

Adverse Possession in Oklahoma: An Idea Whose Time Has Come and Gone?

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I. Introduction

The doctrine of adverse possession is one of the most unusual concepts in the law in that it rewards a wrongdoer for successfully carrying out his wrongful act. In fact, the wrongdoer is actually rewarded quite handsomely if he diligently satisfies all of the requirements of the law. Not only is his victim's remedy time-barred, as is the case with all statutes of limitations, but the adverse possessor is also awarded title to the land he wrongfully possessed.

There must, then, be legitimate purposes for this rather anomalous rule. Those which are most often expressed are to bring certainty to land titles and boundaries, to encourage the use of the land for the benefit of society, and to avoid multiplicity of suits. Oliver Wendell Holmes, Jr. waxed eloquent on the subject, stating that the doctrine is "one of the most sacred and indubitable principles that we have" and that "truth, friendship and the statute of limitations have a common root in time."¹ He explained prescriptive title thusly: "... man, like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size [they] can't be displaced without cutting at his life."²

Justice Holmes' justification of the doctrine may be somewhat overstated. But there is no doubt that the doctrine is firmly entrenched in our legal history; it has been around, in some form or another, for almost a thousand years. It has its roots in the feudal concept of seisin, which originally was essentially the same as possession.³ If the occupant was "disseised", he no longer had title as we understand it today; the "disseisor" had legal title, although his title was defeasible. Legal writs were subsequently developed which allowed the "disseisee" to recover possession. Early on, the limitations periods for such writs were tied by

English statutes to various royal events. Unless the disseised party could show seisin by his ancestor after the statutory date, his action was barred. The coronation of Richard I in 1189 served as the measuring point for over 300 years. Other statutory measuring dates were the coronation of Henry I in 1100, his death in 1135 and the beginning of the reign of Henry II in 1154.⁴

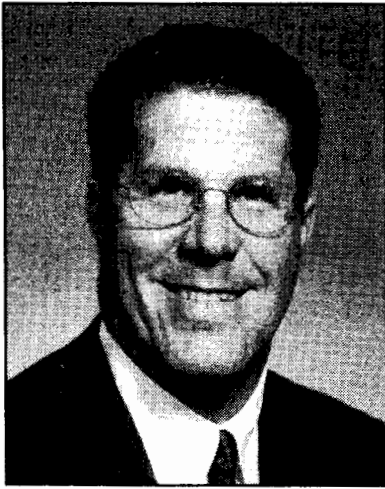
Fortunately, it is not necessary for Oklahoma attorneys to have a working knowledge of the history of the English monarchy in order to determine the statute of limitations for adverse possession. Except where tax deeds or certain judicial sales are involved, the relevant period is fifteen years.⁵

The seeming unfairness of the doctrine of adverse possession has not been lost on the lay person. There were efforts in the Oklahoma legislature, in both 1998 and 1999, to legislatively abolish the doctrine of adverse possession. This article will provide an overview of the existing Oklahoma case law relating to adverse possession, and will then discuss those legislative efforts and consider whether perhaps the time has come for the doctrine to be abolished.

II. Adverse Possession in Oklahoma

A. *The Elements in General*

Adverse possession requires actual, open, notorious, exclusive, hostile, and continuous possession.⁶ The possession must be continuous and uninterrupted for at least fifteen years.⁷ In an action based upon a tax deed or certain judicial sales, the time period is reduced to five years.⁸ There must be a claim to the property in an "open, public and visible manner" showing that the claimant "has exclusive control over the land, under a claim of right to such exclusive possession."⁹ The claimant must show such a "change in the



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character of the possession" so as to remove any doubt as to the claimant's holding of the property, or as to the owner's knowledge that such claim is being made.¹⁰ Adverse possession cannot be established by inference; all the above-stated elements must be proved by "clear and positive proof."¹¹ Since adverse possession claims are fact intensive, each claim will be examined on a case by case basis and a determination made depending on the facts of that particular situation.

Adverse possession of the land of course requires the applicant to possess the land; however, actual residence or personal occupancy is not a requirement, nor is fencing the land necessary. A successful claimant acquires title by prescription.¹²

One of the difficulties in the application of the elements is that they seem to build on and overlap each other. The elements are not mutually exclusive. The practitioner should keep this in mind when dealing with an adverse possession claim.

B. Particular Issues

1. Hostility

The hostility requirement is not meant to create bad relations between neighbors, although adverse possession claims certainly can ruin a friendship. Unfortunately, the Oklahoma courts have not yet specifically defined the hostility element. In fact, there are very few cases even dealing with it. Contrary to what one might think, the element of "hostility"¹³ does not go to the state of mind of the claimant, but rather the nature, viewed objectively, of the claimant's possession. The essence is that the claimant's possession must

be hostile to, or clearly inconsistent with, ownership by the record owner. Where an adverse claimant used the property by placing a fence on the property to contain his cattle, the claimant survived the defendant's allegation that his possession was not hostile. The claimant's dual purpose for the fence, to establish a boundary and prevent his cattle from straying into the river, was not inconsistent with adverse possession, even though the defendant claimed that the dual purpose showed a lack of hostility.

