

ADVERSE POSSESSION AND BOUNDARY BY ACQUIESCENCE IN ARKANSAS: SOME SUGGESTIONS FOR REFORM

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I. INTRODUCTION

Some commentators have characterized adverse possession as a “strange and wonderful system,” others as “legal[ized] land theft.”¹ Like Dr. Jekyll and Mr. Hyde, it has two faces. The positive face, a doctrine of repose, provides a way to cure title problems and promotes stability of title and of boundary lines. Its negative face allows wrongful possessors to gain title, occasionally makes headlines, causes consternation in first-year law students, and no doubt affirms the general public’s suspicion of law.²

The doctrine acts to bar the true owner from successfully suing to recover his property after a certain number of years have passed. It simultaneously creates original title, fully fledged, in the claimant. However, the claimant must exercise a certain type of possession, or she will not be able to take advantage of the doctrine.³ In essence, adverse possession confers

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1. See WILLIAM B. STOEBOCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 11.7 (3d ed. 2000); END ADVERSE POSSESSION NOW, www.endadversepossession.org (last visited Dec. 18, 2010) (an association website dedicated to abolishing adverse possession in all states).

2. See, e.g., Susan Lorde Martin, *Adverse Possession: Practical Realities and an Unjust Enrichment Standard*, 37 REAL EST. L.J., 133, 138–42 (2008) (discussing three recent problematic cases); Sally Kestin, *Squatters Take Over Homes in S. Fla.: Police Call It the Latest Fraud in Housing Crisis*, SUN SENTINEL (June 13, 2010), http://articles.sun-sentinel.com/2010-06-13/news/fl-housing-fraud-adverse-possession-20100613_1_housing-crisis-squatters-real-estate-crisis; Sally Kestin, *Witness Surfaces in Boulder Land Grab: Woman Seen “Tromping” Vegetation Where Path Appeared*, WORLDNETDAILY, (Feb. 15, 2008), <http://www.wnd.com/index.php?fa=PAGE.view&pageId=56514> (at the trial court level, the adverse possessors were awarded 34 percent of the neighboring vacant lot); *Judge Denies Couple’s Push for More of Neighbors’ Land*, DENVER POST, (Dec. 5, 2007), available at http://nl.newsbank.com/nl-search/we/Archives?p_product=DP&p_theme=dp&p_action=search&p_maxdocs=200&p_topdoc=1&p_text_direct0=11D5C58F73D75108&p_field_direct0=document_id&p_perpage=10&p_sort=YMD_date:D&s_trackval=GooglePM (visited on June 18, 2010) (the same couple was later denied an additional nine inches, by the same judge). This last case is discussed in the Martin article. Martin, *supra* at 138–40.

3. See Lawrence Berger, *Unification of the Doctrines of Adverse Possession and Practical Location in the Establishment of Boundaries*, 78 NEB. L. REV. 1 (1999), for a discussion

the legal status of “landowner” on the claimant who has behaved like one for a long enough time.⁴

The Arkansas law of adverse possession has both statutory and case law components. In addition to the traditional common law requirements, in 1995 the General Assembly amended the law to make it more difficult to acquire adverse possession, requiring color of title and payment of taxes in certain contexts, among other requirements. The statutes and amendments are problematic in several aspects. This article will summarize the general aspects of adverse possession and boundary by acquiescence in Arkansas and will discuss the relationship between the two. It will focus on problems with the statutes and will suggest an amended statute. In addition, inconsistencies that seem to lurk in the case law will also be discussed.

Boundary by acquiescence is a doctrine similar to adverse possession. It applies only to property contiguous to that already owned by the claimant and is intended to resolve boundary line disputes where it would be inequitable to allow a party to change a boundary that has been recognized by both parties for many years. In most states, it is a common law doctrine with no statutory elements and requires fewer conditions to be met than adverse possession. In recent years, many Arkansas court decisions have seemed to treat the intent element in boundary by acquiescence and in adverse possession as identical, resulting in judgments that parties have both adverse possession and boundary by acquiescence. Other decisions deny adverse possession but rule that boundary by acquiescence has been proved. Is boundary by acquiescence a sort of “adverse possession light,” serving as a substitute for parties who cannot prove adverse possession of contiguous property?

II. OVERVIEW OF ADVERSE POSSESSION

The doctrine of adverse possession is ancient, and its roots have been documented as far back in time as 2250 B.C. in the Code of Hammurabi.⁵ American law has a more recent foundation in the English law of adverse possession, first codified in 1275 in the Statute of Westminster.⁶ The statutory period was at first quite long and was the same fixed year for all claims which caused a greater burden on claimants with each passing year, but in 1623 the Statute of Limitations created a twenty-year period.⁷ The first colonial statutes followed the twenty-year period, but in general, today the

of the tension between a doctrine of repose and the hostility required for adverse possession and proposing a unified doctrine of adverse possession, boundary by acquiescence, boundary by agreement, and estoppel. We are not so ambitious in this article, merely proposing to clarify existing Arkansas law.

4. See John L. McCormack, *Title to Property, Title to Marriage: The Social Foundation of Adverse Possession and Common Law Marriage*, 42 VAL. U. L. REV. 461 (2007), for an intriguing comparison of the two legal doctrines.

5. Brian Gardiner, *Squatters' Rights and Adverse Possession: A Search for Equitable Application of Property Laws*, 8 IND. INT'L & COMP. L. REV. 119, 123 (1997).

6. *Id.* at 126.

7. *Id.* at 127.

periods are shorter, ranging from the shortest period of three years in Arizona, Florida and Texas (providing certain conditions are met), to sixty years in New Jersey.⁸ All states have adverse possession statutes.⁹ The two most common periods are ten years (fifteen states) and twenty years (fourteen states).¹⁰ Arkansas, Florida and Utah have basic periods of seven years.¹¹

To gain title, the claimant must adversely possess the property in question for at least the statutory period. However, if the true owner of the property is under a disability, almost all states will toll the statute during at least the period of disability.¹² Common disabilities are legal incapacity, minority, imprisonment, absence from the state, or military service.¹³ If one claimant consensually transfers possession to another before the statute of limitations has run, the law allows “tacking”—thus, if *A* conveys to *B* during her third year of adverse possession, and the jurisdiction has a seven-year period, *B* will only have to adversely possess for four more years before the statute of limitations will prohibit the true owner from successfully recovering possession. As the Arkansas Supreme Court has noted, strictly speaking, it is inaccurate to refer to a claimant’s possession “ripening” into title, although courts do it all the time. Instead, the statute of limitations simply prevents the true owner from prevailing over the adverse possession once it has run and the other conditions have been met.¹⁴

The successful adverse possessor’s reward is “original” title.¹⁵ Because the adverse possessor is substituting her own title for that of the true owner, the law is detailed in the type of possession that is required. Typical adjectives used are “actual,” “open,” “continuous,” “exclusive,” “notorious,” and “hostile.” Jurisdictions may also require the payment of taxes, or color of title.¹⁶ Twenty-one states shorten the time period if certain conditions are met. Common conditions are color of title,¹⁷ color of title in addition to payment of taxes,¹⁸ purchase at a tax sale,¹⁹ or good faith, usually in conjunction with color of title.²⁰ Although there is a general requirement of actual possession, many jurisdictions allow adverse possession of a larger tract constructively possessed if the adverse possessor is in actual possession of a part of the tract and has color of title to the rest.²¹

8. See *infra* App. “B.” The state statutes are included in the table under Code Citation.

9. See *infra* App. “B.” The table summarizes adverse possession statutes for each state.

10. See *infra* App. “B.”

11. See *infra* App. “B.”

12. See *infra* App. “B.”

13. See *infra* App. “B.” The table summarizes disabilities tolling the statutes for each state.

14. *Thompson v. Fischer*, 364 Ark. 380, 384, 220 S.W.3d 622, 625 (2005); *Uteley v. Ruff*, 255 Ark. 824, 827, 502 S.W.2d 629, 632 (1973).

15. *STOEBUCK & WHITMAN*, *supra* note 1, § 11.7.

16. See *infra* App. “B.” The table summarizes the common law elements of and special requirements for adverse possession for each state.

