Resolving Boundary Disputes in California: A Radical Reassessment in Light of Proposition 13

By JACK I. GARVEY*

Introduction

THE LAW OF ADVERSE POSSESSION, as it applies to boundary disputes in California, is in need of radical reconstruction. Boundary disputes constitute one of the most frequently litigated areas of California property law. This is because the physical divisions that contiguous owners assume divide their properties from one another are commonly incongruent with surveyed lines, and the law of adverse possession, as currently interpreted and administered, accentuates resulting conflict. The disparity between apparent boundaries—marked by fence lines, landscaping, buildings and other structures—and the lines demarcating the same properties, as those lines appear in a technically administered survey, recorded or unrecorded, consequently entails widespread and continuing risk for real estate sellers, buyers, and their brokers. This disparity, undisclosed when real estate is sold, even despite good faith all around, rises to haunt transactions long thought to be closed, propelling the parties, their brokers, and their lawyers into nightmares of litigation.

The law of adverse possession, as currently applied in California, does not provide predictable, logical, or satisfactory resolution. Where equities favor the adverse claimant, the law of adverse possession does not. The principal impediment for the adverse claimant is the requirement to establish that the claimant has paid taxes on the disputed property. Despite long-term satisfaction of the other requirements for adverse possession,[1] the tax payment requirement results in judicial

* Professor of Law, University of San Francisco School of Law. J.D., Harvard Law School, 1968; A.B., Harvard College, 1964.

1. The requirements of adverse possession are that possession be under a claim of right or color of title, and that the possessor have actual, open, notorious, hostile, and

reversion to the surveyed line, precluding adverse possession.[2] California courts often respond to the confining nature of the tax payment requirement through a variety of common law doctrines to address the equities of actual use. These doctrines are variously named prescriptive easement, equitable easement, estoppel, and agreed boundary (sometimes labeled acquiescence).[3] Often these doctrines overlap or intersect, assuring a dense and fertile field for litigation. It is clear, however, that the trouble begins with the law of adverse possession and its tax payment requirement.

This Article examines the law of adverse possession as applied and proposes to end its irrational application. It is "irrational" because the most significant requirement for achieving adverse possession, on which most results turn—the payment of taxes—is no longer logically applied after the advent of Proposition 13.[4]

The courts generally assume that taxes have been assessed according to the recorded deed description. This was not always true before the passage of Proposition 13 in 1978, and is no longer a correct assumption following the enactment of Proposition 13.[5] Under Proposition 13, the tax value of property is determined from the sales price that is the base negotiated by the parties according to what they see as to apparent boundaries, irrespective of any inconsistent but undisclosed property survey. Accordingly, under Proposition 13, it is the adverse claimant who actually pays the property taxes on the portion that later becomes disputed when the discrepancy between the apparent boundary and surveyed boundary appears. Nevertheless, all of the published opinions have persisted in assuming, in the absence of evi-

continuous occupation and possession for at least five years. *See* CAL. CIV. PROC. CODE § 325 (West 2006).

2. Mehdizadeh v. Mincer, 54 Cal. Rptr. 2d 284 (Ct. App. 1996); *see also* CAL. CIV. PROC. CODE §§ 318–19, 322–28 (West 2006).

3. Joseph P. Loeb, *The Establishment of Boundary Lines by Practical Location*, 4 CAL. L. REV. 179 (1916).

4. Proposition 13 was passed in 1978 by a nearly two-thirds majority. Darien Shanske, Note, *Public Tax Dollars for Private Suburban Development: A First Report on a National Phenomenon*, 26 VA. TAX R. 709, 718 (2007) (noting that the Proposition 13 ballot initiative was passed with 64.8% of the vote). This amendment to the California Constitution fixed the valuation of property to its original purchase price, capping increases in assessed valuation at 2% per year and the overall property tax rate at 1% per year. CAL. CONST. art. XIIIA, §1. The amendment further provided that reassessment could only occur when the property itself changed hands. CAL. CONST. art. XIIIA, §2. If such a transfer of ownership were to take place, the property would be subject to a reassessment at the current market value. The newly assessed value would then increase on a yearly basis not to exceed the 2% per year cap. CAL. CONST. art. XIIIA, §2(b).

5. CAL. CONST. art. XIII, §1.

dence of actual visual assessment by the tax assessor, that it is the owner as designated by survey and public record who has paid the taxes on the disputed parcel, and not the apparent owner.

This Article argues that not only is this assumption broadly invalid after the passage of Proposition 13, but that the failure of this assumption removes the foundation of much of the established corpus of relevant case law. Moreover, this Article argues that the logical imperative Proposition 13 generates now affords the opportunity for a radical reconstruction of the law of adverse possession to eliminate the uncertainty that has characterized its application in California, achieving greater equity while dramatically reducing litigation.

I. The Problematic Nature of the Common Law Response

The effort of California courts to otherwise achieve fairness under the current application of the payment of taxes limitation of adverse possession has been considerable, but largely unsuccessful. That failing is reflected both in terms of numbers of cases and the doctrinal development.

There are no available statistics from which to determine precisely the number of boundary dispute court filings in California. The Court Statistics Report, published by the Judicial Council of California, does not classify civil filings into real estate related filings, let alone real estate boundary disputes.[6] By using the statistics in the report, however, it is possible to make a reasonable estimate of the number of boundary dispute filings.

Approximately fifty boundary dispute appellate cases have been reported since 2003.[7] The general ratio of original civil filings to

6. JUDICIAL COUNCIL OF CAL., STATEWIDE CASELOAD TRENDS, 2008 COURT STATISTICS REPORT 5 (2008), *available at* http://www.courtinfo.ca.gov/reference/documents/csr2008.pdf.

7. *See* Vergara v. Bermudez, No. A117153, 2007 WL 4555716 (Cal. Ct. App. Dec. 28, 2007); Mejia v. California Home Develop., LLC, No. B180457, 2007 WL 4305538 (Cal. Ct. App. Dec. 11, 2007); Barber v. Abreu, No. A116220, 2007 WL 4172297 (Cal. Ct. App. Nov. 27, 2007); Sigman v. Mariano, No. A115132, 2007 WL 4099548 (Cal. Ct. App. Nov. 19, 2007); Valentine v. Flowers, No. D048373, 2007 WL 1793165 (Cal. Ct. App. June 22, 2007); VanSandt v. Trivedi, No. D048030, 2007 WL 1290223 (Cal. Ct. App. May 3, 2007); Cobb v. Gabriele, No. H029796, 2007 WL 1247308 (Cal. Ct. App. Apr. 30, 2007); Escove v. Mertz, No. C052823, 2007 WL 906600 (Cal. Ct. App. Mar. 27, 2007); Niaz v. Avedissian, No. B189581, 2007 WL 738978 (Cal. Ct. App. Mar. 13, 2007); Yeo Lai Sah Buddhist Monastery v. Nelidov, Nos. C047826 & C049616, 2007 WL 482088 (Cal. Ct. App. Feb. 15, 2007); Goldstein v. Beck, No. B185815, 2006 WL 3746121 (Cal. Ct. App. Jan. 22, 2007); Green v. DeVaul, No. B183181, 2006 WL 2536682 (Cal. Ct. App. Sept. 5, 2006); Taylor v. Brown, No. C050077, 2006 WL 1195926 (Cal. Ct. App. June 1, 2006); Baker v. Tramutola, No. D045956, 2006 WL 540920 (Cal. Ct. App. Mar. 6, 2006); Gallardo v. Vigil, No. B181341,

records of appeal filed during that same period averaged about 315 to 1.[8] Therefore, it can be estimated that the fifty appellate boundary cases reported resulted from original superior court filings numbering 15,750.[9] That number, generated over five years, in turn indicates that, on average, more than 3,000 boundary dispute cases are filed every year in California Superior Courts.[10] The expenditure of judicial effort in avoiding the tax payment requirement of the law of adverse possession is commensurately imposing. Since payment of taxes became an essential requirement of adverse possession in 1878,[11] Cali-