A very early court used hostility in connection with disloyalty, stating that the possessor's actions must be of such certain "disloyalty and hostility" as would import knowledge of the possession.¹⁴ In the syllabus of the court in another case, the court found that the hostility and claim of right 'element' (they seem to be one, at least in this situation) were met where the claimant used unenclosed land for grazing and the land was generally known in the community as the claimant's land.¹⁵ In another case, the court determined that a widow who initially occupied the land pursuant to her widow's homestead right could demonstrate hostility to the homestead interest at issue if she abandoned or repudiated her homestead rights and demonstrated continued possession under an independent claim of title.¹⁶

2. Knowledge or Mental State of Claimant

The classic adverse possession case presents this way: a rancher puts up a fence but mistakenly locates the fence on his neighbor's property. Fifteen years pass. The neighbor, for whatever reason, has a survey performed of his property, discovers the encroaching fence

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and of course wants it moved. The rancher says no; he says the fence is now the boundary between the properties, regardless of what the survey says. These families, who were once friendly, now enlist the help of the courts to resolve their differences. Who wins? Does the fence stay or does it go?

The Oklahoma courts have decided that a claimant's mental intention - whether he knew he was occupying his neighbor's land, or whether he consciously intended to take title to his neighbor's land - is not relevant in the adverse possession case. The courts have examined the issue of the rancher's intent and belief, i.e., innocent belief that the fence was placed in the correct location, or "evil" intent to take land which does not belong to him, and the courts have ultimately determined that "intent" and "motive" of a claimant are at odds with the very purpose of the prescriptive title statute, which is to prevent stale claims to land against long term occupiers of land. In other words, the court will not examine whether or not the claimant "knew" he was occupying someone else's land. The result: the fence stays.¹⁷

This was not always the case. In the late 1960's, during an era when the court farmed out some of its case load to members of the bar, a different result was reached. In 1968, the rancher would have lost. At that time, the court decided that possession by mistake was not adverse and accordingly the possession, no matter how long it continued, would not ripen into title.¹⁸ While this particular case has never been overruled, the reasoning has since been looked upon with disdain as reflective of an era when the opinions "sometimes reflected the desires of the authors [attorneys that draft-

ed them] rather than the law."¹⁹ As a result, under today's jurisprudence, the rancher wins and the fence stays. The same result occurred when the parties used a creek as a "mistaken" boundary; the claimant acquired title by prescription.²⁰

3. Boundary by Acquiescence

Many Oklahoma cases discuss the concept of "boundary by acquiescence." This somewhat misleading term is used because, in many cases, both parties are, or the court finds that they should be, aware of the location of a fence or other boundary monument, but are not aware that the fence is not located on the actual property line. This doctrine is essentially a restatement of the Oklahoma rule that the claimant does not have to know whether or not the fence is located on the true boundary of the property. Knowledge is not the issue. Rather, the court will examine whether the parties used the fence as the boundary for the property for the requisite number of years. If so, then the fence will be deemed to be the new boundary for the property.

Boundary by acquiescence is one of the most common types of adverse possession cases. Various defenses have been used in an effort to avoid its application. Defendants have claimed that they did not know that a fence was on the property and that they removed the fence once they discovered it because they believed it was in the wrong place.²¹ Such excuses have not prevailed. They have also alleged that the doctrine of boundary by acquiescence requires that the parties agree that the fence is the true boundary line.²² This contention was also rejected by the court. The court stated the intention of the parties in establishing the

boundary line is not determinative. Rather, the court will examine whether or not the parties treated the fence as the boundary. If so, and if such treatment occurred for the requisite time period, then the parties acquiesced to a new boundary.

In a different case, a defendant alleged that acquiescence requires knowledge of the true line.²³ This was also rejected by the court. The fence was recognized by the owners as the dividing line for over fifteen years and hence, the fence became the boundary between the lands. Another defendant claimed that acquiescence only arises out of a dispute or uncertainty over the true boundary line.²⁴ While there are some jurisdictions that have required a dispute or uncertainty in acquiescence cases, the Oklahoma courts have followed the line of reasoning that does not require dispute or uncertainty. As such, this defense has also been rejected. In another case, the defendant simply denied that he or his predecessors acquiesced. The court found his denial irrelevant when the evidence supported a finding that the parties had respected the boundary established by the fence for over fifteen years.²⁵

4. Permissive Use

If a claimant has possession of land under the permission of the record owner, then the claimant's possession is not adverse. Such is the case when a claimant possesses land under a lease, or some other consensual grant. If the claimant continues to possess the land after the lease expires, then such possession would become adverse.

In some cases, the record owner has sent a letter to the adverse claimant to attempt to establish that his or her continued possession is permissive. Such a letter essentially states that "we know you are there and your use of our land is pursuant to our permission." One might think that this letter would do the trick. However, sending the letter does not change the nature of the claimant's possession from adverse to permissive. The record owner must do more, such as taking action to remove the claimant from his land.²⁶ While the case did not address this specifically, it stands to reason that the parties should be able to expressly agree that possession is permissive. This agreement could be accomplished by a letter from the record owner to the possessor which the possessor signs acknowledging that his possession is permissive and is at the discretion of the

record owner. This letter agreement would be quite different from the "we know you are there" letter since it would involve an agreement between the parties instead of a one-way communication.