17. See, e.g., Alaska and Georgia *infra* App. “B.”

18. See, e.g., Alabama and Colorado *infra* App. “B.”

19. See, e.g., Michigan and Minnesota *infra* App. “B.”

20. See, e.g., Illinois and Louisiana *infra* App. “B.”

21. Arkansas follows this doctrine. See *St. Louis Union Trust Co. v. Hillis*, 207 Ark.

States have sought to limit adverse possession in several different ways. New Mexico requires good faith of all adverse possession claimants.²² Hawaii is of interest in two ways: first, it limits the number of times a person can assert adverse possession claims in a given number of years²³ and, second, it has a Torrens-like system of land registration. Owners who register their land with the state land court receive a “certificate of title” and, *inter alia*, protection from any adverse possession.²⁴ Three states allow a land owner to record notices that hinder claimants in various ways, by tolling the statute of limitations until a lawsuit is filed²⁵ or by barring claims of constructive adverse possession.²⁶ Rhode Island takes the most direct approach, allowing a landowner to serve notice on the claimant and then record the notice and return, which tolls the statute.²⁷

The general rule is that one cannot adversely possess against a government, although a government can adversely possess. However, in 1986 the federal government enacted the Federal Color of Title Act, allowing persons who have occupied federal land for twenty years with color of title, and who have also met other requirements, to apply for a patent from the United States for land they possess.²⁸ Arkansas does not have a similar statute with respect to state-owned land.²⁹ Adverse possession by the government is not considered a taking, although the true owner may sue for inverse condemnation during the seven-year period that the statute of limitations is running.³⁰

It can easily be intuited that one underlying purpose of the doctrine of adverse possession is to encourage possession and development of land. Indeed, as man’s relationship to the planet drastically changed during the twentieth century, and as the change continues and its rate accelerates, some commentators have attacked this premise underlying the doctrine, arguing

811, 813, 182 S.W.2d 882, 883 (1944); *Clark v. Clark*, 4 Ark. App. 153, 159, 632 S.W.2d 432, 436 (1982).

22. N.M. STAT. § 37-1-22 (West 2010).

23. HAW. REV. STAT. §§ 657-31 to -38; § 669-1; § 501-87 (2007).

24. *Id.* at § 501-87. One of the benefits of the Torrens systems is that registered land cannot be adversely possessed. *See also* MINN. STAT. ANN. § 508.02. A discussion of the Torrens system and to what extent it is still in existence in those few states that adopted it is outside the scope of this article.

25. CONN. GEN. STAT. § 52-575 (2005).

26. IDAHO CODE ANN. § 5-208(2) (2010).

27. R.I. GEN. LAWS, § 34-7-6 (2011).

28. 43 U.S.C. § 1068 (2006).

29. However, under the doctrine of the “lost grant,” which Arkansas has “long recognized,” where property has been on the tax rolls, the person in possession has paid taxes for a very long time, and the taxpayer has been in continual and uninterrupted possession a court may infer a grant from the state. *Carter v. Stewart*, 149 Ark. 189, 195, 231 S.W. 887, 889 (1921); *Baker v. Certain Lands in Independence Cnty.*, 19 Ark. App. 253, 256–57, 720 S.W. 2d 318, 320-21 (1986).

30. The government’s vesting by adverse possession of a property interest cuts off the right to recover for inverse condemnation. *Bryant v. Lemmons*, 269 Ark. 5, 10, 598 S.W.2d 79, 82 (1980) (Fogleman, C.J., concurring); *Sebastian Lake Devs., Inc. v. United Tel. Co.*, 240 Ark. 76, 80, 398 S.W.2d 208, 211 (1966); *Daniel v. City of Ashdown*, 94 Ark. App. 446, 450, 232 S.W.3d 511, 514 (2006).

that undeveloped land is desirable.³¹ Other purposes of the adverse possession doctrine are to discourage the relocating of long-settled boundary lines, to discourage stale claims, and to protect justified expectations.³²

III. ADVERSE POSSESSION IN ARKANSAS

At the advent of Arkansas's statehood in 1836, the doctrine of adverse possession consisted of the common law elements and a statute of limitations of ten years (rather than today's seven) for the "recovery of any lands or tenements, or for the recovery of the possession thereof."³³ By 1899, the limitation had dropped to seven years, and in that year, a statute was enacted that vested possession in one claiming unimproved and unenclosed land if the claimant had color of title and had paid taxes for seven years.³⁴ In 1929, a second statute granted a presumption at law of color of title to a claimant who had paid taxes for fifteen years.³⁵ In 1995, spurred by the aggressive actions of an adverse possession claimant in Jacksonville, the General Assembly took up the issue.³⁶ Although proposals were made to abolish adverse possession, in the end the legislature contented itself with imposing two new requirements already in place in a number of other states: color of title and payment of taxes.³⁷ The statute also divided property adversely possessed into two types: contiguous and noncontiguous.³⁸ The color of title and the payment of taxes requirement drastically affected claims for non-

31. See, e.g., William G. Ackerman & Shane T. Johnson, Comment, *Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession*, 31 LAND & WATER L. REV. 79 (1996); Alexandra B. Klass, *Adverse Possession and Conservation: Expanding Traditional Notions of Use and Possession*, 77 U. COLO. L. REV. 283 (2006); John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816 (1994). As the authors write this article, 1.5 to 2.5 million gallons of oil per day are escaping into the Gulf of Mexico in an unprecedented ecological disaster caused by overpopulation and excessive demands on natural resources.

32. See JOSEPH WILLIAM SINGER, PROPERTY 155-162 (3d ed. 2010); Martin, *supra* n. 2, at 133, 137.

33. ARK. REV. STAT., ch. 91, § 1 (1837).

34. Unimproved and unenclosed land shall be deemed and held to be in possession of the person who pays the taxes thereon if he or she has color of title thereto, but no person shall be entitled to invoke the benefit of this section unless he or she, and those under whom he or she claims, shall have paid the taxes for at least seven (7) years in succession.

ARK. CODE ANN. § 18-11-102 (Michie 1987 & LEXIS Supp. 2002).

35. Payment of taxes on wild and unimproved land in this state by any person or his or her predecessor in title for a period of fifteen (15) consecutive years shall create a presumption of law that the person, or his or her predecessor in title, held color of title to the land prior to the first payment of taxes made as stated and that all the payments were made under color of title.

ARK. CODE ANN. § 18-11-103 (West 2010).

36. A detailed discussion of this history is outside the scope of this article, but for an account of the policy concerns and background behind the legislation, as well as a discussion of the new statute itself, see Shane P. Raley, Legislative Note, *Color of Title and Payment of Taxes: The New Requirements of the Adverse Possession Law*, 50 ARK. L. REV. 489 (1997).

37. *Id.* at 490.

38. ARK. CODE ANN. § 18-11-106 (Michie 1987).

contiguous property. It did not much affect claims for contiguous property, but it did start a slow trend toward adding boundary by acquiescence claims as an alternative cause of action in boundary cases. The following sections will discuss the common law and the statutory elements of adverse possession, defects in the statute and proposed solutions, boundary by acquiescence, and its conflation with adverse possession.

A. The Common Law Elements

Adverse possession is a doctrine that typically combines case law with statutory law. The statute sets a statute of limitations, beyond which the original landowner may not successfully bring suit to recover his lands. Statutes may, and in Arkansas do, require more of the adverse possessor, and these requirements are discussed below. The case law typically sets out elements necessary to prove adverse possession, such as “openness,” “actual possession,” “hostility” and similar aspects. These elements must be proved in every suit for adverse possession. The elements are unaffected by the 1995 Arkansas statutory additions. Thus, they will be discussed first. The latest Arkansas Supreme Court decision to recite the elements necessary for adverse possession listed them as: “actual, open, notorious, continuous, hostile, and exclusive, and . . . with an intent to hold against the true owner.”³⁹

1. *Actual*

The most positive act of actual, or as it is sometimes called, “pedal” possession, is to physically occupy property. Other acts held to constitute actual possession include erecting improvements, cultivation,⁴⁰ enclosure by fence,⁴¹ and maintaining a fence.⁴² Enclosing property on all sides with a fence is not necessary if it is enclosed on one or more sides by a bluff or other natural barrier.⁴³ The proof required as to the extent of possession and dominion may vary according to the location and character of the land.⁴⁴ Thus, the fact that a claimant mowed only part of the claimed tract, and did not mow all because the unmowed portion was a ditch, did not preclude adverse possession of the ditch.⁴⁵ Further, acts that can constitute acts of possession with respect to one tract might not with respect to another.⁴⁶ The

39. Thompson v. Fisher, 364 Ark. 380, 384, 220 S.W.3d 622, 625 (2005).

40. Boyd v. Roberts, 98 Ark. App. 385, 391, 255 S.W.3d 895, 899 (2007) (cultivating and planting Bermuda grass, *inter alia*).

41. Blackburn v. Brown, 168 Ark. 743, 271 S.W. 328 (1925); McComb v. Saxe, 92 Ark. 321, 323, 122 S.W. 987, 987 (1909) (noting that an enclosure by a three-wire fence and grazing cattle sufficient, even if fence was broken occasionally by high water); Boyd, 98 Ark. App. at 390, 255 S.W.3d at 898.