2006 WL 459343 (Cal. Ct. App. Feb. 27, 2006); Stout v. Meadows, No. G034463, 2005 WL 3476515 (Cal. Ct. App. Dec. 20, 2005); Ormiston v. Thomas, No. A108148, 2005 WL 3441243 (Cal. Ct. App. Dec. 15, 2005); Fripp v. Walters, 132 Cal. App. 4th 656 (Ct. App. 2005); Freeman v. Mostafavi, No. B176541, 2005 WL 2982091 (Cal. Ct. App. Nov. 8, 2005); Jahn v. Gross, No. H027876, 2005 WL 1983540 (Cal. Ct. App. Aug. 18, 2005); Dutton v. Boyer, No. B175394, 2005 WL 1799200 (Cal. Ct. App. Aug. 1, 2005); Topol v. Cohn, No. A104800, 2005 WL 1528781 (Cal. Ct. App. June 29, 2005); Shahmoon v. Thompson, No. B175574, 2005 WL 1515694 (Cal. Ct. App. June 28, 2005); Van Taylor v. Ivie, No. B167277, 2005 WL 1208979 (Cal. Ct. App. May 23, 2005); Morgan v. Moline, Nos. A104490 & A105073, 2005 WL 519016 (Cal. Ct. App. Mar. 7, 2005); Roman Catholic Welfare Corp. of S.F. v. Bendinelli, No. A103459, 2005 WL 240838 (Cal. Ct. App. Jan. 26, 2005); Goycochea v. Weir, No. D043604, 2004 WL 2943241 (Cal. Ct. App. Dec. 20. 2004); Axford v. Sinsheimer, No. B166690, 2004 WL 1598634 (Cal. Ct. App. July 19, 2004); Young v. Brown, No. G031914, 2004 WL 1381047 (Cal. Ct. App. June 21, 2004); Thompson v. County of Santa Clara, No. H026301, 2004 WL 745700 (Cal. Ct. App. Apr. 8, 2004); Karr v. King, No. B167184, 2004 WL 692798 (Cal. Ct. App. Apr. 2, 2004); Hoffman v. Del Rivo, No. B165053, 2004 WL 530731 (Cal. Ct. App. Mar. 18, 2004); *In re* Person and Estate of Frazier, No. H026237, 2004 WL 249425 (Cal. Ct. App. Feb. 11, 2004); Lean Stewart v. Rolff, No. A101593, 2004 WL 103534 (Cal. Ct. App. Jan. 23, 2004); Ellis v. Louie, No. D038404, 2004 WL 63474 (Cal. Ct. App. Jan. 13, 2004); Harrison v. Welch, 116 Cal. App. 4th 1084 (Ct. App. 2004); Tremper v. Quinones, 115 Cal. App. 4th 944 (Ct. App. 2004); Thompson v. Cutini, No. H025493, 2003 WL 22977577 (Cal. Ct. App. Dec. 19, 2003); Rose v. Hedgecock, No. D039554, 2003 WL 22726626 (Cal. Ct. App. Nov. 20, 2003); Troup v. Dodson, No. A100077, 2003 WL 22371830 (Cal. Ct. App. Oct. 17, 2003); Gerardi v. Gutt, No. F040696, 2003 WL 22147528 (Cal. Ct. App. Sept. 18, 2003); Raynor v. Druge, No. H024062, 2003 WL 22021948 (Cal. Ct. App. Aug. 27, 2003); Embrey v. Kruse, No. C041162, 2003 WL 21367947 (Cal. Ct. App. June 13, 2003); Garrison v. Hodge, No. D039479, 2003 WL 1996048 (Cal. Ct. App. May 21, 2003); Yates v. Jackson, No. B154807, 2003 WL 1890148 (Cal. Ct. App. Apr. 17, 2003); Jensen v. Victoria Inv. Group, No. E030993, 2003 WL 116170 (Cal. Ct. App. Jan. 14, 2003). A majority of appellate cases do not result in a written disposition of the case. One must presume that the above cases reflect even more appellate filings than those listed.

8. JUDICIAL COUNCIL OF CAL., *supra* note 6, at 24, 47. This ratio was derived by averaging the total number of civil Superior Court filings from the last five years and dividing that number by an average of the filed civil records of appeal.

9. *Id.* This number, 15,750, is an average of 315 Superior Court cases filed per appellate case, multiplied by fifty appellate cases.

10. *Id.* If 15,570 cases are filed in a five-year span, then the number of yearly boundary dispute cases may be estimated by dividing 15,570 by five.

11. Cent. Pac. R.R. Co. v. Shackelford, 63 Cal. 261, 267 (1883).

fornia courts have engaged in a variety of doctrinal escapes—namely the agreed boundary doctrine,[12] prescriptive easement,[13] equitable easement,[14] and estoppel doctrine.[15] The effort to achieve good results despite bad law has instead achieved a very substantial legacy of artifice, confusion, and increased complexity and uncertainty.

The archetypal boundary dispute giving rise to this legacy occurs when physical features, such as fences, features of landscaping, access roads, buildings, and other structures, establish apparent boundaries, often passing through many successive ownerships with buyers and sellers acting in good faith, without knowledge of any discrepancy between the apparent boundary and surveyed boundary.[16] One day, because someone shifts a fence line or examines the location of a structure against a recorded survey, or proposes a remodel calling into question set-back requirements, or changes a pathway or access road, the discrepancy between the apparent boundary and surveyed boundary is revealed. The neighbors, each convinced justice is on his or her side—one relying on the survey, the other on the equities of actual use—become litigants, their relationship transformed by the filing of a quiet title action by the record owner, or a claim of adverse possession by the adverse occupant.

Where the apparent boundary has constituted the long-term status quo, the attendant usages and expectations result in equities the courts are hard pressed to ignore. Examples abound in case law.[17] However, given a policy inclination to respect the public record of

12. Joaquin v. Shiloh Orchards, 84 Cal. App. 3d 192, 199 (Ct. App. 1978).

13. Mehdizadeh v. Mincer, 54 Cal. Rptr. 2d 284, 291 (Ct. App. 1996).

14. Hirshfield v. Schwartz, 110 Cal. Rptr. 2d 861, 877–78 (Ct. App. 2001).

15. Roman v. Ries, 66 Cal. Rptr. 120, (Ct. App. 1968).

16. The Good Faith Improver Act, codified at CAL. CIV. PROC. CODE § 871.1 (2006), dealing with the good faith improvement of property owned by another, is not a solution. This Act is not applicable to situations where a landowner constructs an improvement on his or her own land that encroaches onto an adjoining property. *See id.* § 871.6. Hence, the Good Faith Improver Act applies only to the very limited situation in which an improvement is made in good faith, constructed entirely on the land of another, does not cause irreparable damage to the injured landowner, and could be removed only at heavy cost. *See, e.g.*, Brown Derby Hollywood Corp. v. Hatton, 395 P.2d 896, 898 (Cal. 1964).