5. Lack of Knowledge by the Record Owner As a Defense

What if the claimant never notified the record owner that he or she was making a claim to the property? The record owner never affirmatively "knew" that a claim was being made. Can the record owner use this as a valid defense to a quiet title action? A landowner recently tried this defense to no avail.²⁷ The same defense, alleging that the claimant did not establish a "claim of right" to the property since the record owners were not put on notice of the adverse claim, was attempted in the late 1970's without success.²⁸

An adverse possessor is not required to knock on the door of the record owner and tell him that a claim is being made to his property. Rather, the record owner, assuming he is an owner of "ordinary prudence" (and no excuse is given for an owner that does not exercise ordinary prudence) needs to examine his property, go on the property and see what changes have been made, if any, and determine if anyone is there that should not be there. A record owner who is taking care of his property will know its status; he will have "notice" of any adverse claims simply by checking on the property. And if he does not check on his property, and if an adverse claimant is in actual, open, notorious, exclusive and hostile possession of the property, then the record owner will have constructive notice of the adverse possession claim.

The Oklahoma courts tell us that if the claimant's actions are definite and observable, such that an owner, if he visited the property, would see that a claim was being made to his property, or at least enough to put the owner on inquiry, then such actions constitute constructive notice of adverse possession. The record owner does not have to have actual knowledge that a claim is being made. Constructive notice, based on the actions of the adverse claimant, is sufficient.

The outcome changes dramatically if an adverse possessor has titled quieted against him in a quiet title or ejectment action and then continues to remain in possession of the prop-

erty. The Oklahoma Supreme Court considered a case where the claimant retained possession after title had been quieted in the record owner. In that case, the court denied the adverse possession claim even though the claimant was listed as the owner on the tax rolls and the evidence indicated that the claimant was not holding possession subordinate to any person.²⁹ While those facts may have been sufficient to provide constructive notice in the typical adverse possession case, constructive notice is not effective in this situation. In order to succeed, the claimant must show that "express notice" of the adverse claim was "brought home" to the record owner; otherwise, the claim will fail.³⁰

6. Color of Title

Color of title has been defined by the Oklahoma courts as that "which in appearance is title, but which in reality is not title."³¹ Other jurisdictions have established color of title as an independent element for adverse possession claims. Oklahoma makes reference to color of title, but not as a separate element. Rather, in the litany of elements for adverse possession in Oklahoma, color of title is listed as an either/or, the claimant having the obligation to demonstrate possession under "claim of right or color of title."³² The claim of right or color of title element does not appear to be an exclusive, separate element for adverse possession; rather, it appears that this element is simply a restatement or summary of all the other elements of adverse possession.

C. When Title Vests

Once all of the elements are met, the claimant should become "vested" by adverse possession. Oklahoma jury instructions dealing with adverse possession have stated that the adverse possession must continue for the statutory period of fifteen years in order for title to vest in the claimant.³³ However, it may be that this apparently-vested title could be lost if the claimant relinquishes possession after the time periods runs. Say a claimant owned twenty acres and obtained title by adverse possession to an adjoining one acre parcel which was used and occupied together with the twenty acre tract. Say further that the claimant fell on hard times and had to convey the twenty acre tract to his lender bank by a deed in lieu of foreclosure. At that point the fifteen-year period had clearly run. Although the deed to the bank only covered the twenty acre

tract, the bank took possession of both tracts. Would the claimant lose his "title" to the one acre tract even though his title to the one acre tract had theoretically vested? Yes.³⁴ In this situation, the court determined that vesting was lost when the claimant "relinquished possession" of the one acre tract. Even though the deed to the bank did not describe the one acre tract, the court determined that the claimant had relinquished possession to the one acre tract and that title to the one acre tract then became vested in the bank.

But didn't the claimant already have "title" to the one acre tract? If so, wouldn't he have retained title since the one acre tract was not included in the deed? The court specifically stated that once a claimant has met the elements for adverse possession, he does become "vested" with title.³⁵ But this "vested" title is apparently not quite complete, because it can be lost merely by giving up possession. If one gains title to land by adverse possession, the Oklahoma Court of Appeals appears to believe that one must continue to remain in possession of the land in order to retain that title. The holding of this case appears to be contrary to the general rule in other jurisdictions.³⁶

As a result, it appears that if a claimant wants to protect his title by adverse possession, the claimant must bring a quiet title action once all the elements for adverse possession have been met and while he is still in possession. The quiet title action will give the claimant a judicial decree showing title in the claimant, which should then allow the claimant to leave the land, or sell an adjoining tract, without risking loss of title. Otherwise, the Oklahoma courts indicate that a claimant must continue to maintain possession of the land, even after the adverse possession requirements have been met, in order to retain title to the land acquired by adverse possession.

D. The Statutory Time Period

The statute of limitations for the recovery of real property is generally fifteen years, except in tax deed situations and certain judicial sales, which are discussed below. In order for a claimant to establish title by adverse possession, he must show continuous and uninterrupted possession for the fifteen year period. In order for a record owner to successfully defend his land against a claim for adverse possession, he must bring an action to recover

his property (an ejectment action) within fifteen years after the adverse possession begins.