42. Boyd, 98 Ark. App. at 391, 255 S.W.3d at 899.

43. Doniphan Lumber Co. v. Case, 87 Ark. 168, 170, 112 S.W. 208, 208 (1908).

44. Boyd, 98 Ark. App. at 391, 255 S.W.3d at 898.

45. *Id.*, 255 S.W.3d at 898.

46. See Cooper v. Cook, 220 Ark. 344, 346–47, 247 S.W.2d 957, 958 (1952); Clark v. Clark, 4 Ark. App. 153, 159, 632 S.W.2d 432, 436 (1982).

hallmark of acts constituting possession are whether they are acts that the true owner would typically carry out.⁴⁷ An act that changes the nature of the property is such an act.⁴⁸ No particular act is required to prove adverse possession.⁴⁹

On the other hand, the Arkansas Supreme Court has held the following acts inadequate to give notice of adverse possession: planting a row of trees; erecting a light pole; leveling ground; installing a septic tank; and parking trailers from time to time.⁵⁰ Fencing, alone, may not constitute a sufficient act of possession. A corporation that fenced in a fifteen-acre tract with a fence made with bois d'arc posts that soon became overgrown and that did not regularly enter the land, did not perform sufficient acts of adverse possession.⁵¹ The appellate court agreed with the trial court that the "surreptitious" possession of erecting the fence was not sufficiently open and notorious.⁵² Standing alone, hunting and fishing,⁵³ occasional entry to cut timber for firewood,⁵⁴ and mere grazing of cattle⁵⁵ have all failed as sufficient acts of possession. Where the property was woodland, fencing a garden spot and cutting a small amount of timber were insufficient acts.⁵⁶ The mere mowing of a strip not enclosed within a fence is insufficient evidence of adverse possession.⁵⁷ Cutting timber over a line up to a neighbor's fence, once, and planting strawberries over the line for three or four years is not sufficient dominion.⁵⁸

Acts of possession must not only be those that the true owner must normally carry out, but rather, they must also give sufficient notice so that the true owner would, if he inspected the property, be aware that the claimant was in adverse possession. Thus, actual possession is closely related to the next elements, open and notorious. However, wild, unimproved, and unenclosed land represents a problem as to how it can be adversely possessed when it is unoccupied. It would seem to be impossible to actually adversely possess wild, unimproved, and unenclosed land because performing acts of ownership would change its nature. It is hard to think of an act, other than, perhaps, the grazing of livestock, that would be the act of an owner and yet not improve the land in some respect. Mere grazing of livestock,⁵⁹ or mere mowing,⁶⁰ by themselves, have been held to not constitute

47. *Boyd*, 98 Ark. App. at 391, 255 S.W.3d at 899.

48. *Id.*, 255 S.W.3d at 899.

49. *McComb v. Saxe*, 92 Ark. 321, 321, 122 S.W. 987, 987 (1909).

50. *Coons v. Lawler*, 237 Ark. 350, 351–52, 372 S.W.2d 826, 827–28 (1963).

51. *Choupique Enters., Inc. v. Lansford*, 269 Ark. 832, 834, 601 S.W.2d 237, 238 (1980).

52. *Id.*, 601 S.W.2d at 238.

53. *Kenner v. State*, 121 Ark. 95, 105, 180 S.W. 492, 495 (1915).

54. *Sanderson v. Thomas*, 192 Ark. 302, 90 S.W.2d 965 (1936).

55. *Cooper v. Cooper*, 251 Ark. 1007, 1014, 476 S.W.2d 223, 228 (1972).

56. *Maywood v. Mayo*, 153 Ark. 620, 624, 241 S.W. 7, 8 (1922).

57. *Shibley v. Hayes*, 214 Ark. 199, 205, 215 S.W.2d 141, 145 (1948); *De Mers v. Graupner*, 186 Ark. 214, 217, 53 S.W.2d 8, 10 (1932).

58. *Cossey v. House*, 227 Ark. 100, 102, 296 S.W.2d 199, 200–01 (1956).

59. *Cooper*, 251 Ark. at 1014, 476 S.W.2d at 228; *Boyd v. Roberts*, 98 Ark. App. 385,

sufficient acts of possession. Thus, over a century ago, the General Assembly enacted statutes that confer a presumption of color of title upon, and deem land to be in possession of, a claimant who pays the property taxes for the requisite period in the absence of payment by the true owner.⁶¹

2. *Open and Notorious*

The “notorious” requirement of adverse possession is closely related to the “actual possession” requirement, for it is the acts of possession that give notice to the world. “Notice of adverse possession may be inferred from facts and circumstances, such as grazing livestock, erection of a fence, or improving the land.”⁶² The notoriety requirement of adverse possession does not require a claimant to provide actual notice to the landowner, barring some type of special legal relationship.⁶³ “A landowner has a duty to keep himself informed as to any adverse occupancy of his property.”⁶⁴ However, if the claimant can prove that the true owner had actual notice of the claimant’s acts of possession, the claimant need not prove notoriety.⁶⁵ Constructive notice is sufficient to prove adverse possession. Constructive notice is that which would indicate to a reasonable landowner visiting the premises that someone else was asserting an adverse claim of ownership.⁶⁶ “One claiming lands adversely under color of title need not give affirmative notice to another residing in a distant place that he is claiming ownership of the land where he has no knowledge of the existence, whereabouts, or claim of interest of another in the land.”⁶⁷

3. *Continuous*

Whereas possession and notice may be constructive in certain circumstances and “exclusive” need not mean completely exclusive, the “continuous” requirement “permits no variation.”⁶⁸ On the other hand, where fencing in 320 acres for livestock was the only act of possession, and where high water would sometimes break the fence, but the claimant would repair it as soon as the water subsided, the court ruled that this did not cause a break in continuity.⁶⁹ The doctrine of “tacking” enables some claimants to

391, 255 S.W.3d 895, 899 (2007).

60. *Boyd*, 98 Ark. App. at 391, 255 S.W.3d at 899.

61. See discussion *infra* Part III.D.1.

62. *Boyd*, 98 Ark. App. at 391, 255 S.W.3d at 899.

63. *McLaughlin v. Sicard*, 63 Ark. App. 212, 220, 977 S.W.2d 1, 5 (1998).

64. *Id.* at 217, 977 S.W.2d at 3.

65. *Anderson v. Holliday*, 65 Ark. App. 165, 173, 986 S.W.2d 116, 120 (1999) (noting that the owner had actual knowledge that claimant paved over a drainage ditch).

66. *McLaughlin*, 63 Ark. App. at 217, 977 S.W.2d at 3.

67. *Welder v. Wiggs*, 31 Ark. App. 163, 167, 790 S.W.2d 913, 915 (1990); *see also* *Miller v. Chi. Mill & Lumber Co.*, 140 Ark. 639, 215 S.W. 900 (1919).

68. *Uteley v. Ruff*, 255 Ark. 824, 829, 502 S.W.2d 629, 633 (1973); *Clark v. Clark*, 4 Ark. App. 153, 159, 632 S.W.2d 432, 437 (1982).

69. *McComb v. Saxe*, 92 Ark. 321, 321, 122 S.W. 987, 987 (1909).

prove adverse possession for the requisite number of years. Tacking allows a successor of an adverse possessor to add the predecessor's years onto hers.⁷⁰ For tacking to occur, there must be privity, either of title or possession, between the successive claimants.⁷¹ A break in the continuity of possession, however, starts the statute of limitations running anew.⁷² One restriction on the tacking doctrine concerns Arkansas Code section 18-11-103, that deems wild and unenclosed property to be in the possession of a claimant who has paid taxes for fifteen years.

4. *Hostile, and With Intent to Hold Against the True Owner*

It is impossible to separate these two elements, as the core of each is intent; therefore, this article will consider the elements together. Hostility is the “very marrow” of adverse possession.⁷³ Hostility is also the element with the most variation among the states. Is hostility to be determined objectively, without inquiring into the subjective intent of the claimant? Or is her subjective intent an issue? And if the latter, does it matter whether she had mistaken intent or wrongful intent, and if so, may her claim be denied? States differ in their answers to all of these questions.

The majority view and the one favored by secondary authority is that subjective intent is not relevant and that all that matters is the objective intent of the claimant, as evidenced by her actions.⁷⁴ The majority approach is the easiest for courts to handle. The claimant simply offers into evidence her acts, proves that they are the same type of acts a true owner would perform, and as long as there was no permission on the part of the owner, adverse possession is proved. It does not matter whether the claimant is an angel or a devil—the acts and the lack of permission are the keys.

