their counterparts everywhere in the United States." R. Cleland, \textit{From Wilderness to Empire} 320-21 (1944).
Colorado, Florida, Maine, Minnesota, South Dakota, and Washington, beside Illinois.\textsuperscript{26}

Even in Texas, where the tax payment requirement apparently antedates all others,\textsuperscript{27} an early court, in \textit{Dutton v. Thompson}, expressed doubt as to the reason for the statute:\textsuperscript{28}

It is not very clear why the legislature made the payment of taxes necessary in order to sustain the defense of limitation based on five years' adverse possession under a recorded deed. It may have been, to this extent, to require evidence of good faith on the part of the occupant, to secure to the state and its municipal subdivisions the payment of taxes on the land, or to give further notice of the adverse claim and of the time it would mature into title, if possession be not interrupted, than afforded even by adverse possession under a recorded deed.

This Texas decision expresses the three theories of the requirement which are still current today. For simplicity, they may be called the good faith (or evidentiary) theory, the policing theory, and the notice theory.\textsuperscript{29} The policing theory expresses the interest of the state in assuring that taxes are paid. This rationale is self-evident and needs no further comment, even though the value of the theory is questionable when compared with other better means of securing payment of taxes.\textsuperscript{30} The good faith theory is generally accepted\textsuperscript{31} and therefore merits only the brief attention given immediately below in the discussion of \textit{United States v. Schwalby}. The notice theory, however, is controversial. Since it is the only one of the three theories that could have been of direct benefit to the large landholders, this comment will examine it in some depth.

\textsuperscript{26} For a tabulated comparison of all tax payment statutes, see Comment, \textit{The Payment of Taxes Requirement in Adverse Possession Statutes}, 37 \textit{Calif. L. Rev.} 477, 482-83 (1949). Since publication of that comment, Montana has reduced its limitation period from ten years to five years. \textit{Rev. Codes Mont.} § 93-2513 (Allen Smith 1964). Otherwise the provisions listed are substantially the same, although the following states have recodified their statutes: \textit{Colo. Rev. Stats.} §§ 118-7-8, 118-7-9 (Bradford-Robinson 1964); \textit{Me. Rev. Stats., tit. 14, § 816} (West 1965); \textit{Nev. Rev. Stats.} § 11.150 (1957); \textit{N.M. Stats.} § 23-1-22 (Allen Smith 1954); \textit{Utah Code} §§ 78-12-12, 78-12-12.1 (1953); \textit{Wash. Rev. Code} § 7.28.080 (Bancroft-Whitney & West 1961).

\textit{It is sometimes said} (e.g., 37 \textit{Calif. L. Rev. supra} at 480) that Alabama, Arkansas, and Tennessee also have tax payment requirements, but in these states there are no mandatory provisions. Tax payment merely provides an alternate method of obtaining title by adverse possession: \textit{Code of Ala., tit. 7, § 828} (Michie 1960); \textit{Ark. Stats.} § 37-102 (Bobbs-Merrill Repl. 1962); \textit{Tenn. Code Ann.} §§ 28-201, 28-209, 28-210 (Bobbs-Merrill 1955).

\textsuperscript{27} Act of February 5, 1841, § 16.
\textsuperscript{28} 85 Tex. 115, ——, 19 S.W. 1026, 1028 (1892). \textit{See also} Annot., 132 A.L.R. 216, 218 (1941).

\textsuperscript{29} Another theory is that the requirement is peculiar to jurisdictions having short limitation periods. For a discussion showing that this is simply not true, see Comment, \textit{The Payment of Taxes Requirement in Adverse Possession Statutes}, 37 \textit{Calif. L. Rev.} 477, 479-80 (1949).

\textsuperscript{30} \textit{E.g.}, tax liens or tax sales.

\textsuperscript{31} \textit{See note} 37 \textit{infra} and accompanying text.
A later Texas court, in *United States v. Schwalby*, said that the doubt regarding the tax payment requirement, as expressed in *Dutton v. Thompson*, was unreasonable. The court in *Schwalby* stated that the 1858 case of *Mitchell v. Burdett* had resolved all doubts. The *Mitchell* court had clearly pointed out that payment of taxes was one of the incidents of true ownership. In *Schwalby* the Texas court said, "The payment of taxes is an incident of ownership, and a circumstance which tends to show an honest belief, on the part of one claiming under a deed, in the justice of his title." However, the fallacy of the reasoning in *Schwalby* is that the court equates a circumstance of undoubted evidentiary value with a rigid statutory prerequisite. Even states which do not have a statutory requirement for payment of taxes recognize the fact of payment as strong, though not controlling, evidence of a possessor's intent to claim as his own. The statement of the court in *Schwalby* is therefore an expression of the good faith theory. This theory is difficult to quarrel with in principle. However, a statute that rigidly specifies an evidentiary test for good faith can easily work an injustice because of the subjective nature of "good faith."