The "continuous and uninterrupted" requirement is a crucial one. If the court finds that the possession was broken, then even though some of the time would have been characterized as adverse, the claim will be denied and the time element will start all over again. The break in time restores what the court calls "constructive possession" to the record owner.³⁷

If an individual claimant has *not* been in possession of the land for the requisite fifteen years, but if the claimant's time, when taken together with its predecessor in interest's time totals fifteen years, then the claimant would be able to establish continuous and uninterrupted possession by "tacking." Tacking is allowed when one adverse occupant follows another with no break in possession between the successive occupants. Tacking allows the current possessor to meet the continuous and uninterrupted requirement by using his predecessor's time, so long as the predecessor held the land adversely, to achieve the fifteen year time requirement.³⁸

E. Trial Issues

1. Standards of Proof and Evidence

Adverse possession must be established by "clear and positive proof"; it cannot be established by inference. The Oklahoma courts will strictly examine adverse possession. Every presumption is in favor of possession subordinate to the record owner. The claimant has the burden of proving all the elements. The Oklahoma courts have not clarified whether this "clear and positive" proof standard is the same thing as the "clear and convincing" standard with which attorneys are familiar. Obviously, the record owner would argue that the cases do mean that the standard is "clear and convincing"; the claimant could take the position that, as with most other civil cases, the standard is simply "preponderance of the evidence," but that the evidence he presents must be of a high quality.

The question of adverse possession is a question of fact to be determined from all the facts and circumstances in evidence by the court.³⁹ Corroboration of evidence has not been a requirement by the court where the evidence met the required burden of proof.⁴⁰ Witnesses are used at trial to establish or discredit the evi-

dence of adverse possession.⁴¹ Witnesses have also testified as to the performance of certain actions by a claimant with respect to the property.⁴²

2. Right to Jury Trial

The Oklahoma courts have specifically stated that a quiet title action is one of equitable cognizance, indicating that a jury trial would not be appropriate. Nevertheless, there have been Oklahoma cases where the record owner sued to quiet title and recover possession of the land and the matter was tried before a jury.⁴³ Unfortunately, the court did not explain why a jury trial was used. In a different case, the plaintiff brought a quiet title action claiming adverse possession and the defendant counterclaimed for quiet title (which the court correctly identified as a counterclaim for ejectment, not a quiet title counterclaim). The trial court adjudicated the matter in a non-jury trial.⁴⁴ A quiet title action is not the only action in which an adverse possession claim may arise. Injunctive relief has been sought in situations where the holder of title by adverse possession seeks to prevent the record owner from moving a fence after the elements of adverse possession have been met, thus vesting title in the possessor of the fenced in area.⁴⁵ It seems that a plaintiff-owner might be able to obtain a jury trial by characterizing his action as one for ejectment.

III. Related Issues

A. Co-Tenants

Since land held by one co-tenant is presumed to be held for the benefit of all co-tenants,⁴⁶ the elements for adverse possession against a co-tenant are more stringent. There must be either an actual ouster of the co-tenant by the claimant, or an actual denial of the co-tenant rights by the claimant *and* notice or knowledge of the ouster or denial of rights must be "brought home" to the co-tenant.⁴⁷ The claimant in an adverse possession case, including a co-tenancy situation, must meet all the elements with clear and positive proof.⁴⁸ Inferences are not permitted. There is a presumption in favor of possession subordinate to the true owner.⁴⁹

Mere possession by the co-tenant is not sufficient to establish title by adverse possession.⁵⁰ Possession alone does not act as an ouster or a claim of right to the property. The claiming co-tenant must "show a denial or a repudiation of

his co-tenant's rights, or the possession will be deemed to be held in subordination to the rights of the co-tenant."⁵¹

If you have a co-tenancy adverse possession situation, you should consider whether the claimant ever refused to account to the other co-tenant(s), openly repudiated the co-tenancy relationship, or filed an ejectment action against the other co-tenant(s).⁵² If the claimant acted in one of these manners, it is possible that the statute of limitations began to run at the time of such action.

B. Lot Split Issues

In a boundary case, it quite often happens that the adverse possessor acquires title to a portion of an adjoining platted lot. Does that acquisition constitute a "lot-split" which must be approved by the appropriate regulatory authority in order to be valid? It has been held that title by adverse possession is a "new title", not a conveyance or transfer from the previous owner,⁵³ so one might argue that the lot-split approval requirement would not apply. But such ownership would certainly violate the purpose of the lot-split statute, which is to prevent unapproved ownership of small or irregular tracts. Perhaps the prudent thing to do would be to seek approval, which would generally be granted so long as the applicant agrees that the "new" property must always be sold or transferred along with his original tract.