17. *See, e.g.*, Hannah v. Pogue, 147 P.2d 572, 575–76 (Cal. 1944); Park v. Powers, 42 P.2d 75, 79 (Cal. 1935); Moniz v. Peterman, 31 P.2d 353, 356 (Cal. 1934); Vowinckel v. N. Clark & Sons, 18 P.2d 58, 58–59 (Cal. 1933); Muchenberger v. City of Santa Monica, 275 P. 803, 805–06 (Cal. 1929); Nusbickel v. Stevens Ranch Co., 200 P. 651, 651–52 (Cal. 1921); Silva v. Azevedo, 173 P. 929, 930 (Cal. 1918); Schwab v. Donovan, 132 P. 447 (Cal. 1913); Price v. De Reyes, 119 P. 893 (Cal. 1911); Dierssen v. Nelson, 71 P. 456 (Cal. 1903); Thaxter v. Inglis, 54 P. 86 (Cal. 1898); Schneider v. Pascoe, 118 P.2d 860, 862 (Cal. Ct. App. 1941); Todd v. Wallace, 77 P.2d 877, 879 (Cal. Ct. App. 1938); Raney v. Merritt, 238 P. 767, 769 (Cal. Ct. App. 1925); Howatt v. Humbolt Milling Co., 214 P. 1009, 1012 (Cal. Ct. App.

ownership and the mandated requirement of payment of taxes, to the extent these equities favor the adverse claimant, the courts have been inclined to deny adverse possession and utilize other doctrines to protect the adverse claimant's interest.

A. Prescriptive Easement

A favored intellectual ploy has been to convert the adverse possession claim to one of "prescriptive easement." To establish a prescriptive easement, the claimant must prove use of the property, for five years, which use has been open and notorious, continuous and uninterrupted, hostile to the true owner, and under claim of right.[18]

The adverse claimant, with equities to argue, will focus on that claimant's specific uses as the basis for imposing equivalent restrictions as a prescriptive easement, on the parcel of the record owner, to maintain the status quo of respective use.[19] This strategy may be successful where the adverse claimant seeks a limited right of use such as an access road. In such case, the law of prescriptive easement allows the court to balance the respective hardships and impose restrictions to maintain that restricted use. In the most typical case, however, where it is not some specific use but apparent ownership itself that is at issue, the appellate courts in California have not allowed the imposition of a prescriptive easement. Drawing on the distinction between ownership and use, the courts have reasoned that the adverse claimant cannot be allowed to achieve the equivalent of fee ownership through prescriptive easement, as this would obliterate the distinction between adverse possession and prescriptive easement negating the statutorily mandated tax payment requirement that distinguishes adverse possession.[20]

Two leading appellate cases decided in 1996, *Mehdizadeh v. Mincer*[21] and *Silacci v. Abramson*,[22] established this restriction of pre-

1923); Wagner v. Meinzer, 177 P. 293 (Cal. Ct. App. 1918); Perich v. Maurer, 155 P. 471 (Cal. Ct. App. 1915).

18. *Mehdizadeh*, 54 Cal. Rptr. 2d at 290.

19. *See id.* at 289–90; Silacci v. Abramson, 53 Cal. Rptr. 2d 37, 38–39 (Ct. App. 1996); Mesnick v. Caton, 228 Cal. Rptr. 779, 785–86 (Ct. App. 1986); Raab v. Casper, 124 Cal. Rptr. 590, 590–97 (Ct. App. 1975).

20. *Mehdizadeh*, 54 Cal. Rptr. 2d at 290 ("An easement primarily involves the privilege of doing a certain act on, or to the detriment of, another's property." (citing Wright v. Best, 121 P.2d 702, 710 (Cal. 1942))); *see also id.* ("An easement gives a nonpossessory and restricted right to a specific use or activity upon another's property, which right must be less than the right of ownership." (citing *Mesnick*, 228 Cal. Rptr. at 786)).

21. 54 Cal. Rptr. 2d 284.

22. 53 Cal. Rptr. 2d 37.

scriptive easement. Prior case law, to the contrary, had sometimes allowed prescriptive easement, effectively legitimizing encroachment amounting to a fee interest in a neighbor's property, notwithstanding the failure to satisfy the tax payment requirement of adverse possession.[23]

Both *Mehdizadeh* and *Silacci* involved typical boundary disputes, and in both cases the trial courts granted prescriptive easements over land that had been fenced in for many years. Reversing the trial courts, both appellate courts held that where an exclusive right to "use" looks more like "occupancy, possession, and ownership," a prescriptive easement cannot be allowed, in that where transfer of legal title is prohibited (i.e., failure to satisfy the tax payment requirements for adverse possession), it is inconsistent to give the encroaching party the effective equivalent by way of a title based on prescriptive use.[24]

The irony of this case law development is apparent and inevitably troubling. As the equities more greatly favor the adverse claimant to establish rights equaling that of a fee simple interest, the more likely the denial of any right to the adverse claimant by way of designation of an easement. Where the long-established status quo is one of exclusive use by the party claiming adverse possession, this exclusive use becomes the strongest case for denial of the claim. On the same premise, it has been held that even where the encroaching landscaping did not physically exclude the servient tenement owner, a prescriptive easement could not be granted.[25] Thus, in the typical case where the apparent boundary is different than the surveyed boundary, and the adverse claimant has de facto enjoyed exclusive and complete possessory rights, believing in good faith that the land enclosed by the apparent boundary is his, the result is denial of any right—no rights as adverse possessor because of the application of the tax payment requirement, and no prescriptive easement because it would amount to a fee simple interest. So the resulting corpus of case law on prescriptive easement is a paradigm of injustice—where the litigant's interest in adverse possession is strongest, the more likely it is to be frustrated.

23. Otay Water Dist. v. Beckwith, 3 Cal. Rptr. 223, 226 (Ct. App. 1991) ("Where, as here, the use during the statutory period was exclusive, a court may properly determine the future use of the prescriptive easement may continue to be exclusive.").

24. *Mehdizadeh*, 54 Cal. Rptr. 2d at 290–91.

25. Harrison v. Welch, 11 Cal. Rptr. 3d 92, 100–01 (Ct. App. 2004).

B. Equitable Easement and Balancing of Hardships

Related to but distinct from prescriptive easement, California courts have invoked judicial power to impose an "equitable easement." Typically, the doctrine requires that (1) a party has used and improved the equivalent of an easement for a long span of time with an innocent belief that he had a right to use the easement; (2) irreparable harm would occur if the party could not continue that use; and (3) the servient tenement would suffer little harm from that continued use.[26] This doctrine has been employed where an encroacher is not entitled to an easement on one of the more traditional grounds, particularly where the court seeks to exercise equitable power outside the confines of prescriptive easement.[27]

The distinction between equitable easement and prescriptive easement was articulated most directly in the Second District Court of Appeal's decision in *Hirshfield v. Schwartz*.[28] In *Hirshfield*, the adverse claimant's predecessors in interest had erected a fence on the presumed boundary between their property and the Hirshfields, the owners by survey.[29] The adverse claimant bought the property in 1979 and for the next eighteen years made substantial improvements up to the fence, including waterfalls, a koi pond with a stone deck, a putting green, and a retaining wall.[30] In 1997, the Hirshfields commissioned a survey which found that the apparent boundary was in fact encroaching on the Hirshfield's property and instituted an action to quiet title, for declaratory relief and trespass.[31] Applying the relative hardship doctrine, the trial court found that equities balanced in the encroacher's favor and entered a decision accordingly.[32] The appellate court affirmed the trial court's grant of a protective interest for the encroachment, explaining that the court has the power in equity to grant affirmative relief by fashioning an interest to protect the encroacher's use of the disputed land, and because the interest was created in equity, it was not subject to decisions which bar creation of an exclusive prescriptive easement.[33]

26. HARRY D. MILLER & MARVIN B. STARR, MILLER AND STARR CALIFORNIA REAL ESTATE § 15:46 (3d ed. 2007) (discussing equitable easement and balancing of hardships).