The basic premise of the notice theory is that payment of taxes by a stranger will become a matter of public record and will thus give the true owner notice of that stranger's intent to claim adversely. Many authorities dispute the validity of this premise, but even if accepted, the inconsistency of decisions as to what constitutes payment of taxes precludes any practical application of the notice theory. The State of Washington exemplifies the glaring disagreement that can arise within a single state. Under a seven-year statute of limitation, the Washington Supreme Court held in *Tremmel v. Mess* that the notice theory required that seven years must elapse between the date of the first payment of taxes and the commencement of suit to recover the land. The court therefore barred an action by the adverse claimant where seven years' taxes had been paid over an elapsed period of only four years. But, just two years later, in *Lara v. Sandell*, where the occupant claiming adversely had purchased

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33 22 Tex. 633 (1858).
34 87 Tex. at —,—, 30 S.W. at 437.
35 22 Tex. at 634.
36 87 Tex. at —,—, 30 S.W. at 437.
37 2 C.J.S. *Adverse Possession* § 178 (1936). Here too, though, the holdings are not consistent.
40 52 Wash. 53, 100 P. 166 (1909).
at a tax sale and paid five of the seven years' taxes at that time, the same court held that its decision in *Tremmel v. Mess* added "materially to the language of the statute." The court in *Lara* then said that the defense of adverse possession was good, attempting to distinguish the two cases on grounds that the earlier case (*Tremmel*) involved vacant and unoccupied land, whereas the later (*Lara*) involved a city lot. Still later, in *Kennedy v. Anderson*, the Washington court cited *Tremmel v. Mess* approvingly and thus apparently returned to its prior holding that taxes must be paid throughout the full limitation period. But the court in *Kennedy* made no mention of *Lara v. Sandell*, and that case still remains on the books to perpetuate the inconsistency.

Further evidence of inconsistency in the application of the notice theory is a South Dakota decision holding that there is substantial compliance with the tax payment requirement despite delinquency of one installment during a ten year limitation period. Probably no one would argue with the justice of this decision, but no case has been discovered in any jurisdiction that decides the point at which such delinquencies negate substantial compliance.

But, at the height of inconsistency, Montana completely undermines the rationale of the notice theory by holding that an adverse claimant need not pay taxes each year as they become due. He may, at any time during the limitation period, pay up all taxes theretofore levied. Such a holding renders the notice theory meaningless. And even California has held in one case that reimbursement of the true owner for taxes that he has paid satisfies the requirement. One commentator interprets this holding to mean that payment of taxes "is not required in order to serve as an additional notification to the true owner ... ."

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41 *Id.* at —, 100 P. at 167.
42 88 Wash. 457, 153 P. 319 (1915).
43 *Id.* at —, 153 P. at 321.
44 Murphy v. Redeker, 16 S.D. 615, 94 N.W. 697 (1903).
46 For example, Nevada puts the notice theory in proper perspective when it states: "If for the purpose of giving notice to the true owner that, perchance, an adverse claimant has appeared upon the scene, his payment of taxes as notice of that fact is entirely insignificant when compared to the circumstances of his open and notorious possession of the land." *Zubieta v. Tarner*, 76 Nev. 243, —, 351 P.2d 982, 984 (1960).
47 Williams v. Stillwell, 217 Cal. 487, 19 P.2d 773 (1933). In another case where reimbursement for taxes by the adverse possessor was held sufficient, the court, citing Williams v. Stillwell, says: "It is well settled that the requirement of payment of taxes is satisfied if payment is made by the claimant, or by someone on his behalf or in privity with him." *Cooper v. Carter Oil Co.*, 7 Utah 2d 9, —, 316 P.2d 320, 322 (1957).
48 22 CALIF. L. REV. 111, 112 (1933).
The aforementioned Montana and California holdings appear to apply the coup de grâce to the notice theory. However, Illinois went to the opposite extreme and rigidly applied the notice theory when it held that payment of taxes for six years and eight months of the seven-year period, plus payment of an additional ten years' delinquent taxes, did not satisfy the statute.  

The courts have also been ambivalent in deciding the effect of payment of taxes in connection with land sold for delinquent taxes. In the leading California case of Owsley v. Matson the court held that a redemption of land sold for delinquent taxes satisfied the requirement of section 325. However, this is a minority view, and even California has not applied it uniformly. Most courts hold that neither the purchase of land at a tax sale nor redemption of land from a tax sale constitutes a payment of taxes for the purpose of adverse possession.