C. Effect of Mortgages

When an adverse possessor obtains title by prescription, the Oklahoma statutes specifically state that this title by prescription "is sufficient against all."⁵⁴ While the Oklahoma courts have not yet addressed this specific issue, it stands to reason that a record owner's mortgage would be extinguished if a claimant established title to the mortgaged property by adverse possession. The Oklahoma courts have cancelled a lease and mortgage that were executed by a claimant where the record owner prevailed in an ejectment action.⁵⁵

D. Tax Deeds and Judicial Sales

Tax deeds have the effect of wiping out a record owner's title to property as well as any claim for adverse possession. The grantee in the tax deed takes clear title, at least in theory. In actuality, title acquired by tax deed is quite often subject to doubt due to potential claims

from pre-tax sale owners or encumbrancers. A different time period applies for adverse possession in a tax deed situation. Instead of the usual fifteen year period, a five year period, commencing with the date of recording of the tax deed, applies.⁵⁶ Otherwise, the same elements for adverse possession must be satisfied.⁵⁷

A five year period is also applicable to claims based upon certain judicial sales and transfers. Included are execution sales (which would include sheriff's sales in mortgage foreclosures), sales occurring in partition actions, transfers under probate decrees, sales by guardians and personal representatives.⁵⁸ The period generally starts to run at the time of recording of the operative deed or decree. The time period runs whether the sale is void or voidable.⁵⁹ However, as with tax deeds the grantee must be in possession throughout the five-year period.⁶⁰

E. Minerals

Say you have a client that succeeds in a quiet title action based on adverse possession. Does that client now own the minerals as well? The answer depends on whether or not there was a severance of the mineral interest from the surface interest before the adverse possession began. Adverse possession of the surface is not effective against the severed minerals, but is effective against unsevered minerals.⁶¹ As such, the practitioner needs to determine whether or not the mineral estate was severed from the surface estate.⁶² If severance has not occurred, then title by adverse possession will include minerals not severed before the commencement of the adverse possession.⁶³ Additionally, severance, absent ouster, after commencement of adverse possession does not interrupt or stop the possession.⁶⁴

Say the record owner leased minerals on his land, land which is subject to a claim for title by adverse possession. Could the record owner use the very existence of the lease of the minerals as a successful defense to the adverse possession claim? The answer depends on the facts, but it appears to be no. The Oklahoma courts have determined that executed oil and gas leases are not sufficient to bar a claim of adverse possession where the claimant has used the surface for cattle.⁶⁵

F. Government Issues

Most attorneys are familiar with the rule that the statute of limitations does not operate against the state or its subdivisions where the public rights are involved. As a general rule, one cannot obtain title by adverse possession against the state.

1. Schools

In determining whether or not title could be obtained by adverse possession against school property, the Oklahoma courts had to determine whether or not public rights were involved. If so, the adverse possession claim would fail. The court, after examining numerous statutes concerning school property, determined that if a school board could not dispose of school property except as provided for by statute, then the school district could not be divested of its title by inaction through an adverse possession claim. The result: in Oklahoma, one cannot obtain title by adverse possession against school property.⁶⁶

2. Subdivisions of the State

As stated above, one cannot gain title by adverse possession against the state or its subdivisions where public rights are involved. There are very few cases addressing the issue of subdivisions. From our discussion concerning schools, we know that title cannot be obtained by adverse possession against the state or its schools. As to other subdivisions of the state, the court has established the "public right" test as the dispositive issue. The court will ask whether the affected right is public or private. If it is a public right, it will "affect the public generally" whereas a private right "merely affects a class of individuals within the political subdivision."⁶⁷ The statute of limitations will not operate against a subdivision of the state where public rights are involved.

Using these criteria, the court determined that the statute of limitations did not run against the Commissioners of the Land Office.⁶⁸ Since the commissioners could not dispose of property in a foreclosure action except as provided for in the statutes, the court determined the land was acquired on behalf of the public; hence a public right was affected and the statute of limitations would not be effective.

In a separate case, the court examined adverse possession against a city. The court

denominated the city as "an arm of the State," which is slightly different terminology from "subdivision" of the State.⁶⁹ Nevertheless, the court determined that rules applying to the state also apply to the city. In this particular case, the court concluded that any judgment quieting title against a city based on adverse possession is a void judgment which may be vacated at any time.⁷⁰ In a recent, unpublished Oklahoma Court of Appeals case, the Court determined that property held by a city in its private or proprietary capacity may be acquired by adverse possession.⁷¹

3. Government Acquiring Title by Adverse Possession.

While the government can use the statute of limitations defensively by prohibiting claims against state property, it can also use the statute of limitations offensively in order to establish title in itself by adverse possession. The City of Norman established title to a tract of land which it had been using as a part of one of its city parks where the City proved that it had maintained the land (filling depressions and sowing grass) and used it continuously for the statutory period.⁷² As such, the court upheld the trial court's decision to quiet title in the City. In another case, the court determined that Oklahoma City had met the elements of adverse possession to land which was being used for a roadway. The court agreed with the City's claim for adverse possession and found that it had developed the boulevard (Grand Boulevard) which had been open to the public for over fifty-five years at the time of the action.⁷³

In another case, the State failed to succeed in a claim for adverse possession where the State and the record owner of the property were in possession of the property at the same time.⁷⁴ Where there is mixed possession of property, the court will find that the one with better title (in this case, record title) will be deemed to be in possession. Since two parties cannot hold the same property against each other at the same time, the claim for adverse possession will fail.