On the other hand, there is an old view that a mistaken or good-faith claim will not suffice to meet the hostility requirement;⁷⁵ the adverse possessor must have wrongful intent. This view is sometimes referred to as the “Maine Doctrine,” after one of the leading cases, even though Maine no longer follows it.⁷⁶ This approach protects the wrongdoer, and penalizes one who occupies property in good faith, believing it is hers. While it operates

70. *Trice v. Trice*, 91 Ark. App. 309, 316, 210 S.W.3d 147, 152 (2005).

71. *St. Louis Union Trust Co. v. Smith*, 207 Ark. 815, 818, 182 S.W.2d 945, 946 (1944).

72. *Utley*, 255 Ark. at 829, 502 S.W.2d at 633; *Clark*, 4 Ark. App. at 160, 632 S.W.2d at 437.

73. *STOEBUCK & WHITMAN*, *supra* n. 1, § 11.7.

74. *Id.*; *SINGER*, *supra* n. 32, at 151. For an explanation of the objective test, see *Tavares v. Beck*, 814 A.2d 326, 351 (R.I. 2003), *Nome 2000 v. Fagerstrom*, 799 P.2d 304, 310 (Alaska 1990), and *Chaplin v. Sanders*, 676 P.2d 431 (1984).

75. *See, e.g.*, *Mannillo v. Gorski*, 241 A.2d 276 (N.J. Super. Ct. Ch. Div. 1968) *rev'd* by *Mannillo v. Gorski*, 255 A.2d 258 (N.J. 1969) (providing a lengthy discussion of the history and reasoning of the two approaches).

76. The case for which the Maine Doctrine is named is *Preble v. Me. Cent. R.R.*, 85 Me. 260 (1893). Maine's current law is found at ME. REV. STAT. tit. 14, § 810-A (2003 & Supp. 2010).

to support and to fulfill some of the purposes of adverse possession—the development of land and the discouraging of stale claims—it would not seem to protect justified expectations of anyone except wrongdoers. The approach also calls for additional evidence, that of subjective intent.

On the other hand, some states require the exact opposite: A successful adverse possession claimant must be mistaken, occupying the property in good faith.⁷⁷ While this approach is more in harmony with society's justified expectations, it requires more in the way of proof and renders outcomes less determinate.⁷⁸ This approach also requires additional evidence in contrast with the objective intent approach.

a. The intent to hold against the true owner

Arkansas case law contains several conflicting threads with respect to the exact nature of hostile intent, no doubt complicated by the additional requirement of the “intent to hold against the true owner.”⁷⁹ The plain meaning of this phrase would seem to exclude mistaken or good-faith intent, although it may also refer to the requirement of the absence of permission by the true owner. It first appears in that exact form in *Terral v. Brooks*, a 1937 boundary case involving mistaken intent.⁸⁰ In *Terral*, a utility easement was located on the boundary between two city lots, extending for five feet onto each lot. The owners of the two lots had used the easement as a driveway. Brooks, the owner of one lot, petitioned for an injunction to stop a telephone company from erecting a pole on its easement that would block the driveway. Terral, the owner of the second lot, intervened, petitioning for an order enjoining Brooks from using the driveway and denying any right of adverse possession in Brooks.⁸¹

The court set out the requirements for adverse possession, adding “with an intent to hold against the true owner.”⁸² The court cited *Watson v. Hardin* for the proposition.⁸³ Unlike *Terral*, *Watson* is not a boundary case; it concerns adverse possession by a life tenant against a reversioner. *Watson*, in turn, cites this pertinent language from *Ringo v. Woodruff*: “. . . possession must be . . . accompanied by an intent to hold adversely and in de-

77. See, e.g., COLO. REV. STAT. § 38-41-101(3)(b)(II) (2007 & Supp. 2010); OR. REV. STAT. § 105.620(1)(b) (2007) (requiring “honest belief”).

78. See SINGER, *supra* n. 32, at 149–54.

79. For more discussion of the intent requirement in Arkansas adverse-possession cases, see William Hayden Spitler, Case Note, *Over a Century of Doubt and Confusion: Adverse Possession in Arkansas, Intent to Hold Adversely, and Recognition of Superior Title in Fulkerson v. Van Buren*, 53 ARK. L. REV. 459 (2000).

80. *Terral v. Brooks*, 194 Ark. 311, 108 S.W.2d 489 (1937).

81. *Id.* at 313, 108 S.W.2d at 491.

82. *Id.* at 316, 108 S.W.2d at 493. Although not cited for the proposition by *Terral*, *Wilson v. Hunter*, 59 Ark. 626, 628, 28 S.W. 419, 419 (1894), also contains the same two contradictory statements and would seem to be the first Arkansas case to do so. *Wilson* cites out-of-state cases for authority.

83. *Watson v. Hardin*, 97 Ark. 33, 132 S.W. 1002 (1910). *Watson*, however, dealt with attempted adverse possession of a life tenant against a reversioner, and not with mistaken intent.

rogation of, and not in conformity with, the right of the true owner [and further], [i]t must be hostile in order to show that it is not held in subordination and subserviency to the title of the owner.”⁸⁴ The meaning of the phrase in these original cases seems simply to distinguish the claimant’s possession from permissive possession.

b. Cases requiring subjective hostile intent

As stated above, the “Maine Doctrine” denies successful adverse possession to the claimant who possesses property with mistaken, or “with good-faith” intent. Under the Maine Doctrine, which arose in connection with boundary cases, where an adverse possessor’s claim was conditional, that is, where the claimant only possessed the land because she thought it was hers and would not have taken possession otherwise, such a claim will be denied for lack of the requisite intent.⁸⁵ *Murdock v. Stillman* is a perfect illustration of the Maine Doctrine.⁸⁶ In *Murdock*, a claimant’s predecessor had built a fence on the neighbor’s property. On direct examination, he testified that he claimed to where his fence was; on cross examination, however, he stated that he intended to claim only what was in his deed and thought that the fence line was correct. The court denied adverse possession, and cited *Wilson v. Hunter* for the rule.⁸⁷ The *Wilson* court, in turn, dealing with a house built twenty inches over the boundary line, stated two rules. First, if a claimant encloses or builds on a neighbor’s property through ignorance of the line and with no intent to claim the property, such possession is not adverse. On the other hand, it would be adverse if she enclosed or built on the land with the belief that it was her own, even though her claim was the result of mistake.⁸⁸ The distinction is a fine one, and is often difficult to prove.

*Shibley v. Hayes*⁸⁹ is worth remarking on in this context. In *Shibley*, a “Mrs. Mary Hayes” had encroached over seventy feet onto an empty neighboring lot. She claimed that she was shown the incorrect line at the time she purchased her own lot.⁹⁰ She sued to enjoin the new owner of the adjoining lot from moving her fence or disturbing her possession and won in the trial court. On appeal, the appellant’s attorney argued the theory that mistaken intent would not suffice for adverse possession. He contended that Mrs. Hayes had so much integrity that she could not possibly have entertained

84. *Id.* at 36, 132 S.W. at 1003 (quoting *Ringo v. Woodruff*, 43 Ark. 469 (1884); *Ellsworth v. Hale*, 33 Ark. 633 (1878)).

85. See *Mannillo v. Gorski*, 255 A.2d 258 (N.J. 1969), for a lengthy discussion of wrongful versus good-faith intent in adverse possession.

86. *Murdock v. Stillman*, 72 Ark. 498, 82 S.W. 834 (1904).

87. *Id.* at 499, 82 S.W. at 834.

88. *Wilson v. Hunter*, 59 Ark. 626, 626, 28 S.W. 419, 419 (1894) (citations omitted) (holding that there was sufficient intent to support adverse possession). For another case citing these two rules, see *Butler v. Hines*, 101 Ark. 409, 142 S.W. 509 (1912) (remanding the case to clarify intent of claimant’s predecessor in title as to whether he knew the fence he built was not on the line).

89. 214 Ark. 199, 215 S.W.2d 141 (1948).

90. *Id.* at 202; see also *Murdock*, 72 Ark. at 498, 82 S.W. at 834.

the intent necessary for hostile possession. In other words, her integrity would cost her adverse possession and all of the use and the enjoyment from the land that she had treated as her own for over nine years.⁹¹

Although the rule denying adverse possession to the mistaken claimant is often cited, there are few published cases that actually apply it.⁹² However, it has been applied with some regularity in opinions designated as “unpublished” by the Arkansas Court of Appeals.⁹³ It is the belief of the authors that many claimants with mistaken intent either claim exclusively under the doctrine of boundary by acquiescence, or claim under both adverse possession and boundary by acquiescence, because of the uncertainty of winning an adverse possession case with mistaken intent. Nonetheless, despite the cases holding that adverse possession cannot bottom on mistaken intent, there are many more cases holding that mistaken intent is no bar to adverse possession.

c. Cases allowing mistaken intent

Of the three approaches, most Arkansas cases seem to fall into this category. For example, in *Reeves v. Metropolitan Trust Co.*, the claimant thought a car axle was the surveyor’s pin and planted a border hedge at the pin.⁹⁴ In reality, the boundary was eleven feet over into the adjoining lot. The claimant mowed and treated the property as his own for twenty years. With the briefest of discussion and no citations to case law, the Arkansas Supreme Court held that Mr. and Mrs. Reeves were adverse possessors.⁹⁵ An additional line of cases holds, with respect to boundary disputes, that the fact that a claimants are “ignorant or mistaken as to the location of the true line does not prevent them from asserting title by adverse possession if they

91. *Shibley*, 214 Ark. at 202. Luckily for Mrs. Hayes, the court ruled that even though she was mistaken, there was sufficient evidence of intent to award the title to her.