27. Hirshfield v. Schwartz, 110 Cal. Rptr. 2d 861, 875 (Ct. App. 2001).

28. *Id.*

29. *Id.* at 864.

30. *Id.*

31. *Id.* at 864–65.

32. *Id.* at 865.

33. *Id.* at 876–77.

By characterizing the interest awarded as being created in equity, the court was able to circumvent the decisions in *Mehdizadeh* and *Silacci*. In doing so, the appellate court explained that the fundamental rationale behind the relative hardship doctrine is to protect a well-established prescriptive status quo of possession, and thereby promote justice.

The *Hirshfeld* court stated the distinction between a prescriptive interest in equity and a prescriptive easement as follows:

> Adverse possession and prescriptive easements express a preference for use, rather than disuse, of land. They are designed not to reward the taker or punish the dispossessed, but to reduce litigation and preserve the peace by protecting long-standing possession . . . Equity is manifestly different. When a court exercises its equity powers, its principal concern is to promote justice, acting through its conscience and good faith.[34]

While opening the way further to recognize the "equities" of the adverse claimant, this decision also expands the opportunity for inconsistent results in boundary litigation.[35] Such results reflect the unrelenting need to escape the constraint imposed by the tax payment requirement for adverse possession. Where there is inability to grant an exclusive prescriptive easement after *Mehdizadeh* and *Silacci*, the appellate court shifts to employ a highly discretionary equitable power, leading to more uncertainty and litigation.

C. Agreed Boundary Doctrine

Unable to prove payment of taxes on the disputed land, many claimants have turned alternatively to the agreed boundary doctrine. This doctrine states that a boundary may be established by agreement between coterminous landowners where the true location of the boundary is uncertain or in doubt.[36] To establish title by agreed boundary, a party must show that there is:

---

34. *Id.* at 874.

35. Even prior to the articulation of equitable easement as distinct from prescriptive easement in *Hirshfield*, however, courts have employed their equitable powers to allow encroachments that would have been precluded under the doctrine of prescriptive easement. *See, e.g.*, Baglione v. Leue, 325 P.2d 471, 474 (Cal. Ct. App. 1958) (finding that equitable interest should be fashioned to protect the eves of a building); Ukhtomski v. Tioga Mut. Water Co., 55 P.2d 1251, 1252 (Cal. Ct. App. 1936) (holding that equitable interest should be created to protect an encroaching reservoir, pipes, and lines).

36. French v. Brinkman, 387 P.2d 1, 4 (Cal. 1963); Ernie v. Trinity Lutheran Church, 336 P.2d 525, 528 (Cal. 1959); Joaquin v. Shiloh Orchards, 84 Cal. App. 3d 192, 197 (Ct. App. 1978); Roman v. Ries, 66 Cal. Rptr. 120, 122 (Ct. App. 1968); Kraemer v. Superior Oil Co., 49 Cal. Rptr. 869, 876 (Ct. App. 1966); Janes v. LeDeit, 39 Cal. Rptr. 559, 567 (Ct. App. 1964).

> [U]ncertainty as to the true boundary line, an agreement between the coterminous owners fixing the line, and acceptance and acquiescence in the line so fixed for a period equal to the [five-year adverse possession] statute of limitations or under such circumstances that substantial loss would be caused by a change of its position.[37]

Once these elements are established, the agreed boundary line becomes the true line of the properties and is legally enforceable regardless of whether a subsequent survey shows a discrepancy between the agreed boundary line and the surveyed boundary line.[38] The agreed boundary line is deemed to attach itself to the deeds of the respective parties and each coterminous owner is deemed to have paid taxes according to his deed.[39] The purpose of this rule is to "secure repose, to prevent strife and disputes concerning boundaries, and make titles permanent and stable" by respecting agreements between adjoining landowners, who settle their boundary disputes in good faith, outside of the courtroom.[40]

However, the elements required to establish an "agreed boundary" different from the survey line are conflicted in the current case law. The difficulty starts at the very beginning of application of the doctrine, with the threshold requirement of uncertainty as to the true boundary. Historically, where strong equity claims existed, trial courts and courts of appeal were willing to infer that there was an agreement between adjoining landowners resulting from uncertainty or a dispute, or from the long-standing acceptance of a fence or other physical boundary between their lands, even though the parties were without knowledge of a boundary dispute for the statutory period.[41]

But numerous cases have held that the adverse claimant must affirmatively show that there was a dispute and that the dispute was resolved by apparent or express agreement.[42] Moreover, while some courts find it sufficient that the parties were only subjectively uncer-

37. *Ernie*, 336 P.2d at 528–29.

38. Young v. Blakeman, 95 P. 888, 890 (Cal. 1908).

39. Price v. De Reyes, 119 P. 893, 895 (Cal. 1911).

40. *Young*, 95 P. at 890.

41. *See* Mello v. Weaver, 224 P.2d 691, 694 (Cal. 1950); Roberts v. Brae, 54 P.2d 698, 700 (Cal. 1936); Moniz v. Peterman, 31 P.2d 353, 357 (Cal. 1934); Vowinckel v. N. Clark & Sons, 18 P.2d 58, 59 (Cal. 1933); Swartzbaugh v. Sargent, 86 P.2d 895, 900 (Cal. Ct. App. 1939); Todd v. Wallace, 77 P.2d 877, 880 (Cal. Ct. App. 1938); S. Counties Gas Co. v. Eden, 5 P.2d 654, 657 (Cal. Ct. App. 1931); Raney v. Merritt, 238 P. 767, 769 (Cal. Ct. App. 1925); Bd. of Trs. of the Leland Stanford Junior Univ. v. Miller, 201 P. 952, 953 (Cal. Ct. App. 1921); Perich v. Maurer, 155 P. 471, 473 (Cal. Ct. App. 1915).

42. *See* Huddart v. McGuirk, 199 P. 494, 495 (Cal. 1921); Staniford v. Trombly, 186 P. 599, 600 (Cal. 1919); Mann v. Mann, 91 P. 994, 997 (Cal. 1907).

tain, and could have ascertained the true boundary, if the situation was characterized as one of "mutual mistake," the agreed boundary doctrine may not be available to the adverse claimant.[43] Other courts, emphasizing the policies of stability underlying the doctrines of prescriptive rights and adverse possession, have concluded that long-term acquiescence in a mistake *is* sufficient to recognize an apparent boundary as an agreed boundary.[44] Thus, although the agreed boundary doctrine is ostensibly a contract theory, the results, as in cases of mistake, expose a more pervasive and fundamental vacillation between contract and prescription as the rationale.