4. Co-Tenancy and the State

There are situations where the State has owned property as a tenant in common instead of absolute fee simple. In the co-tenancy situation, the State's co-tenant has attempted to defend a claim for adverse possession against

its co-tenancy position by alleging that since adverse possession is not effective as against the State, it should not be effective as against the State's co-tenant. The Oklahoma courts have rejected this argument. Instead, title may be obtained by adverse possession as against the private co-tenant, but not against the State.⁷⁵

G. Prescriptive Easements

The elements for obtaining an easement by prescription are basically the same as with a claim for fee title by adverse possession. The activity on the property must be actual, notorious, hostile, open, visible, continuous, exclusive and with a claim of right, such that parties will see that the property is not held in subordination to any title or claims of others, but against all titles and claimants. There is a presumption in favor of possession in subordination to the rightful owner. The claimant must prove each element with clear and positive proof; inferences are not permitted.⁷⁶ If the use is permissive, then it will not give rise to a prescriptive easement no matter how long it is exercised. The claimant must demonstrate a claim of right to the easement.

1. Nature of the Claim

A prescriptive easement gives the claimant the right to use another's land, not actual title to the land. The most common fact patterns in a prescriptive easement situation concern a claimant's alleged use of a roadway on neighboring property. The claimant uses the roadway for ingress and egress. A vehicle drives over the roadway across the neighbor's property. Of course, the vehicle is not continuously driving across the property. This is very different from a claim for title by adverse possession where the use of the land is more constant. As a result of the factual differences between a fee versus easement situation, it is factually much more difficult to establish a prescriptive easement than fee title by adverse possession.

2. Unique Issues

Because of the factual differences, the court examines prescriptive easements using two different tests. If the land on which the easement is claimed is open land (not enclosed by a fence), then the burden for proving the elements of a prescriptive easement is more stringent on the claimant. The reason is that use of unfenced land, especially in open range areas, for roads is quite common and is often permis-

sive. If the land on which the easement is claimed is enclosed land, then the court will presume that the owner had knowledge of the adverse use, ultimately resulting in a rebuttable presumption of an easement once the requisite time has passed.

The courts have not provided an excellent example of when the facts show a prescriptive easement and when they do not. In fact, the Oklahoma courts have rarely made any specific application of the facts to the law in prescriptive easement cases. Instead, the courts simply state the facts (sometimes) and determine that the facts either do or do not support the elements for a prescriptive easement. The issue is generally decided based on whether or not the claimant's use was permissive. Extensive analysis is generally left out. In any event, the following cases are examples of fact patterns where the courts have denied or granted a prescriptive easement:

(i). The claimant used a neighbor's unenclosed land to access a public road, even though necessity did not demand such use. The trial court granted the easement, but the trial court's minute order granting the easement failed to provide a legal description of the easement. On appeal, the court found that the use was permissive, did not meet the fifteen year statutory requirement and was not under a claim of right, and that the court's minute order was void for failure to contain a legal description of the purported easement.⁷⁷

(ii). The claimants used a roadway over their neighbors' unenclosed farm for approximately 40 years. When the neighbors passed away and their daughter moved to the farm, she enclosed the farm, including the roadway. Since the claimants refused to close the gate providing access to the farm, the daughter refused to give the claimants access to the roadway. The claimants alleged that their use of the road for so many years created a presumption of adverse use. The court did not agree. The court noted that the burden is more stringent for a claim of an easement over unenclosed land and found that the use was initially permissive and continued to be permissive.⁷⁸

(iii). The claimant's initial use of a roadway over unenclosed land was permissive. As such, the claimant had the burden of proving when the use became adverse. The land was ultimately enclosed with a fence which was main-

tained and closed at certain times of the year. The claimant only used the roadway during portions of the year. As a result, the trial court's granting of a prescriptive easement was overruled.⁷⁹

(iv). Where the claimant had used a roadway over enclosed property for approximately fifty years, the court found a presumption of an easement. The land owner then had the burden of rebutting the presumption by showing permissive use. The court determined that the trial court's conclusion that the claimant's use met the requirements for a prescriptive easement was not clearly against the weight of the evidence. Hence, the prescriptive easement was granted.⁸⁰

IV. Legislative Initiatives to Repeal Adverse Possession

In 1998, Rep. Gary Bastin (D-Del City) introduced HB2558. That bill would have repealed, prospectively, the doctrine of adverse possession by repealing Sections 332 and 333 of Title 60. The bill passed the House, and then went to the Senate where it was referred to Sen. Brad Henry's Judiciary Committee and killed. According to Rep. Bastin (who chose not to run for re-election in 1998), he had been approached by a constituent who had inherited a 160-acre tract of land which had been owned by his grandmother and then by his mother. No one had lived on the land for a number of years. The constituent discovered that an adjacent owner moved a fence - intentionally, according to the constituent - to include five acres of the grandmother's land. Once fifteen years had passed, the adjacent owner filed suit to quiet title based on adverse possession. It was at that point that the constituent inherited the property, found out about the suit and became acquainted with the doctrine of adverse possession. The constituent felt that the land had been stolen from his family and that the legal system had allowed it to be stolen.⁸¹

Similar repeal legislation was introduced and killed in the 1999 session. Perhaps because of the failure of those two efforts, no such legislation was introduced in 2000. But there is little doubt that popular sentiment against the doctrine is still strong.