Although the incongruity of the above holdings throws doubt on the validity of the notice theory, large landholders probably espoused it as the only widely held theory that would have been directly beneficial to them. A relatively recent application of the notice theory to obtain passage of a tax payment statute in Indiana provides support for this hypothesis. Large corporations owned extensive tracts of unoccupied lands in northern Indiana, but they were losing these to “squatters” who obtained title by adverse possession. Since the corporations were either unable or unwilling to settle the land and obtain notice or foreclose adverse possessors in that manner, they sought and obtained passage of the tax requirement by the Indiana Legislature in 1927.

Although this recent corporate activity in Indiana did not involve railroads, it gives additional support to the similar proposition that passage of tax payment requirements often resulted from lobbying efforts of the railroads. Early railroads obviously desired some automatic notification of attempts to claim their lands adversely. Since they owned such tremendous acreages in sparsely settled parts of the country, they found it impractical to discover potential adverse possessors by mere visual observation of their holdings. Sig-

50 156 Cal. 401, 104 P. 983 (1909).
51 See Bowen v. Olson, 2 Utah 2d 12, ——, 268 P.2d 983, 984 (1954), and cases cited in note 10 therein.
53 Ch. 42, § 1, Acts of 1927.
significantly, the tax payment requirement is in effect in states which benefitted from more than 71 percent of the lands granted to encourage railroad construction. In this group of states, excepting Texas, railroad land grants comprised over 12 percent of their combined total area. Railroad land ownership in individual states ranged from a low of 3 percent in Idaho to a high of 27 percent in Washington. With such a concentration of land ownership, it would be surprising if the railroads were not able, or even anxious, to influence or procure legislation favoring their titles. Not coincidentally, the great majority of tax payment statutes became effective during the latter third of the nineteenth century. This was the greatest period of railroad building and land settlement in the previously nearly vacant western part of the United States.

65 Estimated area of land grants made by Congress to States, Territories, and Corporations, 1850-1880; figures are based on total quantity to be given if all contemplated railroads were constructed; the total includes approximately 5,000,000 acres originally granted for construction of canals and military roads, but many of these grants were subsequently converted to railroad use:

<table>
<thead>
<tr>
<th>State</th>
<th>Acres</th>
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</thead>
<tbody>
<tr>
<td>* Arizona</td>
<td>18,500,000</td>
</tr>
<tr>
<td>* Montana</td>
<td>17,000,000</td>
</tr>
<tr>
<td>* California</td>
<td>16,387,000</td>
</tr>
<tr>
<td>* Washington</td>
<td>11,700,000</td>
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<td>* Nevada</td>
<td>4,000,000</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>3,553,865</td>
</tr>
<tr>
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</tr>
<tr>
<td>* Colorado</td>
<td>3,000,000</td>
</tr>
<tr>
<td>Alabama</td>
<td>2,807,648</td>
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<tr>
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<tr>
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<td>2,605,251</td>
</tr>
<tr>
<td>* Illinois</td>
<td>2,595,053</td>
</tr>
<tr>
<td>* Utah</td>
<td>1,850,000</td>
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<tr>
<td>* Florida</td>
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</tr>
<tr>
<td>* Idaho</td>
<td>1,500,000</td>
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<tr>
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<td>1,256,430</td>
</tr>
<tr>
<td>Mississippi</td>
<td>1,137,130</td>
</tr>
<tr>
<td>* Texas</td>
<td>Note a</td>
</tr>
</tbody>
</table>

Total 154,067,553 acres

Note a: Texas also made substantial grants, but since there were no United States lands in Texas, these grants were made by the State.

* States so indicated have a tax payment requirement as part of their adverse possession statutes. Alabama and Arkansas might also be included. See note 26 supra. Maine and Indiana are the only states with this type of statute that are missing from the list.
Adapted from T. DONALDSON, THE PUBLIC DOMAIN 268, 287 (1884).

66 Comment, THE PAYMENT OF TAXES REQUIREMENT IN ADVERSE POSSESSION STATUTES, 37 CALIF. L. REV. 477 n.3 (1949).
CURRENT CALIFORNIA POSITION

Inconsistencies in the application of the tax payment requirement also prevail in California and are sometimes even amplified.®

In Schoenfeld v. Pritzker,® an action to quiet title, plaintiff owned a quarter section adjoining defendant’s land. In 1939 plaintiff constructed a pipeline along the common boundary but some 200 feet inside his own land. A power line and road were also built at about the same time. Thereafter, defendant occupied the major portion of the 200-foot strip by planting and harvesting annual crops of grain. Plaintiff made no comment or attempt to interfere with this use until he had a survey made in 1959. The survey established the true boundary line and showed defendant’s encroachment. Defendant, however, refused to recognize this line and continued to plant and harvest his crop. Plaintiff did nothing further until defendant began to plant orange trees on the strip in 1963. At that time, some twenty-four years after defendant’s initial use of the strip, he notified defendant in writing of his encroachment and demanded that he desist. When he did not, plaintiff brought suit in 1965.