92. In addition to *Murdock*, cases citing the rule and denying adverse possession because of mistaken intent include: *Ogle v. Hodge*, 217 Ark. 913, 234 S.W.2d 24 (1950); *Hull v. Hull*, 212 Ark. 808, 205 S.W.2d 211 (1947); *Deweese v. Logue*, 208 Ark. 79, 185 S.W.2d 85 (1945); and *Waters v. Madden*, 197 Ark. 380, 122 S.W.2d 554 (1938).

93. *E.g.*, *Cruse v. Grooms*, 1999 WL 1096120 (Ark. Ct. App. Dec. 1, 1999) (unpublished) (holding no adverse possession where appellant took possession of land under mistaken representation by predecessor as to boundary line); *Hancock v. Ga.-Pac. Corp.*, 1992 WL 223726 (Ark. Ct. App. Sept. 9, 1992) (unpublished) (holding no adverse possession where claimant had signed a permission form but had erected fence on mistaken boundary line); *Lovegrove v. Jones*, 1989 WL 10052 (Ark. Ct. App. Feb. 8, 1989) (unpublished) (holding no adverse possession where, on basis of incorrect survey, neighbor had farmed over the true line for at least thirteen years); *Wandzura v. Kosarek*, 1986 WL 7033 (Ark. Ct. App. June 25, 1986) (unpublished) (holding no adverse possession where fence not on boundary but parties intended to claim only to true line); *Leslie v. Nolen*, 1982 WL 853, (Ark. Ct. App. Oct. 6, 1982) (unpublished) (holding no adverse possession where fence located by mistake as to boundary).

94. *Reeves v. Metro. Trust Co.*, 254 Ark. 1002, 1003, 498 S.W.2d 2, 3 (1973); *see also*, *Barclay v. Tussey*, 259 Ark. 238, 241, 532 S.W.2d 193, 195 (1976) (“[T]he doctrine of adverse possession is intended to protect one who honestly enters into possession of land in the belief that the land is his own.”)

95. *Reeves*, 254 Ark. at 1003, 498 S.W.2d at 3.

held possession with the intention of claiming to the fence line regardless of the location of the true boundary.”⁹⁶

d. Cases ignoring subjective intent

Majority-rule “objective intent” decisions in other states mention the hostility requirement but then qualify it by explaining that hostility is proved by acts and not by objective intent.⁹⁷ More recent Arkansas cases follow this majority rule as well. For example, in *Rye v. Bauman*, during cross examination, a predecessor in possession to the claimant testified that he never claimed more than his deed called for.⁹⁸ The appellant contended that this showed a lack of intent on his part to claim adversely to the true owner. The court stated the “mistaken intent” rule—“if the intent of the disseisor [claimant] is merely to hold to the true line, no adverse possession can arise”—but then stated that intent was to be measured by “the reasonable import of his conduct in the years preceding the litigation,” rather than by “one remark made during the stress of cross-examination.”⁹⁹ This is clearly the “objective intent” approach—intent is proved by conduct.

Dickson v. Young is a court of appeals case that used the objective intent approach.¹⁰⁰ In *Dickson*, the owner built a road across the land that his neighbor claimed originally by deed description. Later, the claimant discovered that one of the corner posts he was claiming from was wrong. He then argued adverse possession, the land having been in his family from 1959. At trial, Dickson admitted that he did not intend to possess the land of another. The trial court ruled against him. On appeal, the court of appeals stated that “it is the claimant’s objective conduct from which his subjective intent to claim the land that he is possessing is derived that is determinative.”¹⁰¹ A statement of the majority “objective intent” rule could not be clearer. The court then examined Dickson’s objective conduct, which consisted of maintaining four gardens, constructing a shed, and mowing, and then ruled that he “maintained the property as his own.”¹⁰²

Of this confused collection of holdings, the *Dickson* court said, “[t]he law of adverse possession, and specifically the intent required, has often been misinterpreted and misapplied. The question of intent becomes one of

96. See, e.g., *Lollar v. Appleby*, 213 Ark. 424, 430, 210 S.W.2d 900, 901 (1948); cf., *Gregory v. Jones*, 212 Ark. 443, 445, 206 S.W.2d 18, 19 (1947) (holding that mistaken intent is acceptable for boundary by acquiescence).

97. See, e.g., *Nome 2000 v. Fagerstrom*, 799 P.2d 304, 310 (Alaska 1990) (explaining that hostility is determined by an objective test that merely asks whether the claimant acted toward the land as if she owns it).

98. *Rye v. Bauman*, 231 Ark. 278, 280, 329 S.W.2d 161, 163 (1959).

99. *Id.* at 280–81, 329 S.W.2d at 163–64; see also *Rindeikis v. Coffman*, 231 Ark. 422, 424, 329 S.W.2d 550, 551 (1959); *Daniel v. City of Ashdown*, 94 Ark. App. 446, 451, 232 S.W.3d 511, 515 (2006); *Hicks v. Flanagan*, 30 Ark. App. 53, 57, 782 S.W.2d 587, 589–90 (1990).

100. 79 Ark. App. 241, 85 S.W.3d 924 (2002).

101. *Id.* at 245, 85 S.W.3d at 926.

102. *Id.* at 246, 85 S.W.3d at 926.

nuance in many cases, with hair-splitting terminology deciding the fate of the possessor's claim. This holds especially true in cases of mistaken boundary."¹⁰³ Indeed, virtually all of the above cases deal with boundaries.

e. Permission

The true owner's rebuttal to the hostility claim is that the claimant was using the land with permission. Permissive use defeats any claim of adverse possession.¹⁰⁴ Of course, the claimant who used with permission yesterday may decide to possess adversely today, but in that case, for the statute to run, the claimant must give actual notice or hold so openly and notoriously so as to raise a presumption of notice.¹⁰⁵ Actions by the claimant that recognize the superior title of the owner, but that are performed after the statute of limitations bars a successful claim, cannot divest a title that has already vested by adverse possession.¹⁰⁶ One such action is an offer by the claimant to purchase the property by the owner. As the court explained in *Baughman v. Foresee*:

[T]he fact that he had to some extent recognized the title of the defendant after the statutory period had elapsed is not conclusive against him for, not being a lawyer, he might have done so in ignorance of the fact that adverse possession for over seven years gave him title, or he might have made the offer to purchase not in recognition of plaintiff's title, but in order to buy his peace, and to avoid litigation.¹⁰⁷

On the other hand, a similar fact was used against the claimant in *Thompson v. Fischer*.¹⁰⁸ In this case, Fischer claimed title to four lots in DeVall's Bluff under the requirements for adverse possession of contiguous property. The trial court found that he had title to and paid taxes on the property contiguous to the four lots. It held that he held the property adversely.¹⁰⁹ However, the Arkansas Supreme Court disagreed. It noted that in 1996, his father, the predecessor in possession, had once stated to Thompson that he did not own the four lots and that he intended to purchase them for taxes at some time in the future.¹¹⁰ This negated any intent to hold against the true owner.¹¹¹ The court did not discuss the possibility that

103. *Id.* at 243, 85 S.W.3d at 925.

104. *McWilliams v. Schmidt*, 76 Ark. App. 173, 182, 61 S.W.3d 898, 905 (2001); *see McCulloch v. McCulloch*, 213 Ark. 1004, 1009, 214 S.W.2d 209, 211 (1948).

105. *Mikel v. Dev. Co.*, 269 Ark. 365, 374, 602 S.W.2d 630, 636 (1980).

106. *Baughman v. Foresee*, 211 Ark. 149, 152, 199 S.W.2d 546, 597 (1947).

107. *Id.*, 199 S.W.2d at 597 (citations omitted).

108. *Thompson v. Fischer*, 364 Ark. 380, 220 S.W.3d 622 (2005).

109. *Id.* at 382, 220 S.W.3d at 624.

110. *Id.* at 385, 220 S.W.3d at 626.

111. *Id.* at 384–85, 220 S.W.3d at 625–26.