Some would argue that with modern developments such as global positioning systems, more accurate surveys and well-maintained

written land records which have been in place since sovereignty, adverse possession no longer serves its original purposes. Ownership can be easily verified simply by checking land records, many of which are now computerized, and, so it is argued, the chances of a legitimate dispute about whether the equivalent of "livery of seisin" occurred many years in the past are virtually nil. The good-faith landowner who mistakenly locates a fence should not be rewarded with extra land when he could easily have had an accurate survey done to locate his true boundaries. And certainly a bad-faith trespasser should not be allowed to use the law as a weapon to steal land from an innocent owner.

All of this, of course, runs squarely into the legal theory of adverse possession. No one would deny that there should be a statute of limitations for ejectment actions, just as there are statutes of limitations for tort and contract actions. In fact, in most every jurisdiction the statutory period for adverse possession is much longer than for other lawsuits. It seems logical that the landowner who sits on his hands for those many years should lose his right to sue, just as the injured victim who waits too long to sue will not be able to recover. If a trespasser cannot be sued for ejectment, then he cannot be removed by anyone, and it is not much of a logical leap, at least for attorneys, to say that the trespasser has good title.

In addition, in Oklahoma adverse possession is most definitely useful as a title clearing mechanism, at least in the eastern part of the state. Title to lands originally allotted to members of the Five Civilized Tribes is quite often clouded by missing probates or heirship determinations for deceased allottees or their heirs. Since the Marketable Record Title Act⁸² is not a statute of limitations, and thus is not applicable to restricted Indians,⁸³ about the only way such clouds can be properly removed is by a quiet title suit, based in large part on adverse possession. If the doctrine were to be repealed, it would be much more difficult, if not impossible, to resolve such title defects.

V. Conclusion

Perhaps more than any other concept that is a part of our body of law, the doctrine of adverse possession has been applied to produce inequitable results. Nevertheless, it is so firmly rooted in the common law, both in Oklahoma and elsewhere, that it is hard to imagine

its disappearance. It may be that the mere fact that it has survived for so long proves its usefulness. Its theoretical basis is quite elegant and intellectually sound. However, most attorneys would have to admit that they have, at one time or another, squirmed a little bit when attempting to justify the doctrine to those outside our profession - especially to a client who has just lost a piece of valuable real estate.

1. Backman, James H. and Thomas, David A., A Practical Guide to Disputes Between Adjoining Landowners-Easements, § 7.01[2] (1996).
2. *See Id.*
3. Thompson, George W. and Grimes, John S., Commentaries on the Modern Law of Real Property § 2540 (1979).
4. Backman, *supra* note 1, at § 7.01[3].
5. *See* OKLA STAT. tit. 12, § 93 (1991).
6. *See Bynum v. Liberty National Bank and Trust Company of Oklahoma City*, 338 F.2d 412, 414 (10th Cir. 1964).
7. *See* OKLA STAT. tit. 12, § 93(4) (1991).
8. *See* OKLA STAT. tit. 12, § 93 (1991).
9. *Christ Church Pentecostal v. Richterberg*, 334 F.2d 869, 874 (10th Cir. 1964) (citing *Fessler v. Thompson*, 130 P.2d 513 (Okla. 1942)).
10. *See St. Louis-San Francisco Ry. Co. v. Walter*, 305 F.2d 90, 93 (10th Cir. 1962).
11. Bynum, 338 F.2d at 414.
12. *See* OKLA STAT. tit. 60, § 333 (1991).
13. *See Fadem v. Kimball*, 612 P.2d 287 (Okla. Ct. App. 1979).
14. *Gassin v. McClunkin*, 48 P.2d 320, 326 (Okla. 1935).
15. *See Stern v. Franklin*, 288 P.2d 412 (Okla. 1955).
16. *See Turner v. Hubbell*, 288 P.2d 394, 398 (Okla. 1955).
17. *See Threet v. Polk*, 620 P.2d 467 (Okla. Ct. App. 1980).
18. *See Sudheimer v. Cheatham*, 443 P.2d 951 (Okla. 1968).
19. *Threet*, 620 P.2d at 470 (see footnote no. 6 in the opinion).
20. *See Leach v. West*, 504 P.2d 1233 (Okla. 1972).
21. *See Berry v. Mendenhall*, 964 P.2d 974 (Okla. Ct. App. 1998).
22. *See Id.*
23. *See Buckner v. Russell*, 331 P.2d 401 (Okla. 1958).
24. *See Lewis v. Smith*, 103 P.2d 512 (Okla. 1940).
25. *See* Unpublished Opinion of the Oklahoma Court of Appeals, Div. No. 3, Appeal No. 90,727 (April 9, 1999).
26. *See Macias v. Guymon Indust. Found.*, 595 P.2d 430 (Okla. 1979).
27. *See Krosmico v. Pettit*, 968 P.2d 345 (Okla. 1998).
28. *See Fadem*, 612 P.2d at 290.
29. *See Shepherd v. Lyle*, 395 P.2d 641 (Okla. 1964).
30. *Id.* at 643.
31. *Boland v. Heck*, 65 P.2d 1213 (Okla. 1937).
32. *Krosmico*, 968 P.2d at 349.
33. *See Kinkade v. Simpson*, 197 P.2d 968, 970 (Okla. 1948).
34. *Cloer Land Co. v. Wright*, 858 P.2d 110 (Okla. Ct. App. 1993).
35. *Id.* at 111.
36. *See* THOMPSON, *supra* note 3, at § 2552.
37. *See Loris v. Patrick*, 414 P.2d 249, 252 (Okla. 1966) (citing *Ander-son v. Francis*, 57 P.2d 619, 620 Okla. 1936)).
38. *See Buckner v. Russell*, 331 P.2d 401 (Okla. 1958).