Defendant based his claim on three main arguments: first, that the five-year statute of limitation in section 318 of the Code of Civil Procedure® barred plaintiff’s action; second, that defendant had title to the strip under the doctrine of agreed boundary;® and third, that plaintiff’s action was barred by laches. Although the court found against defendant on all three arguments, only the first is considered in detail in this comment.

Although the holding of the court in denying the application of section 318 covered several specific points, all essentially relied on the fact (undisputed by defendant) that he had not paid taxes on the disputed strip and had therefore not established one of the essential

® See note 51 supra.
® 257 Cal. App. 2d 117, 64 Cal. Rptr. 592 (1967).
® “No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question, within five years before the commencement of the action.” CAL. CODE CIV. PROC. § 318 (West 1954).
® The dividing line between the doctrines of adverse possession and agreed boundary has been stated to be “the fiction that the agreed line attaches to the parties’ respective deeds.” But the interpretation of what constitutes an “agreement” is uncertain, and the California courts have not applied the concept uniformly. Comment, Boundary Litigation in California, 11 STAN. L. REV. 720, 723 (1959).
In Ernie v. Trinity Lutheran Church, 51 Cal. 2d 702, 336 P.2d 525 (1959), the California Supreme Court said, in discussing an agreed boundary line, “[T]he division line, when thus established, attaches itself to the deeds of the respective parties, and simply defines, not adds to, the lands described in each deed . . . .” Id. at 709, 336 P.2d at 529.
elements of adverse possession. The points discussed by the court were: (1) that seisin, or possession, remains in the legal owner until adverse possession has ripened into good title;\(^{61}\) (2) that a mere showing of legal title satisfies the possession requirement of section 318, so long as requirements of other applicable adverse possession statutes are not fulfilled; (3) that the presumption of possession being subordinate to the title of the legal owner \(^{62}\) applies unless all elements of adverse possession have been satisfied; and (4) that so long as the possession was not of such nature that it could ripen into valid adverse title, plaintiff was under no duty to take affirmative action. All of these four conclusions, as expressed by the court, depend upon defendant's satisfaction of the adverse possession requirements of section 325. The missing requirement, deemed essential by the court, was defendant's undisputed failure to pay taxes.

Defendant in Schoenfeld v. Pritzker relied heavily on Cocking v. Fulwider.\(^{63}\) The holding of Cocking was essentially contrary to the holding of Schoenfeld, though almost squarely in point on the facts. In Cocking, another quiet title action, plaintiff had not possessed a disputed boundary strip for more than thirty years. Defendant's predecessors had planted fruit trees on the strip, and defendant continued to maintain them. The trial court found for the defendant on his pleas of adverse possession, statute of limitations, laches, and an agreed boundary line. The court of appeal affirmed the decision but discussed in detail only the question of the application of the statute of limitations. The court said:

The purpose of the code section [318] is to prevent the prosecution of stale demands such as we have here, and for this purpose it limits the remedy of the plaintiff, even though all the elements necessary to establish adverse possession on defendant's part are not present.\(^{64}\)

The court further said that since defendant and his predecessors had been in undisputed actual possession for more than thirty years, plaintiff was not in possession, and section 318 therefore barred his action.

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\(^{61}\) But see Farrer v. Johnson, 2 Utah 2d 189, 271 P.2d 462 (1954), and notes 69 and 70 infra and accompanying text.

\(^{62}\) "In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title, for five years before the commencement of the action." Cal. Code Civ. Proc. § 321 (West 1954).

\(^{63}\) 95 Cal. App. 745, 273 P. 142 (1928).

\(^{64}\) Id. at 748, 273 P. at 143 (emphasis added). Could the Schoenfeld court's rejection of Cocking be interpreted to mean that this court will no longer find a bar to any action to recover real property merely because of passage of the limitation period?
Despite the similarity of the cases, the Schoenfeld court refused to accept Cocking as authority, but adopted the reasoning of a critical 1929 law review comment. The critic of Cocking believed that the court had placed too narrow an interpretation on the term "seized or possessed" as used in section 318 by requiring actual possession within the five-year period, as opposed to theoretical possession under the common law theory of seisin. However, the common law theory of seisin was actual possession. The most effective method of disseisin in early England was occupancy in fact and planting and harvesting of crops. One noted authority states flatly, "Seizin is possession." Although the equality of the two concepts has been modified over the years, the common law concept of seisin still requires possession. It is therefore wrong to imply, as the court did in Schoenfeld v. Pritzker, that seisin is mere legal title. Actually, the "narrow" interpretation of Cocking is more in line with the common law theory on which the commentator allegedly relied.

The Schoenfeld court ignored a later comment on Cocking which pointed out that in 1959 the supreme court had a clear opportunity to attack Cocking but failed to do so. This commentator continues:

Thus it cannot be said that the case [Cocking v. Fulwider] does not represent the current California rule, even though the relative infrequency of its appearance in subsequent opinions may indicate that it is destined to become "a derelict on the waters of the law."