Fischer's title had already "ripened" into adverse possession at that time. Fischer claimed that his family had received color of title in 1984.

5. *Exclusive*

Few Arkansas cases discuss exclusivity. It was an issue, however, in *Anderson v. Holliday*, where the claimant, a business, had installed pipes in a ditch and paved it over, making the surface part of its parking lot.¹¹² The owner argued that the claimant's use was not exclusive because the public used the parking lot as well. However, the court ruled that as long as the public's use and the claimant's use are not the same, that public use of land that is adversely possessed does not render the claimant's use non-exclusive.¹¹³ In *Anderson*, the claimant used the land as an owner would, and the public used it merely as licensees or invitees.¹¹⁴

In another case involving undeveloped land where a claimant corporation had enclosed fifteen acres by building a fence over a period of many years but did not regularly enter the property, whereas the owners entered from time to time to "dig small trees and violets," the court held that the corporation's possession was not exclusive and did not interfere with the use and enjoyment of the owner.¹¹⁵

The most difficult cases to prove exclusivity are those where the true owner has used the disputed parcel, as above in the *Choupique* case. A case reaching the opposite result from *Choupique* and awarding adverse possession was *England v. Eaton*.¹¹⁶ In this case, a boundary dispute, the claimant, England, owned land to the east of the disputed strip. He used a building at the eastern end of the strip as a shop, and on the western end he maintained a gravel road (which provided access to the shop), built a gravel parking lot, ran cattle, and, at one point, fenced in some of the property.¹¹⁷ However, the record owner and owner to the west, Eaton, rented out her property. She and her tenants used the gravel road and the parking lot, and she had the western part mowed. After 2006, when England had the land surveyed, he remarked that Eaton was the owner of land where the lot was located.¹¹⁸ The trial court divided ownership of the strip between England and Eaton, awarding her the western part containing the parking lot and part of the road.¹¹⁹ On appeal, the court of appeals awarded it all to England, finding that Eaton and her tenants only used the western portion with England's permission.¹²⁰ A strong dissent argued that England had no right to consent to the record

112. *Anderson v. Holliday*, 65 Ark. App. 165, 172, 986 S.W.2d 116, 120 (1999).

113. *Id.* at 173–74, 986 S.W.2d at 120.

114. *Id.* at 174, 986 S.W.2d at 121.

115. *Choupique Enters., Inc. v. Lansford*, 269 Ark. 832, 836, 601 S.W.2d 237, 239 (1980).

116. *England v. Eaton*, 102 Ark. App. 154, 283 S.W.3d 228 (2008).

117. *Id.* at 155, 283 S.W.3d at 229.

118. *Id.*, 283 S.W.3d at 229.

119. *Id.*, 283 S.W.3d at 229.

120. *Id.* at 156–58, 283 S.W.3d at 230–31.

owner's use. The majority relied on *Anderson*, discussed above, and authority from other states, but the dissent correctly pointed out that *Anderson* involved use by the public, and here the use was by the record owner and her tenants.¹²¹

6. *Common Law Elements of the Court of Appeals*

The common-law elements of adverse possession recited in eighty-nine Arkansas Court of Appeals decisions differ slightly from those of the Arkansas Supreme Court. The court of appeals' elements are "visible, notorious, distinct, exclusive, hostile, and with intent to hold against the true owner," "continuously for more than seven years."¹²² It appears that "visible" is a synonym for "open," insofar as in some opinions, it is used in conjunction with "notorious."¹²³ Likewise, "distinct" is used together with "exclusive."¹²⁴ The first decision of the Court of Appeals to use these elements was *Clark v. Clark*.¹²⁵ It cites *Potlatch Corp. v. Hannegan*, a court of appeals case that contains the supreme court's phrase.¹²⁶ There is no explanation given for the difference. Only thirty-three court of appeals decisions use the supreme court's list of elements.

B. Special Aspects of Adverse Possession

1. *Special Relationships*

a. Life tenants, remaindermen and third parties

A successful adverse possession claimant receives only the estate of the person adversely possessed against. This rule comes into play when third parties adversely possess against life tenants. The facts in *Heustess v. Oswalt* clearly illustrate this rule.¹²⁷ Mary owned a section to the west of her uncle, W.E. She took possession in 1960. Her fence was over the line so that fifteen acres of W.E.'s land was behind her fence. W.E. had passed away in 1955, and his widow, Maude, was in possession when the seven years would have run. Maude did not die until 1968, at which point Matthew, the remainderman, came into possession. Mary asserted that the statute of limitations had run before Maude's death. However, even if an adverse possessor is successful in a claim of adverse possession against a life tenant, the statute resets back to zero at the death of the life tenant. "The statute of limitations could not begin to run against the remainderman until

121. *Id.* at 158–64, 283 S.W.3d at 231–35 (Baker, J., dissenting).

122. *Cleary v. Sledge Props., Inc.*, 2010 Ark. App. 755, at 5, ___ S.W.3d ___, ___. This phrase does not appear in a single Arkansas Supreme Court decision.

123. *Clark v. Clark*, 4 Ark. App. 153, 159, 632 S.W.2d 432, 436 (1982).

124. *Id.*, 632 S.W.2d at 436.

125. *Id.*, 632 S.W.2d at 436.

126. 266 Ark. 847, 849, 586 S.W.2d 256, 257 (1979).

127. 253 Ark. 730, 488 S.W.2d 707 (1973).

the death of the [life tenant].”¹²⁸ Because remaindermen have no possessory right in their real property, this rule makes sense. This rule also holds true with respect to those claiming against reversioners.¹²⁹

On the other hand, where a widow and personal representative claimed an entire tract of her intestate spouse, more than her statutory share, and died two years later devising the property to relatives who immediately conveyed it to a third party, and the third party took and exercised possession for nine years, the descendants of the original decedents lost their rights to recover possession.¹³⁰ All that they had done during the time period was petition to have an inventory of the estate filed before the widow died. They had not sued for possession at any time.¹³¹

A life tenant asserting an adverse possession claim has an uphill battle. A life tenant in possession cannot adversely possess the property without “bringing home” to the remainderman her hostile intent in order to start the statute running.¹³² She is presumed to “hold in subordination to the title conveyed.”¹³³

b. Cotenants

A cotenant, likewise, is presumed to hold for the benefit of all other joint tenants or tenants in common. Possession of one cotenant is the possession of all.¹³⁴ A cotenant cannot establish adverse possession “by the mere act of occupancy.”¹³⁵

Similarly, a cotenant who purchases the property at a tax sale, or purchases it from a stranger to the title who bought it at a tax sale, is in essence redeeming the property and does so for the benefit of all of the cotenants.¹³⁶ The purchasing cotenant is then entitled to contribution from the other cotenants for the amount expended.¹³⁷

For the possession of one cotenant to be adverse to that of the others, knowledge of the adverse claim must be “brought home” to them, either directly or by such acts that notice may be presumed.¹³⁸ The clearest act, of course, is ouster. Ousting a cotenant conveys notice of the intent to adverse-

128. *Id.* at 731, 488 S.W.2d at 708.

129. *Luster v. Arnold*, 249 Ark. 152, 158, 458 S.W.2d 414, 418 (1970).

130. *Scott v. Hill*, 1 Ark. App. 281, 282–85, 614 S.W.2d 690, 691–92 (1981).

131. *Id.*, 614 S.W.2d at 691–92.

132. *Rickett v. O’Dell*, 86 Ark. App. 86, 91, 160 S.W.3d 717, 720 (2004).

133. *Id.*, 160 S.W.3d at 721.

134. *Graham v. Inlow*, 302 Ark. 414, 419, 790 S.W.2d 428, 430 (1990); *Trice v. Trice*, 91 Ark. App. 309, 316, 210 S.W.3d 147, 152 (2005).

135. *Phillips v. Carter*, 222 Ark. 724, 726, 263 S.W.2d 80, 81 (1953); *Jones v. Morgan*, 196 Ark. 1153, 1153, 121 S.W.2d 96, 97 (1938).

136. *Barr v. Eason*, 292 Ark. 106, 109, 728 S.W.2d 183, 185 (1987) (citing *Smith v. Smith*, 210 Ark. 251, 195 S.W.2d 45 (1946)).

137. *Id.*, 728 S.W.2d at 185.