The California Supreme Court has been equally ambivalent as has the broader corpus of case law. In *Ernie v. Trinity Lutheran Church*,[45] a 1959 decision, the California Supreme Court inferred from improvements made by the defendant, and the lack of objection from the adjoining landowner for twenty-six years following the improvements, that there was uncertainty as to the true line of the boundary and that it was settled and agreed to by practical location.[46] More recently, the California Supreme Court decided in *Bryant v. Blevins*[47] that where the record is silent as to when, or why a fence was built, the requirements of uncertainty and agreement are not met.[48] The Bryant court noted that although the presence of the fence suggested a lengthy acquiescence in its existence, that circumstance alone did not nullify *Ernie*'s other requirements of uncertainty as to the location of the true boundary line and agreement to employ the location of the fence as the means of establishing the boundary.[49]

The *Bryant* court relied heavily on the First District Court of Appeal's reasoning in *Armitage v. Decker*,[50] which found no agreed boundary. The appellate court noted that the agreed boundary doctrine arose as a way to settle disputes over boundaries in a time when surveys were notoriously inaccurate and the monuments and

43. *See Huddart*, 199 P. at 495; Kraus v. Griswold, 43 Cal. Rptr. 139, 145 (Ct. App. 1965); Cosgrave v. Donovan, 199 P. 808, 809 (Cal. Ct. App. 1921); Janke v. McMahon, 133 P. 21, 24 (Cal. Ct. App. 1913).

44. *See* Martin v. Lopes, 170 P.2d 881, 884 (Cal. 1946); Nusbickel v. Stevens Ranch Co., 200 P. 651, 653 (Cal. 1921); Aborigine Lumber Co. v. Hyman, 54 Cal. Rptr. 371, 374 (Ct. App. 1966); Janes v. LeDeit, 39 Cal. Rptr. 559, 566 (Ct. App. 1964).

45. 336 P.2d 525 (Cal. 1959).

46. Ernie v. Trinity Lutheran Church, 336 P.2d 525, 528 (Cal. 1959).

47. 36 Cal. Rptr. 2d 86 (1994).

48. *Id.* at 99.

49. *Id.* at 93.

50. Armitage v. Decker, 267 Cal. Rptr. 399, 407–09 (Ct. App. 1990).

landmarks they described could not be located years later.[51] The First District Court of Appeal reasoned that since accurate surveys are now possible, and verifiable recorded deeds are the rule, to allow the doctrine of agreed boundary to supersede recorded legal descriptions of property would destroy the significance of recorded instruments and foster litigation rather than prevent it.[52]

The outcomes in *Bryant* and *Armitage* indicate that when existing legal records provide a basis for fixing the boundary, courts are unlikely to find the elements for the agreed boundary doctrine satisfied. With the advent of newer and more accurate technology, courts have expressed a clear preference for objective scientific surveys and recorded instruments over agreements between adjoining landowners.

Uncertainty also stems from the requirement that the physical demarcation of an agreed boundary must be specified, definite, and certain.[53] But more often than not, the fencing and vegetation or other physical marks that are claimed to constitute an "agreed boundary" vary along the alleged line, or the line includes vacancies of physical markers or is incomplete. Typically, a fence will follow the natural contours of the land, including irregular terrain. Accordingly, the variation in results is extreme. It has been held that if the fence does not run the whole distance of the alleged boundary, it cannot constitute the agreed boundary.[54] Yet courts have also held that there was an agreed boundary where the only visible marking was a single tree.[55] Case law also is uncertain and variable in outcome where it is unclear whether the agreed line was intended as the agreed boundary or an agreed barrier; it is essentially a question of fact concerning the often conflicting and uncertain testimony from the adjoining neighbors as to their respective intent.[56]

Finally, there is the uncertainty of the relationship between the agreed boundary doctrine and the statute of limitations for adverse possession. The cases often state the statute of limitations governs,[57] though some find the opposite given that an agreed to boundary is a

51. *Id.* at 408.

52. *Id.*

53. Garrett v. Cook, 200 P.2d 21, 24 (Cal. Ct. App. 1948).

54. Grants Pass Land & Water Co. v. Brown, 143 P. 754, 757 (Cal. 1914) (dictum).

55. Carr v. Schomberg, 232 P.2d 597 (Cal. Ct. App. 1951).

56. *See* Staniford v. Trombly, 186 P. 599, 600 (Cal. 1919); *Grants Pass*, 143 P. at 757 (dictum); Talmadge v. Moore, 220 P.2d 588, 590 (Cal. Ct. App. 1950); Copley v. Eade, 184 P.2d 698, 698–99 (Cal. Ct. App. 1947).

57. *See* Silva v. Azevedo, 173 P. 929, 930 (Cal. 1918); Loustalot v. McKeel, 108 P. 707, 710 (Cal. 1910) (dictum) (quoting Sneed v. Osborn, 25 Cal. 619, 626 (1864)).

binding contract upon agreement.[58] In relation to the statute of limitations for adverse possession, the result may also vary depending on the length of acquiescence, whether the agreement is express or implied, and the extent to which equities such as improvements may weigh in.[59]

Accordingly, the litigant seeking security within the agreed boundary doctrine can expect to pay a lawyer handsomely to work through this morass of complex, conflicting, and ambiguous case law. From a public policy perspective, it is a far cry from the stability and repose that the doctrine of agreed boundary is supposed to secure, and yet another negative and paradoxical result of courts attempting to avoid the tax payment requirement of adverse possession.

D. Estoppel

Estoppel is also commonly invoked to get around the tax requirement limitation of adverse possession; however, this avenue, like the agreed boundary doctrine, lands the litigant in conflicted and ambiguous case law that results in anything but repose. Indeed, the cases are often unclear as to which doctrine is being employed, agreed boundary or estoppel, and tend to confuse or interchange the two doctrines.[60]

Insofar as the doctrine of estoppel has an independent identity, it is focused on the elements of representation and reliance. Where a grantee relied on representations made by a grantor, by way of improvements or other irretrievable expenditures, thereby inflating the purchase price of a property appearing to contain more land than the amount indicated by survey, courts have invoked the doctrine of estoppel to try to achieve fairness.[61] The doctrine, as it emerged in cases

58. *See* Cavanaugh v. Jackson, 27 P. 931, 932 (Cal. 1891); White v. Spreckels, 17 P. 715, 717 (Cal. 1888); Helm v. Wilson, 18 P. 604, 608 (Cal. 1888); Needham v. Collamer, 211 P.2d 308, 309 (Cal. Ct. App. 1949).

59. *See* French v. Brinkman, 35 Cal. Rptr. 289, 290–91 (1963); Ernie v. Trinity Lutheran Church, 336 P.2d 525, 528 (Cal. 1959); Mehdizadeh v. Mincer, 54 Cal. Rptr. 2d 284, 287–88 (Ct. App. 1996); Roman v. Ries, 66 Cal. Rptr. 120, 122 (Ct. App. 1968); Aborigine Lumber Co. v. Hyman, 54 Cal. Rptr. 371, 373 (Ct. App. 1966); Kraus v. Griswold, 43 Cal. Rptr. 139, 143–44 (Ct. App. 1965); Janes v. LeDeit, 39 Cal. Rptr. 559, 563 (Ct. App. 1964); Fobbs v. Smith, 20 Cal. Rptr. 545, 548 (Ct. App. 1962).

60. *See* Dibirt v. Bopp, 4 Cal. App. 2d 541, 544 (Ct. App. 1935); Johnson v. Buck, 46 P.2d 771, 773–74 (Cal. Ct. App. 1935).