His latter statement may eventually prove true, as common law theories are modified. But several courts have cited Cocking as

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65 257 Cal. App. 2d at 120, 64 Cal. Rptr. at 595.
67 See note 59 supra.
70 "[T]he further back we trace our legal history the more perfectly equivalent do the two words seisin and possession become . . . ." F. Maitland, The Mystery of Seisin, 3 Select Essays in Anglo American Legal History 591 (1909).
71 But see Code of Civil Procedure section 321, note 62 supra. The court in Schoenfeld stated that this section did not apply and relied on section 318 (note 59 supra) instead. Apparently the court felt that seisin and possession are not the same.
72 For the modern American concept of seisin, see 1 American Law of Property § 1.6 (A.J. Casner ed. 1952); 1 H. Tiffany, Real Property § 20 (3d ed. 1939).
74 Id.
authority for the proposition that actual possession is necessary to satisfy the requirements of section 318. Since the courts of appeal now disagree, the only way to resolve the dispute is by a clear-cut California Supreme Court decision. The Schoenfeld case presented this opportunity, but unfortunately the supreme court denied a hearing. This refusal does not amount to a tacit disapproval of Cocking and an approval of Schoenfeld because in 1929 the supreme court also denied a hearing on Cocking v. Fulwider. A claim that Schoenfeld is now approved amounts to unwarranted speculation.

Another reason for the necessity of a supreme court decision is that the court of appeal in Schoenfeld failed to answer defendant's principal contention that the rule of the more recent supreme court case of Ernie v. Trinity Lutheran Church76 barred plaintiff's action under section 318.77 In Ernie, also an action to quiet title to a disputed boundary strip, the supreme court denied defendant's plea of adverse possession because plaintiff, and not defendant, had paid the taxes. Nevertheless, the court found for defendant under the doctrine of an agreed boundary78 and held that plaintiff's action was barred, in part, because she failed to show actual possession as required by section 318. Apparently the court felt that plaintiff must show at least a complete chain of title.79 Consideration of this language might have brought about an opposite result in Schoenfeld. Furthermore, in Ernie, the supreme court cited with approval80

76 51 Cal. 2d 702, 336 P.2d 525 (1959).
78 The court first determined: "It is true that the judgment for the defendant cannot be supported on any theory of title by adverse possession because of the affirmative showing and finding of payment of taxes by the plaintiff since the acquisition of her deed. . . . The trial court found that no taxes had been levied or assessed upon any easement in the disputed strip, but it made no finding that the defendant had acquired a prescriptive easement. While such a finding could have been made it would not support the judgment quieting the title in the defendant in fee." 51 Cal. 2d at 707, 336 P.2d at 528.
79 "The plaintiff did not offer evidence to establish a prima facie case on any of these alternatives or to overcome the bar of the statute of limitations contained in section 318 of the Code of Civil Procedure. No evidence was offered to deraign her title from the government or to show that any common grantor appeared in the chain of title of herself and the defendant. What title the plaintiff's grantor had or how she acquired it does not appear, and no proof was offered that she or her grantor ever had possession. The mere introduction of the deed from her immediate grantor was not sufficient to establish a prima facie case. [Citations omitted]. The plaintiff, therefore, failed to prove either legal title or actual possession and judgment was properly entered denying her any relief." Id. at 706-07, 336 P.2d at 528.

However, in a recent case, one appellate court has stated that a finding of an agreed boundary by inference due to long acquiescence is justifiable only in the exceptional case. The court distinguished Ernie v. Trinity Lutheran Church as being that exceptional case. Dooley's Hardware Mart v. Trigg, 270 A.C.A. 368, 75 Cal. Rptr. 745 (1969).
80 51 Cal. 2d at 706, 336 P.2d at 528.
Haney v. Kinevan, on which defendant in Schoenfeld also relied. Haney was a boundary case in which plaintiff failed to adduce evidence showing that he had been in possession of a disputed strip within five years of the action. The court held that plaintiff’s action was barred because he had not been seised or possessed of the land as required by section 318.

Thus the “loophole” established by Cocking and implicitly approved by Ernie suggests that the apparently rigid California tax payment requirement can be bent with judicial insistence. Schoenfeld mistakenly rejected this opportunity and simultaneously confused the matter. In short, the holdings of the courts of appeal are sufficiently confusing so that resolution by the California Supreme Court is necessary.

BOUNDARY DISPUTES

A similar confusion prevails in California in cases involving disputed common boundaries. While a detailed discussion of boundary doctrines is beyond the scope of this comment, courts frequently invoke boundary principles in order to avoid resting a decision upon adverse possession. This may be done when a strict application of adverse possession principles (and the tax payment requirement) would produce a result that appeared unjust in the eyes of the court.