138. *Graham*, 302 Ark. at 419, 790 S.W.2d at 431.

ly possess but may not do so if there are multiple cotenants and only one was ousted by the claimant.¹³⁹

Acts that “bring home” hostile intent to a landlord, remainderman, or cotenant include the claimant delivering a deed purporting to convey fee simple title to a stranger to the deed;¹⁴⁰ such a deed conveys color of title and starts the running of the statute of limitations, assuming that the grantee also pays taxes on the land conveyed. The fact that a cotenant alleged she did not know of the transaction was not considered relevant by the court.¹⁴¹

Short of ouster or conveyance of a fee simple to a stranger, there are no specific actions that guarantee that a court will find possession adverse to cotenants. Several cases have, however, set out a list of factors that courts will consider when deciding whether a cotenant has successfully adversely possessed against her other cotenants. These factors include the following: 1) possession; 2) possession for a long time, e.g., thirty years; 3) payment of taxes; 4) assessment of property in the claimant’s name; 5) the claimant listed as the insurance beneficiary and accepting proceeds; 6) retention of rents and income; 7) completion of improvements; 8) sale of timber; 9) sale of crops; 10) execution of leases; 11) execution of deeds purporting to convey a fee simple; and 12) generally treating the property as the claimant’s own.¹⁴²

c. Landlord-Tenant relationship

In general, a tenant may not adversely possess against a landlord without first surrendering possession.¹⁴³ In the alternative, a tenant who gives the landlord actual notice of her adverse possession or performs acts of such an “open, notorious and hostile character that the landlord must have known of it,” may adversely possess.¹⁴⁴ Where the tenant is responsible for paying property taxes and fails to do so but later purchases the property at a tax sale, the tenant has effectively redeemed the title for the benefit of the landlord, and this action will not cause the statute of limitations for adverse possession to run.¹⁴⁵ One instance in which a tenant did prevail against a landlord was where the tenant adversely possessed contiguous land under color of title (a deed from a predecessor in possession) and proved possession for more than twenty-five years.¹⁴⁶ In another case, a tenant who leased farmland from the landlord up to the year prior to which he purchased the land at a tax sale was held to adversely possess the land (because the tax

139. *Trice*, 91 Ark. App. at 317, 210 S.W.3d at 153.

140. *Marshall v. Gadberry*, 303 Ark. 534, 536, 798 S.W.2d 99, 100 (1990).

141. *Id.*, 798 S.W.2d at 100.

142. *Ueltzen v. Roe*, 242 Ark. 17, 23–24, 411 S.W.2d 894, 897 (1967); *Sherman v. Wallace*, 88 Ark. App. 229, 236, 197 S.W.3d 10, 14 (2004).

143. *Tyler v. Niven*, 194 Ark. 538, 538–40, 108 S.W.2d 893, 894 (1937).

144. *Mo. Pac. R.R. v. Bozeman*, 178 Ark. 902, 902, 12 S.W.2d 895, 896 (1929) (quoting *Gee v. Hatley*, 114 Ark. 376, 376, 170 S.W.2d 72, 75 (1914)).

145. *Baker v. Smith*, 256 Ark. 286, 289, 506 S.W.2d 842, 844 (1974).

146. *Howell v. Baskins*, 213 Ark. 665, 212 S.W.2d 353 (1948).

deed was void) after having remained in possession for the requisite time after the tax sale.¹⁴⁷

d. Claimant purchasing land under executory contract

A claimant purchasing land under an executory contract cannot claim adverse possession against the owner without ceasing all payments and notifying the owner of the intent to claim adversely, because the claimant came into possession with the permission of the owner.¹⁴⁸ Otherwise, it would be easy to execute a contract, renege on payment, and later claim adverse possession.

e. Mortgagors and Mortgagees

Adverse possession may affect the rights of mortgagors and mortgagees in two ways: first, a mortgagor may attempt to adversely possess against the mortgagee, and second, a “mortgagee in possession” may attempt to claim against the mortgagor. As with land under an executory contract, a mortgagor cannot succeed at adverse possession unless, in addition to fulfilling all other conditions, she proves continuous adverse possession.¹⁴⁹ The foreclosure sale starts the running of the statute.¹⁵⁰

Second, a void foreclosure sale produces a “mortgagee in possession,” when either the mortgagee or her grantee takes possession of the foreclosed property. At common law, if the foreclosure sale is void, when the mortgagee or her successor in title enters into possession afterward, nonetheless the equity of redemption period continues, and the mortgagee will not hold adversely against the dispossessed mortgagor until she gives actual notice.¹⁵¹ However, the same case stating this proposition ruled that a grantee from the mortgagee who promptly moved in after the sale, cleared and cultivated the land and tore down the existing house and built another, and who remained in exclusive possession for nineteen years without being contacted by the heirs of the mortgagor successfully acquired title by adverse possession.¹⁵²

2. *Adverse Possession of Timber Rights*

Arkansas has not ruled definitively on whether adverse possession of timber rights is possible. In *Bonds v. Carter*, the Arkansas Supreme Court

147. *Sims v. Petree*, 206 Ark. 1023, 178 S.W.2d 1016 (1944).

148. *Tillar v. Clayton*, 76 Ark. 405, 405, 88 S.W. 972 (1905); *Cleary v. Sledge Props., Inc.*, 2010 Ark. App. 755, at 7, ___ S.W.3d ___, ___.

149. *Moore v. Anthony-Jones Lumber Co.*, 252 Ark. 883, 885–86, 481 S.W.2d 707, 708–09 (1972).

150. *Id.*, 481 S.W.2d 707, 708–09.

151. *McFarland v. Miller*, 211 Ark. 962, 965, 203 S.W.2d 404, 406 (1947).

152. *Id.* at 966, 203 S.W.2d at 406.

was faced with this question.¹⁵³ The plaintiff's predecessor in title had conveyed the timber rights for a period of one hundred years and seven months before he sold the surface estate to the plaintiff. The timber deed was recorded six months before the sale to the plaintiff. The plaintiff paid all real and personal property taxes on the property from 1981 through 1998, including the separately assessed timber taxes, and then claimed adverse possession of the timber rights.¹⁵⁴ In Arkansas, a timber deed is a *profit à prendre*.¹⁵⁵ A profit is not an estate in land, but it is the right to enter the land of another and take the profits of the soil, such as game, fish or timber.¹⁵⁶ Profits are, like easements, incorporeal hereditaments or servitudes, and may be abandoned.¹⁵⁷ A number of states have ruled timber deeds to be profits.¹⁵⁸ From a theoretical perspective, one would speculate that because a profit is not an estate, it may not be adversely possessed; although, similar to an easement, it could be acquired or terminated by prescription.

On a related issue, Arkansas has stated that to adversely possess land subject to another's timber rights, there must be actual adverse possession, that is, cutting of the timber, because the presumption is that the surface owner's right is subordinate and not adverse.¹⁵⁹

3. *Adverse Possession of Mineral Rights*

When mineral rights have been severed, the owner of the surface rights must make a hostile act to adversely possess them. Mere nonuse by the mineral rights owner will not cause mineral rights to be abandoned.¹⁶⁰ Hostile action would be opening mines or drilling wells and producing minerals for at least seven continuous years.¹⁶¹ Thus, the statute of limitations for the adverse possession of mineral rights will not run until the claimant actually opens mines or drills wells and begins production.¹⁶² The law is similar with respect to a claimant adversely possessing the surface rights and intending to adversely possess severed mineral rights as well.¹⁶³ As two commentators have characterized it, the adverse possession of mineral rights in Arkansas is "darn near impossible."¹⁶⁴

153. *Bonds v. Carter*, 348 Ark. 591, 75 S.W.3d 192 (2002).

154. Timber rights are assessed separately from the surface estate, and the sale of either for nonpayment of taxes does not affect the rights of the holder of the other. ARK. CODE ANN. § 26-26-1109 (LEXIS Supp. 2009).

155. *Bonds*, 348 Ark. at 599, 75 S.W.3d at 197.

156. 25 AM. JUR. 2D *Easements and Licenses* § 3 (2002).

157. *STOEBUCK & WHITMAN*, *supra* note 1, § 8.1.

158. *See, e.g., Layman v. Ledgett*, 89 Wash. 2d 906, 911, 577 P.2d 970, 972 (1978).

159. *Bonds*, 348 Ark. at 600, 75 S.W.3d at 197 (2002) (citing *Collins v. Bluff City Lumber Co.*, 86 Ark. 202, 204, 110 S.W. 806, 806 (1908)).

160. *Bodcaw Lumber v. Goode*, 160 Ark. 48, 61, 254 S.W.345, 349 (1923).

161. *Taylor v. Scott*, 285 Ark. 102, 103-04, 685 S.W.2d 160, 161 (1985).

162. *Garvan v. Potlatch Corp.*, 278 Ark. 414, 417, 645 S.W.2d 957, 959 (1983).

163. *Skelly Oil Co. v. Johnson*, 209 Ark. 1107, 1121-22, 194 S.W.2d 425, 432 (1946).