39. *See Mitchell v. Graham*, 143 P.2d 815 (Okla. 1943)(see syllabus no. 3 by the court).
40. *See Fadem*, 612 P.2d at 291.
41. *See Leach*, 504 P.2d at 1236.
42. *See Winslow v. Watts*, 446 P.2d 598, 600 (Okla. 1968).
43. *See Kinkade*, 197 P.2d at 969.
44. *See Krosmico*, 968 P.2d at 346.
45. *See Threet*, 620 P.2d at 470.
46. *See Keeler v. McNeir*, 86 P.2d 1004, 1007 (Okla. 1939).
47. *See Westheimer v. Neustadt*, 362 P.2d 110, 111 (Okla. 1961). *See also Coats v. Riley*, 7 P.2d 644, 652 (Okla. 1931); *St. Louis-San Francisco Ry Co.*, 305 F.2d at 93.
48. *See Coats*, at 654.
49. *See Wilcox v. Wickizer*, 266 P.2d 638, 642 (Okla. 1954).
50. *See Coats*, at 652; *Morris v. Futischa*, 148 P.2d 986, 987 (Okla. 1944)(occupancy is regarded for the "use and benefit of the true owner").
51. *See Coats*, at 652.
52. *See Keeler*, at 1008.
53. BACKMAN, *supra* note 1, at § 7.01[1].
54. *See* OKLA STAT. tit. 60, § 333 (1991).
55. *Fernow v. Pfile*, 178 P.2d 106 (Okla. 1947).
56. OKLA STAT. tit. 12, § 93(3) (1991).
57. *Herron v. Swarts*, 350 P. 2d 314 (Okla. 1960).
58. *See* OKLA STAT. tit. 12, § 93(1), 93(2) (1991).
59. *See* OKLA STAT. tit. 12, § 93(6); *United States ex rel. Farmers Home Administration v. Hobbs*, 921 P.2d 338 (Okla. 1996).
60. *See Farmers Home Administration*, 921 P.2d at 343; *Dearing v. State ex rel. Commissioners of the Land Office*, 808 P.2d 661, 668 (Okla. 1991); *Kizzire v. Sarkeys*, 361 P.2d 1082 (Okla. 1961).
61. *See Fadem v. Kimball*, 612 P.2d 287, 292 (Okla. Ct. App. 1979)
62. *See Krosmico*, 968 P.2d at 350.
63. *See Id.*
64. *See Fadem*, 612 P.2d at 293.
65. *See Krosmico*, 968 P.2d at 350 (also citing *Fadem v. Kimball* 612 P.2d 287 (Okla. Ct. App. 1979)).
66. *See Merritt Independent School Dist. No. 2 of Beckham County v. Jones*, 249 P.2d 1007 (Okla. 1952).
67. *See Sears v. Fair*, 397 P.2d 134, 137 (Okla. 1964).
68. *See Id.* at 139.
69. *See Mobbs v. City of Lehigh*, 548 P.2d 1048, 1049 (Okla. Ct. App. 1976).
70. *See Id.*
71. *See* Unpublished Opinion of the Oklahoma Court of Appeals, Div. No. 4 Appeal No. 91,673 (Sept. 28, 1999).
72. *See Hair v. City of Norman*, 389 P.2d 634 (Okla. 1963).
73. *See Putnam v. Oklahoma City*, 296 P.2d 797 (Okla. 1956).
74. *See Sears v. State of Oklahoma Department of Wildlife Conservation*, 549 P.2d 1211, 1213 (Okla. 1976).
75. *See Grand Lodge of Oklahoma, Independent Order of Odd Fellows v. Webb*, 306 P.2d 340, 343 (Okla. 1956).
76. *See Brown v. Mayfield*, 786 P.2d 708, 712 (Okla. Ct. App. 1989).
77. *See Id.*
78. *See Willis v. Holley*, 925 P.2d 539 (Okla. 1996).
79. *See Irion v. Nelson*, 249 P.2d 107 (Okla. 1952).
80. *See Telford v. Stettmund*, 235 P.2d 692 (Okla. 1951).
81. Telephone interview with Gary Bastin, October 25, 2000.
82. *See* OKLA STAT. tit 16, §§ 71-85 (1991).
83. *See Mobbs v. City of Lehigh*, 655 P.2d 547 (Okla. 1982).