61. *See* Friedman v. S. Cal. Trust Co., 176 P. 442, 443–44 (Cal. 1918); Grants Pass Land & Water Co. v. Brown, 143 P. 754, 757 (Cal. 1914); Stanley v. Green, 12 Cal. 148, 163 (1859); Humphrey v. Futter, 215 Cal. Rptr. 178, 182 (Ct. App. 1985); Dooley's Hardware Mart v. Trigg, 75 Cal. Rptr. 745, 748–49 (Ct. App. 1969); Hay v. Allen, 247 P.2d 94, 98–99

concerning claims by buyer against seller, rests on the premise that an owner is presumed to know the boundaries of his property and a purchaser may rely on the owner's representations.[62] When a grantee purchases property and relies on an adjoining landowner's statements regarding the location of the boundary between the properties, there is a similar basis for estopping the adjoining landowner and successors from disputing the location of the boundary.[63]

A typical illustration of a court confusing estoppel with the agreed boundary doctrine occurs in *Roman v. Ries*,[64] where an adjoining landowner made representations to the defendants concerning a common boundary, which the defendants relied upon by making improvements up to that boundary. Plaintiffs subsequently purchased the land, commissioned a survey, and sued defendants to quiet title.[65] The defendants won at trial, and on appeal the First District Court of Appeal remanded for a determination as to what portion of land was reasonably required to prevent the defendant from suffering substantial loss due to his reliance on the agreed boundary.[66] The First District Court of Appeal noted that prior cases had repeatedly held that the doctrine of estoppel may apply where the evidence supports a finding of an agreed boundary line with prior uncertainty as to its location.[67] The court cited *Frericks v. Sorensen*,[68] for the proposition that representations made and acquiescence in possession of a strip of land, combined with improvements, made out a complete case of equitable estoppel.[69]

To the extent there is a difference between the doctrines of agreed boundary and equitable estoppel in their application by the California courts, it is that the reasonable reliance to support estoppel will not be inferred from the mere fact of long-term acquiescence,[70] but that such acquiescence may support an inference of an agreed boundary. For example, the California Supreme Court held in

(Cal. Ct. App. 1952); Eichelberger v. Mills Land & Water Co., 100 P. 117, 120–22 (Cal. Ct. App. 1908).

62. MILLER & STARR, *supra* note 26, § 14:8 (3d ed. 2007) (discussing estoppel and the agreed boundary theories).

63. *Id.*

64. Roman v. Ries, 66 Cal. Rptr. 120, 121 (Ct. App. 1968).

65. *Id.* at 121–22.

66. *Id.* at 123–24.

67. *Id.* at 122–23.

68. 248 P.2d 949 (Cal. Ct. App. 1952).

69. *Id.* at 951.

70. *Boundary Litigation in California*, 11 STAN. L. REV. 720, 729 (1959).

Staniford v. Trombly[71] that estoppel was not applicable where there was an absence of false statements or concealments made by one having knowledge of the facts.[72] On the other hand, the doctrine of estoppel may extend further than agreed boundary. Insofar as the agreed boundary cases require that an agreement be based on a dispute,[73] the estoppel doctrine may yet save the claimant's position in a case of mere mistaken acquiescence.[74] But again, as with the other common law doctrines employed to circumvent the tax payment constraint of adverse possession, the matter remains unresolved. There is also the factual and legal question of what degree of negligence, if any, on the part of the adverse claimant in discovering the surveyed line may defeat the claim based on estoppel.[75] Again, the effort to achieve an equitable result outside adverse possession leaves litigants and their lawyers in throes of uncertainty and expense.

II. The Tax Payment Requirement

The tax payment requirement of adverse possession has long been a subject of academic and judicial critique.[76] That critique has focused on the anachronistic nature of the requirement, and its dubious, if not negative, public policy implications.

The historical evidence, such as it is, indicates the payment of taxes requirement of adverse possession in California was the result of lobbying by owners of large acreages in sparsely settled areas, particularly in conjunction with the development of the transcontinental railroads. The area of land grants acquired by the railroads in California

71. 186 P. 599 (Cal. 1919).

72. *Id.* at 601–02.

73. Clapp v. Churchill, 130 P. 1061, 1062–63 (Cal. 1913); Mann v. Mann, 91 P. 994, 996 (Cal. 1907); Spear v. Smith, 327 P.2d 36, 38 (Cal. Ct. App. 1958).

74. *See* Grants Pass Land & Water Co. v. Brown, 143 P. 754, 757 (Cal. 1914); Frericks v. Sorensen, 248 P.2d 949, 951 (Cal. Ct. App. 1952).

75. *See* Nilson v. Sarment, 96 P. 315, 318 (Cal. 1908) (dictum), *cited with approval in* Friedman v. S. Cal. Trust Co., 176 P. 442, 444 (Cal. 1918); Frericks v. Sorensen, 248 P.2d 949, 951 (Cal. Ct. App. 1952).

76. *See* Averill G. Mix, *Payment of Taxes as a Condition of Title by Adverse Possession: A Nineteenth Century Anachronism*, 9 SANTA CLARA LAWYER 244, 244 (1968); *see generally* Moira Deirdre Ford, *The Payment of Taxes Requirement in Adverse Possession Statutes*, 37 CAL. L. REV. 477 (1949) (comparing the realities and effect of the tax payment requirement in a variety of jurisdictions); *Boundary Litigation in California*, *supra* note 70, at 729. Judicial observations include that the requirement "has no natural relation whatever to the matter of actual adverse possession of land," Eberhardt v. Coyne, 46 P. 84, 85 (Cal. 1896) (McFarland, J., dissenting), and that it is "anomalous," McDonald v. McCoy, 53 P. 421, 426–27 (Cal. 1898).

is estimated to have comprised more than sixteen million acres.[77] The railroads and other owners of large tracts of vacant land sought security of their titles against adverse possession by squatters. Unable to assure discovery of adverse possessors through visual observation of their properties, they lobbied for the barrier of the payment of taxes requirement and the notice such payment might provide. This appears to be the only available explanation for the amendment to section 325 of the California Civil Code in 1878, which established the tax payment requirement for adverse possession.[78] The conjunctive public policy was the notion that the payment of taxes requirement evidenced the good faith of the claimant, would serve to provide the owner notice of the intent to claim adversely, and avoid any necessity for the titled owner to inspect the property during the limitations period.[79]

Given that urbanization has replaced the ownership of large tracts of undeveloped land that drove adoption of the tax payment requirement, today the notice to the owner rationale of that requirement is devoid of any significant merit, as critics have noted.[80] It would be unusual for a fee simple owner not to have inspected that fee interest for the limitations period of five years, and it is surely not unduly burdensome to impose the duty on the owner of property to inspect it at least once every five years. Furthermore, public record of payment of taxes does not assure notice. At least it is less effective notice than actual possession of the land by the adverse claimant or recordation of an instrument representing color of title. Indeed, it is the other elements for establishing a claim of adverse possession, that the claim of the adverse possessor be actual, open, notorious, adverse and hostile to the true owner, and continuous for at least five years[81] (characteristically including occupation, possession, cultivation, and enclosure), that serve to assure adequate notice as well as the good faith of the claimant. Moreover, these elements serve to accomplish this without the technical rigidity that a payment of taxes requirement imposes.

77. Mix, *supra* note 76, at 254 n.55.

78. CAL. CIV. PROC. CODE § 325 (West 2006).

79. *See* Mix, *supra* note 76, at 245–49. Another purported justification has been the states' interest in ensuring the payment of taxes. In modern context, however, this justification is dubious at best. *Id.* at 250.

80. *Id.* at 252.