Adverse possession and agreed boundary principles are closely related and are frequently confused; but they are, at least theoretically, applicable to different factual situations. But because of the uncertainty regarding which rules are to be applied, it is difficult

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82 257 Cal. App. 2d at 119, 64 Cal. Rptr. at 595.
84 “Considering all of the various jurisdictions in the United States, the doctrine [of agreed boundary] is still in a chaotic condition, and no one has yet undertaken to point out definitely the circumstances under which it is applicable.” Annot., 69 A.L.R. 1430, 1431 (1930). See also Annot., 113 A.L.R. 421 (1938) (supplementary).
to predict the outcome of a case that is not clearly identifiable as one or the other of the two factual situations. Schoenfeld v. Pritzker was such a case.

To bring such a dispute within the rules of agreed boundary in California, three elements must be present: (1) an uncertainty as to the true boundary, (2) an agreement between the parties fixing the line, and (3) acquiescence in the line so fixed for a period equal to the statute of limitations.85 The same statutes of limitation apply as in the case of an action to recover real property from an adverse possessor, and they present many of the same difficulties.

Two of the most difficult questions under the California agreed boundary doctrine are, what is uncertainty, and what is agreement?86 In Schoenfeld v. Pritzker87 an alternative argument, which the court did not accept, presented both of these questions (as do many adverse possession cases involving contiguous landowners). California takes two views of uncertainty: objective uncertainty and subjective uncertainty.88 Defendant in Schoenfeld argued the former: that plaintiff's long-continued failure to object to his use of the strip for annual crops had caused an agreed boundary to arise by implication. The court rejected this contention and followed the doctrine of Clapp v. Churchill,89 which holds that there can be no boundary agreement where the true line can be readily established (as was done in 1959 by plaintiff's survey). In so holding, the court found no objective uncertainty. When objective uncertainty is present, the California courts normally grant judgment for the defendant, provided he can also establish an agreement. The court's other alternative would have been to follow the theory of subjective uncertainty, upon which the California courts are divided.90 However, defendant's argument in support of this theory would have been difficult in view of the results of the 1959 survey. Since the court took the objective uncertainty approach, and found no uncertainty, it never reached defendant's argument of an implied agreement. Thus the court was

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86 "These requirements envisage a situation where the parties, being uncertain as to the location of the true boundary, have agreed, either expressly or impliedly, to resolve this uncertainty by establishing a boundary in lieu of the true line." Comment, Boundary Litigation in California, 11 STAN. L. REV. 720, 723 (1959).
87 257 Cal. App. 2d 117, 64 Cal. Rptr. 592 (1967).
88 Comment, Boundary Litigation in California, 11 STAN. L. REV. 720, 723 (1959). There is subjective uncertainty where the true boundary is capable of being accurately ascertained but the parties are not certain of the true boundary. On the other hand, objective uncertainty is present where the boundary is not reasonably ascertainable by reference to deeds, maps, or prior surveys.
89 164 Cal. 741, 130 P. 1061 (1913).
precluded from using any boundary theory in order to avoid the harshness of a strict application of the tax payment requirement.

But if the court had reached this question, no doubt a similar conflict would have arisen between the "contract theory" and the "prescription theory" of an agreement. Courts that follow the "contract theory" find for the legal owner on grounds of either lack of a true agreement or mutual mistake of fact. Courts following the "prescription theory" tend to avoid the issue of agreement and substitute an adverse possession rationale to find for the claimant. According to one commentator, the clear trend of California boundary cases is to adopt a "prescription theory" closely akin to the underlying policy of adverse possession which favors stability and repose of titles.

When the courts do adopt this "prescription theory," they may also take a liberal approach to the tax payment requirement. If the courts adopted a strict approach to assessment, based on the exact deed description, they would find themselves caught again in strict adverse possession principles and in the tax payment requirement. Many cases in California and other states, therefore, adopt the visual approach to assessment and state:

[T]he natural inference would be that the assessor put the value on the land and improvements of each party as disclosed by the visible possession, rather than that he ascertained the true line by a careful survey and assessed to one a part of the possessions of the other. . . .

Thus taxes assessed on a readily visible encroachment would satisfy the tax payment requirement regardless of the description in the deed.

In Schoenfeld, however, defendant did not include the theory of a visual assessment in his arguments for either adverse possession or agreed boundary. If he had done so, would the result have been different, even under the same facts? Again, the inconsistencies in the rules strongly suggest an affirmative answer.