81. CAL. CIV. PROC. CODE §§ 318–19, 322–28.

Further, as critics have also noted, the payment of taxes requirement is highly uncertain.[82] Case law is divergent as to what constitutes payment of taxes. During what portion of the limitations period for adverse possession must taxes be paid by the adverse claimant? The California Supreme Court has held that payment of delinquent taxes is sufficient, a result that evaporates the notice justification of the tax payment requirement.[83] Also rendering the notice policy irrelevant, is a California case which held that reimbursement by the adverse claimant to the record owner for taxes the record owner paid is sufficient for the adverse claimant to satisfy the payment of taxes requirement.[84]

The payment of taxes requirement, as scholarship has demonstrated, is difficult, if not impossible, to justify today. But what renders California's law of adverse possession not just of questionable merit, but fatally flawed, is its application. Not addressed by any academic critique to date, is that California courts have persisted in applying the tax payment requirement in a manner that can no longer be correct after the passage of Proposition 13.

Enforcement of the payment of taxes requirement has largely depended on a perfunctory application of the general rule that it is the surveyed and recorded owner of a disputed parcel that has paid the taxes on that parcel. This is not correct after the passage of Proposition 13, which mandated 1% of sales price[85] as the basis for the tax assessor's ultimate determination of market value.[86] Sales price, of course, is based on apparent value, what buyers and sellers negotiate as the price determined by what they see as the apparent perimeter of a property, irrespective of surveyed lines. This is so except in the atypical transaction in which a survey is required; for example the sale of raw land for development. In the conventional real estate sales transaction, certainly in the sale of land with existing homes or business structures, sales price is determined by what the parties see, without engaging a survey and checking it against the record ownership.

Consequently, in the great majority of transactions where there is an apparent boundary that does not in fact conform to the recorded boundary, it is the purchaser of the more inclusive apparent boundary whose tax assessment includes the subsequently disputed portion, and

82. Mix, *supra* note 76, at 252.

83. Owsley v. Matson, 104 P. 983, 984–85 (Cal. 1909).

84. *See* Williams v. Stillwell, 19 P.2d 773, 775 (Cal. 1933); Gray v. Walker, 108 P. 278, 279–80 (Cal. 1910); Kraemer v. Kraemer, 334 P.2d 675, 686–87 (Cal. Ct. App. 1959).

85. CAL. CONST. art. XIIIA, § 1(a).

86. CAL. CONST. art. XIIIA, § 2(a).

therefore, de facto, satisfies the payment of taxes requirement. If the courts were to recognize this, then in cases where the other elements of adverse possession are met, the payment of taxes requirement would no longer generate strained attempts to obtain equity. The apparent owner, the owner who in fact paid the taxes, would no longer be barred, by the tax payment requirement, from achieving adverse possession.

Since the passage of Proposition 13, not one reported California case has recognized the unassailable logic that it is the apparent owner, and not the surveyed owner, who has paid the taxes. Awareness of the impact of Proposition 13 on the payment of taxes requirement for adverse possession has not appeared in any published opinion. It *has* surfaced, though, in two unpublished appellate opinions, *Baumann v. Miles*[87] and *Young v. Brown*,[88] albeit without articulation and with misunderstanding of its full implication.

In *Baumann*, the appellate court rejected the proposition "that after Proposition 13, parties pay[ ] a price for a particular lot based, in part, on the expectation that they will be entitled to use adjoining property. . . ."[89] But the *Baumann* court also noted that there was no clear evidence of a shared expectation of the neighbors as to an apparent boundary, nor any evidence that the payment of taxes was based on visual inspection, which was especially significant since the party asserting adverse possession had purchased their residence in 1976, two years before the passage of Proposition 13.[90] It is also evident the court was off point when it stated, in support of its position, "that a party might pay a premium for land adjacent to parkland, but this does not mean that the taxes representing the premium are taxes paid on the parkland."[91] The use of this awkward analogy indicates the court did not have in mind the archetypical situation that has generated so much litigation; where contiguous residential neighbors pay for their properties with the same understanding of ownership based on what appears to be the boundary between their respective properties.

In *Young*, the other unpublished opinion, the appellate court stated that "in the post-Proposition 13 world, a reassessment following

87. Baumann v. Miles, No. A096174, 2002 WL 2006312, at *6 (Cal. Ct. App. Sept. 3, 2002).

88. Young v. Brown, No. G031914, 2004 WL 1381047, at *9 (Cal. Ct. App. June 21, 2004).

89. *Baumann*, 2002 WL 2006312, at *7.

90. *Id.*

91. *Baumann*, 2002 WL 2006312, at *7 n.4.

a sale of property usually is not based upon an assessor's visual inspection," but nevertheless found in favor of the party claiming adverse possession based on evidence presented in the trial record of the assessor's visual assessment.[92] The appellate court entirely missed the significance of the fact that, in the post–Proposition 13 world, all assessment begins with the de facto visual assessment by the parties that establishes sales price, and that the assumed apparent boundary becomes the basis for assessing market value.

The rare post–Proposition 13 opinions that have addressed Proposition 13 as a benchmark for the payment of taxes requirement of adverse possession so far have it wrong. No opinion has truly focused the matter in the context of Proposition 13. In *Baumann*, the appellate court confused the easy adverse claim situation where one or both neighbors is aware of the discrepancy between the surveyed boundary and the apparent boundary, with the problematical but standard adverse claim situation where both parties purchase on the basis of the assumed apparent boundary, and their respective purchase prices become the basis for determination of market value and hence taxation. In *Young*, the appellate court also missed the point by simply falling back on visual inspection by the assessor.

The failure to recognize the post–Proposition 13 logic of assessment in accord with apparent boundary has persisted despite the fact that in pre–Proposition 13 cases, where there was evidence presented that tax assessment was based on visual inspection by the tax assessor, it was concluded that it was the apparent owner and not the surveyed owner who had paid the taxes, and thus that the adverse claimant could recover despite the contrary deed description in the public record.[93] The California Supreme Court first stated the relevant principle in *Price v. De Reyes*,[94] in which a fence line was acquiesced in as marking the boundary between contiguous properties for a period exceeding the statutory five years for adverse possession. The California Supreme Court stated that evidence of visual assessment, if sufficient, requires attribution of tax payment to the apparent owner:

> [The] natural inference would be that the assessor put the value on the land and improvements of each party as disclosed by the visual assessment, rather than that he ascertained the true line by a

92. *Young*, 2004 WL 1381047, at *8.

93. *See* Price v. De Reyes, 119 P. 893, 895 (Cal. 1911); Raab v. Casper, 124 Cal. Rptr. 590, 597 (Cal. Ct. App. 1975); Drew v. Mumford, 325 P.2d 240, 242–43 (Cal. Ct. App. 1958); Frericks v. Sorensen, 248 P.2d 949, 951–52 (Cal. Ct. App. 1952); Carr v. Schomberg, 232 P.2d 597, 602 (Cal. Ct. App. 1951).

94. *Price*, 119 P. at 895.

careful survey and assessed to one a part of the possession of the other . . . .[95]

This line of cases was again acknowledged by the California Supreme Court in a post–Proposition 13 case, *Gilardi v. Hallam*,[96] decided in 1981. In *Gilardi*, the California Supreme Court reasoned that where the claimant, by the building of fences, has visibly shown occupation of a disputed strip of land adjoining the boundary, the natural inference is that the assessor did not base the assessment on the record boundary, but valued the land and improvements as visibly possessed by the parties.[97] However, the California Supreme Court failed to recognize the general proposition that after the passage of Proposition 13 in 1978 established 1% of fair market value as the base for property tax assessment, the logic of attributing payment of taxes to the apparent possessor, and not the owner indicated by survey, applied with even greater force and that this logic became comprehensively applicable to adverse possession.

Thus, notwithstanding the pre– and post–Proposition 13 recognition that visual assessment means the apparent owner pays the taxes, there has been a general failure in the reported post–Proposition 13 cases to recognize this reality. When an apparent boundary does not coincide with the surveyed boundary, given that current assessment of market value begins with the land's sales price, it is the apparent owner, not the surveyed owner, who in fact pays the taxes on the disputed parcel.

III. Resolution

While scholarship addressing the tax payment requirement of adverse possession has been consistently critical for many decades, the recommended legislative or judicial response has varied, and none has been implemented. The proposals range from complete legislative abolition of the tax payment requirement, to various forms of partial elimination, to a recommendation that the tax payment requirement no longer be treated as absolute, but only as one of a variety of factors to be taken into account in assessing the good faith of the adverse claimant.[98]

95. *See* cases cited *supra* note 93.

96. 636 P.2d 588 (Cal. 1981).

97. *Id.* at 593–94.

98. *See* Mix, *supra* note 76, at 264–65; Ford, *supra* note 76, at 492; *Boundary Litigation in California*, *supra* note 70, at 732.

However, despite the consensus for retrenchment of the tax payment requirement, "Who has paid the taxes?" on the disputed parcel is surely a relevant and legitimate question for courts to consider as to certain elements of adverse possession and prescriptive easement. This question is relevant to determining good faith, hostile intent, and notoriety of claim. Just as surely, the payment of taxes offers relevant evidence of intent for balancing the hardships for equitable easement and to establish mutual understanding as the necessary foundation for "agreed boundary." And in establishing estoppel, the requirements of representation and reasonable reliance also may significantly turn on who has paid the taxes. Moreover, as to all the common law theories as applied by California courts in boundary dispute litigation, payment of taxes bears on the public policy considerations involved. Indeed, one of the claimed justifications for the tax payment requirement is the state's interest in assuring that taxes are in fact paid.[99]

What the critics fail to recognize is that post–Proposition 13, the problem is not whether the tax payment requirement is irrelevant or should be limited, but that it is fundamentally and comprehensively misapplied. California courts have adjudicated claims of adverse possession in boundary disputes either under the general rule that adjoining lots are assessed merely by numbers and without reference to a survey, and therefore the claimant cannot establish payment of taxes,[100] or the court struggles to assess ambiguous and incomplete records of the assessor's office that may contain some indication of visual assessment, such as notes indicating a visit was made to the property by an official of the tax assessor's office.[101]

But, as argued here, the general rule in favor of the paper record as the basis of assessment is factually unsupportable for most real estate sales transactions after Proposition 13. Moreover, notes relating to inspection by the office of the assessor are typically without dispositive detail for determining whether the assessment was based on a visual inspection during the visit, or whether the assessor ultimately relied on a recorded survey. But, whether through application of the

99. Mix, *supra* note 76, at 250; Ford, *supra* note 66, at 481; *see also, e.g.*, McDonald v. McCoy, 53 P. 421, 426–27 (Cal. 1898).

100. Raab v. Casper, 124 Cal. Rptr. 590, 597 (Ct. App. 1975).

101. *See* Mesnick v. Canton, 228 Cal. Rptr. 779, 784–85 (Ct. App. 1986) (finding that the defendant (adverse claimant) did not pay taxes on land occupied inside a fence because, among other things, an official from the tax assessor's office made a visual inspection of the property from the street but did not note the existence of the fence boundary sought as the property line by the adverse claimant).

presumptive validity of the paper record, or reliance on visual assessment by the assessor, critics and courts fail to recognize that Proposition 13 converted most cases to visual assessment by mandating sales price as the base line for determination of market value.

Recognition of this post–Proposition 13 reality would remove the tension, currently endemic to the case law, between the equities of the adverse claimant and the tax payment requirement. The tax payment requirement in light of the post–Proposition 13 reality of visual assessment would be seen as conforming to considerations of fairness. In the standard case, where buyers and sellers have assumed the same apparent boundary for more than the five-year statutory period, courts would no longer have to respond to considerations of hardship and understandings between the parties by escaping into the factual and legal complexities and uncertainty of the current corpus of common law doctrine. Rather, in these cases, the courts could simply find that if the claim of apparent boundary has satisfied the other requirements of adverse possession, the tax payment requirement is met as well.[102]

A concern may be that, for good or ill, recognition of the impact of Proposition 13 would increase the success rate of litigants claiming adverse to the paper title and/or survey. Given the extent to which courts have responded to the fairness considerations involved, thereby escaping from the currently misunderstood tax payment constraint of adverse possession into the other common law doctrines for relief, it is questionable whether the net result would be greater ultimate success by litigants claiming adversely. Moreover, even if a "floodgates" concern was valid, an available solution is for California to require a minimal survey in conjunction with the sale of real property, or to create a function within the assessor's office to require certification of the congruence of surveyed lines with apparent lines before consummation of a sales transaction. The political viability of either response to any fear of increase in success of adverse claimants is questionable. But even if such responses were adopted, the costs would be far less than the assortment of costs resulting from the current state of the case law, and the litigation it generates, including costs to litigants, brokers, title in-

102. The approach argued in this Article would not apply where one neighboring property owner purchased land prior to the passage of Proposition 13 in 1978. Because taxation was not based on market value, the analysis would revert back to examining the tax assessor's records for evidence of visual assessment, and without such evidence, the general rule that taxes were paid in accordance with the parcel number would apply.

surance companies, and eventually all property owners as title insurance costs get passed on.

Nevertheless, and most significant, is that the reassessment in light of Proposition 13 is in the interest of fairness. For adjacent landowners who both purchased in the typical case where a survey was not involved, and ownership was thought by the respective purchasers to conform to the division of their properties as physically appearing on the ground, the price paid by each was based on apparent ownership. Irrespective of what a later survey might have shown, the party who appeared to own the portion later shown to be in discrepancy with the survey paid more, and the record owner paid less, than if the recorded ownership had been examined at the time of purchase against a survey clearly staked on the land. After Proposition 13, the adjacent owners were also taxed accordingly, based on sales prices that did not accurately reflect what a survey would have revealed. Thus, so long as the other elements of adverse possession are satisfied, that the adverse claim has been under a claim of right, open, hostile, notorious, and continuous for the limitations period; fairness in relation to the respective purchase prices paid, as well as in relation to who paid the taxes, would support the result in favor of the adverse claimant.

Conclusion

To the extent any of the elements of adverse possession besides payment of taxes are at issue in a given case, recognition of the impact of Proposition 13, of course, would not necessarily resolve that case in favor of the adverse claimant. However, where apparent ownership supports the claim for adverse possession and it is only the tax payment requirement that has not been satisfied, correct application of the tax payment requirement would work to avoid or resolve much of the boundary dispute litigation burdening the courts in such great numbers. By allowing adverse possession, without the courts having instead to juggle the equities through the uncertain convolutions of prescriptive easement, equitable easement, agreed boundary, and estoppel, the law would operate clearly at the threshold level of litigation, so that the level of settlement could rise exponentially.

There is no present need for new legislation or administrative intervention to achieve this beneficial result. It is within the discretion of courts to reach new decisions under the current statutes. It is simply time for California judges to recognize that the passage of Proposition 13 implicates a new analysis. That analysis demonstrates that the tax payment requirement of adverse possession must be reconceived in its

application. The new analysis under Proposition 13 reveals that, as currently applied, the tax payment requirement violates the essential maxim that Karl Llewellyn anointed as the "grand tradition" of the common law: "The rule follows where its reason leads; where the reason stops, there stops the rule."[103] For California courts, the requirement of reason is to rethink the rule.

103. K. N. LLEWELLYN, BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 157–58 (1953).