91 Id. at 725.
92 Where a claimant in a boundary case can establish neither adverse possession nor an agreed boundary, the California courts have sometimes found in his favor on a theory of estoppel. Id. at 728. This argument was not used in Schoenfeld v. Pritzker. Other theories sometimes used in boundary cases are (1) the concept of a new monument as a fixed boundary and (2) the concept of "practical location." Id. at 733. See also Browder, The Practical Location of Boundaries, 56 Mich. L. Rev. 487 (1958).
94 Id. at 721.
CRITICISMS OF THE TAX PAYMENT REQUIREMENT

Many of these boundary situations, and inequitable results of some adverse possession cases, have stimulated resounding criticisms of the tax payment requirement almost from its inception. Both courts\(^{96}\) and commentators\(^{97}\) have called the requirement harsh, anomalous, or inapplicable.

In line with these comments, courts outside of California have, when the results seemed otherwise unjust, taken some rather extreme positions in order to evade the tax payment requirement. In a Utah case the tax payment requirement prevented defendant from obtaining title by adverse possession where his building encroached on plaintiff's lot.\(^{98}\) However, the court found that defendant had acquired an easement for the life of his building. In city lot boundary cases, regardless of the question of agreement, Idaho holds that a fence controls the description in an assessment made by lot number.\(^{99}\) Payment of taxes thus assessed satisfies the requirement. Indiana, despite the lack of any exception in its statute,\(^{100}\) faces squarely up

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\(^{96}\) Typical comments are that the requirement does not apply "to a small strip along a boundary line." McDonald v. Drew, 97 Cal. 266, 270, 32 P. 173, 174 (1893) (concurring opinion); that it "has no natural relation whatever to the matter of actual adverse possession of land . . . ." Eberhardt v. Coyne, 114 Cal. 283, 287, 46 P. 84, 85 (1896) (dissenting opinion); that it is an "anomalous law." McDonald v. McCoy, 121 Cal. 55, 73, 53 P. 421, 426 (1898); that it is a "harsh rule to apply." Crane v. Judge, 30 Utah 56, —, 83 P. 566, 567 (1905); that "his misfortune is a hardship beyond the power of this court to redress." Central Pac. R.R. v. Tarpey, 51 Utah 107, —, 168 P. 554, 560, 1 A.L.R. 1319, 1328 (1917); and that "it proves harsh to the possessor . . . ." Lykes Bros. v. Brautcheck, 106 So. 2d 582, 586 (Fla. App. 1958).

\(^{97}\) "[B]ecause of the harshness in this type situation, it might be desirable for the legislature to enact a proviso, similar to the one in force in another state [Minnesota], that this statute should not be applicable to mistaken boundary situations." 1 U. Fla. L. Rev. 291, 293 (1948). "[T]he benefits derived therefrom are uncertain, the legislative purpose difficult to determine, and the effect unfortunate and anomalous in view of the policy underlying adverse possession." Comment, The Payment of Taxes Requirement in Adverse Possession Statutes, 37 Calif. L. Rev. 477, 478 (1949).

"[I]t is illogical to require that there be an agreed boundary to satisfy the tax requirement of adverse possession in the contiguous landowner situation." 32 S. Cal. L. Rev. 90 (1958). "It seems apparent that application of the tax requirement to the disputed boundary situation effectively prevents accomplishment of this objective [to correct errors in conveyancing]." Comment, Boundary Litigation in California, 11 Stan. L. Rev. 720, 721 n.6 (1959). "[T]he payment of taxes requirement should be eliminated from section 325, at least insofar as that section applies to the disputed boundary situation." Id. at 734.


\(^{100}\) "Hereafter in any suit to establish title to lands or real estate no possession thereof shall be deemed adverse to the owner in such manner as to establish title or rights in and to such land or real estate unless such adverse possessor or claimant shall have paid and discharged all taxes and special assessments of every nature falling
to the problem and holds that in disputed boundary situations possession is sufficient, despite failure to pay taxes.\textsuperscript{101}

In 1939 Florida became the most recent state to add a tax payment requirement.\textsuperscript{102} This addition has contributed to increased litigation and has brought about at least one strongly unfavorable comment.\textsuperscript{103} In \textit{Palmer v. Greene},\textsuperscript{104} one of the first cases to arise under the new statute, the court first held that payment of taxes was not required in a boundary dispute involving city lots, where the fence was not on the true boundary. The court's grounds were that plaintiff's choice of the quiet title action was improper and that he should have brought ejectment. The court then reasoned that since the proper remedy was ejectment, and since the legislature had surely not intended to abolish the common law remedy of ejectment, the tax payment requirement was inconsistent and could not apply. Obviously, though, the court was confused, and it reversed itself on rehearing, holding that the equitable action to quiet title was proper, and that payment of taxes was required. In this case, the court apparently felt that the tax payment requirement produced an unjust result. Therefore, it tried, though unsuccessfully, to find another basis for its decision. In later litigation in Florida, the judicial feeling against the unjustness of the requirement evidently became stronger.\textsuperscript{105} Finally, in 1961, one appellate court took a boundary case out from under the requirement of the statute by holding that when an adverse claimant fenced a disputed strip, the fencing integrated the strip into his lands and gave him color of title, so that

due on such land or real estate during the period he claims to have possessed the same adversely: Provided, however, That nothing in this act shall relieve any adverse possessor or claimant from proving all the elements of title by adverse possession now required by law." \textsc{Ind. Stats. Ann.} § 3-1314 (Bobbs-Merrill 1968).


\textsuperscript{102} "Where it shall appear that there has been an actual continued occupation for seven years of premises under a claim of title exclusive of any other right, but not founded upon a written instrument, or a judgment or decree, the premises so actually occupied, and no other, shall be deemed to have been held adversely; provided that during the period of seven years aforesaid the person so claiming adverse possession without color of title shall have within a year after entering into possession made a return of said property by proper legal description to the assessor of the county wherein situated and has subsequently, during each year paid all taxes theretofore or thereafter levied and assessed against the same and matured installments of special improvement liens theretofore or thereafter levied and assessed against the same by the state and county and by city or town, if such property be situated within any incorporated city or town, before such taxes become delinquent." \textsc{Fla. Stats.} § 95.18 (1965).

\textsuperscript{103} See 1 U. \textsc{Fla. L. Rev.} 291, 293 (1948) note 97 \textit{supra}. [Cited with approval in Lykes Bros. v. Brautcheck, 106 So. 2d 582, 586 (Fla. App. 1958)].

\textsuperscript{104} 159 Fla. 174, 31 So. 2d 706 (1947).

\textsuperscript{105} Holley v. May, 75 So. 2d 696 (Fla. 1954); Euse v. Gibbs, 49 So. 2d 843 (Fla. 1951).
a different statute applied. This holding is analogous to the California fiction that an agreed line attaches to the deeds.

Minnesota is the only state which unqualifiedly faces the problem of the tax payment requirement in boundary cases. In 1913 Minnesota added a provision to its statute specifically exempting disputed boundary situations from the tax payment requirement. A Minnesota court later expressed the purpose of this addition by saying, "A peculiarly useful application of the doctrine of adverse possession is in the settlement of disputed or mistaken boundary lines. 'The object of the statute is to quiet titles and end disputes.' [citation omitted]." Since that time there has been very little litigation on the subject in Minnesota.

CONCLUSION

Although the origin and reasons for the tax payment requirement, as an essential statutory element of adverse possession, are obscure, the statutes were probably enacted because of the lobbying activities of large landholders, principally the western railroads. These landholders apparently proceeded under some version of the notice theory, which has been proven unsound by subsequent court decisions under the statutes. Furthermore, even if the notice theory is accepted, there are serious questions whether a need exists for this type of notice under modern conditions and whether any notice is actually communicated to the true owner. Except in Alaska, the public domain of the United States has practically vanished, and if land is sufficiently desirable for a legal owner to be interested in retaining it, surely it is not asking too much to require him to make an inspection of the land, either personally or by representative, once every five years. Such a duty would help promote the general public policy in favor of full utilization of land. Under circumstances existing today, therefore, the requirement is an anachronism.

One possible solution to the problem is a more liberal interpretation of the requirement by the courts, such as greater adoption of

107 See note 60 supra.
108 "The provisions of paragraph two [the tax payment provision] shall not apply to actions relating to the boundary line of lands, which boundary lines are established by adverse possession . . . ." MINN. STATS. ANN. § 541.02 (West Supp. 1967).
110 But see 1 U. Fla. L. Rev. 291 (1948).
111 Under normal circumstances, no state with a tax payment requirement prescribes a limitation period of less than five years. Mining claims are an exception.
visual approach to assessment.\textsuperscript{112} By an extension of that doctrine, the courts in California, as they have in other states, could probably take most boundary cases out from under the requirement of section 325 of the Code of Civil Procedure.\textsuperscript{113}

This solution will not work, though, in adverse possession cases that do not involve contiguous boundaries. Here, legislative action to repeal the tax payment requirement is probably the only fully effective solution. This is not to say, however, that the evidentiary value of payment of taxes as an indication of a possessor's intent to claim adversely should be eliminated. The logic of such a position is indisputable. But since it is already generally recognized, even without the benefit of legislation,\textsuperscript{114} no action is necessary in this respect. However, care must be exercised in drafting repealing legislation to insure that no inadvertent damage is simultaneously done to the evidentiary position of tax payment.

\textit{Averill Q. Mix}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{112} See cases cited note 95 \textit{supra}.
  \item \textsuperscript{113} See note 1 \textit{supra}.
  \item \textsuperscript{114} 2 C.J.S. \textit{Adverse Possession} § 178 (1936).
\end{itemize}
\end{footnotesize}