164. Thomas A. Daily & W. Christopher Barrier, *Well, Now, Ain't That Just Fugacious!?: A Basic Primer on Arkansas Oil and Gas Law*, 29 U. ARK. LITTLE ROCK L. REV. 211, 222 (2007). This article contains excellent coverage of not only the adverse possession of miner-

4. *Adverse Possession and Watercourses*

Whereas land under non-navigable and navigable, man-made watercourses (lakes and rivers) belong to the riparian owners, the law is different with respect to navigable, non-man-made watercourses. The state owns the land under navigable watercourses up to the mean high-water mark or high-tide line in trust for the public. This is the public trust doctrine. The contours of shores and riverbanks may change over time, slowly—by accretion—or quickly—by avulsion. Avulsion may be caused naturally, by a flood or earthquake, or by human actions such as building a dam or a levee. When an artificial means causes continual flooding of lands for seven years without their owners' consent, at the end of that time, the state has title to the flooded land by adverse possession.¹⁶⁵

C. The Current Statutes

The current Arkansas adverse possession statutes that are the subject of this article read as follows:

Section 18-11-102

Unimproved and unenclosed land shall be deemed and held to be in possession of the person who pays the taxes thereon if he or she has color of title thereto, but no person shall be entitled to invoke the benefit of this section unless he or she, and those under whom he or she claims, shall have paid the taxes for at least seven (7) years in succession.¹⁶⁶

Section 18-11-103

Payment of taxes on wild and unimproved land in this state by any person or his or her predecessor in title for a period of fifteen (15) consecutive years shall create a presumption of law that the person, or his or her predecessor in title, held color of title to the land prior to the first payment of taxes made as stated and that all the payments were made under color of title.¹⁶⁷

Section 18-11-106

al rights but also the current status of their tax assessment and foreclosure. In 2009, the General Assembly made tax foreclosure on mineral rights even more difficult by setting the taxable value of nonproducing mineral rights at zero. ARK. CODE ANN. § 26-26-1110(c) (LEXIS Supp. 2009).

165. *State v. Hatchie Coon Hunting & Fishing Club, Inc.*, 372 Ark. 547, 555, 279 S.W.3d 56, 61–62 (2008) (citing *State ex rel. Thompson v. Parker*, 132 Ark. 316, 321, 200 S.W. 1014, 1016 (1917)).

166. ARK. CODE ANN. § 18-11-102 (LEXIS Supp. 2009).

167. *Id.* § 18-11-103 (LEXIS Repl. 2003).

(a) To establish adverse possession of real property, the person, and those under whom the person claims, must have actual or constructive possession of the real property being claimed and have either:

(1)(A) Held color of title to the property for a period of at least seven (7) years, and during that time have paid ad valorem taxes on the property.

(B) For purposes of this subdivision (a)(1), color of title may be established by the person claiming adversely to the true owner by paying the ad valorem taxes for a period of at least seven (7) years for unimproved and unenclosed land or fifteen (15) years for wild and unimproved land, provided the true owner has not also paid the ad valorem taxes or made a bona fide good faith effort to pay the ad valorem taxes which were misapplied by the state and local taxing authority; or

(2) Held color of title to real property contiguous to the property being claimed by adverse possession for a period of at least seven (7) years, and during that time paid ad valorem taxes on the contiguous property to which the person has color of title.

(b)(1) The requirements of subsection (a) of this section with regard to payment of ad valorem taxes shall not apply to a person or entity exempt from the payment of ad valorem taxes by law.

(2) For the person or entity exempt from the payment of ad valorem taxes to establish adverse possession of real property, the person or entity must have:

(A) Actual or constructive possession of the property being claimed and held color of title to the property for a period of at least seven (7) years; or

(B) Actual or constructive possession of the property being claimed and held color of title to the real property contiguous to the property being claimed by adverse possession for a period of at least seven (7) years.

(c) The requirements of this section are in addition to all other requirements for establishing adverse possession.

(d)(1) This section shall not repeal any requirement under existing case law for establishing adverse possession, but shall be supplemental to existing case law.

(2) This section shall not diminish the presumption of possession of unimproved and unenclosed land created under § 18-11-102 by payment of taxes for seven (7) years under color of title, or the presumption of color of title on wild and unimproved land created

under § 18-11-103 by payment of taxes for fifteen (15) consecutive years.¹⁶⁸

D. Statutory Requirements—Noncontiguous Tracts

A always wanted to live in a forest, surrounded by nature. One day A quit her job, bought an ax, and went to live in the forest north of Lake Maumelle on land owned by Deltic Timber. A cut down a few trees, built a log cabin and lived happily until ten years later when she was discovered by Deltic employees. A showed them her calendar, with ten years marked off. Is A a successful adverse possessor of the land?

Prior to 1995, to adversely possess land in Arkansas, the claimant was required to prove possession fulfilling the common law elements discussed above of actual, open, notorious, continuous, hostile, and with the intent to claim against the owner.¹⁶⁹ In addition, because proving possession of unimproved and unenclosed land is difficult, payment of taxes for seven continuous years under color of title was deemed to be possession.¹⁷⁰ One line of cases designated such payment of taxes under color of title as conferring “title by limitation,” or “investiture of title.”¹⁷¹ Similarly, payment of taxes for fifteen consecutive years on wild and unimproved lands raised a presumption of color of title.¹⁷²

In 1995, the Arkansas General Assembly significantly changed the requirements for adverse possessors such as A, in the above hypothetical, by adding the requirement of color of title, payment of taxes, and a showing that the true owner had not paid taxes. Parties whose adverse possession vested prior to 1995 need only prove the original common law elements.¹⁷³

If the tract claimed is not contiguous to one already owned by the claimant, the requirements are:

1. Actual or constructive possession of the property.
2. Color of title.
3. Payment of ad valorem taxes.
4. Having or doing all of the above for seven continuous years.

168. *Id.* § 18-11-106 (LEXIS Supp. 2009).

169. *Cleary v. Sledge Props.*, 2010 Ark. App. 755, at 5–6, ___ S.W.3d ___, ___.

170. ARK. CODE ANN. § 18-11-102 (LEXIS Supp. 2009).

171. *Buckner v. Sewell*, 216 Ark. 221, 230, 225 S.W.2d 525, 531 (1949); *Burbridge v. Bradley Lumber Co.*, 214 Ark. 135, 146, 215 S.W.2d 710, 718 (1948); *Appollos v. Int'l Paper Co.*, 34 Ark. App. 205, 207, 808 S.W.2d 786, 787 (1991). In fact, in *Jones v. Barger*, the court of appeals went so far as to say that the doctrine of “title by limitation” was unaffected by the 1995 statutory amendments to the law of adverse possession. 67 Ark. App. 337, 341 n.1., 1 S.W.3d 31, 34 (1999). This position would seem to be incorrect and has not been followed by any subsequent decisions.

172. ARK. CODE ANN. § 18-11-103 (LEXIS Repl. 2003).

173. *Schrader v. Schrader*, 81 Ark.App. 343, 348, 101 S.W.3d 873, 878 (2003).

5. Nonpayment of ad valorem taxes by the true owner for the same seven years.

A closer examination of each of these requirements is in order.

1. *Actual or Constructive Possession.*

Although Arkansas Code section 18-11-106 requires actual or constructive possession, “actual” is also one of the common law elements of adverse possession, and is discussed in depth above.¹⁷⁴ This section, therefore, deals with the Arkansas statute that confers possession on one who has paid taxes on wild, unimproved, or unenclosed property, and with the doctrine of “constructive possession.”

- a. Wild, unimproved and unenclosed property

Wild, unimproved, and unenclosed property is property that is essentially in a “state of nature.” It is not property that is fenced, cultivated, or located on a city lot where a house has burned down, and the property has been leveled.¹⁷⁵ The more developed a tract of property is the easier it is to tell if there is possession. Where property is wild and unimproved, there may be little or no evidence of possession. Thus Arkansas Code section 18-11-102 states that if the property is “unimproved and unenclosed,” payment of taxes for seven years by one holding color of title is “deemed” to be possession.¹⁷⁶ Arkansas Code section 18-11-102 deals with “unimproved and unenclosed” property, and Arkansas Code section 18-11-103 confers a presumption of color of title on a possessor of “wild and unimproved” property who has paid taxes long enough,¹⁷⁷ but the Arkansas Supreme Court says that these two descriptions apply to exactly the same type of property.¹⁷⁸ The statute should be amended so that constructive possession and color of title both apply to “wild, unimproved and unenclosed” property.¹⁷⁹

- b. Constructive possession

Constructive possession arises in several contexts. First, if a claimant has color of title to a larger tract (and pays taxes on it), but only actually possesses a smaller portion of the tract, the claimant will be deemed to adversely possess the whole tract.¹⁸⁰ Similarly, if a claimant actually possesses

174. See *supra* Part III.A.1 and accompanying text.

175. *Schuman v. Martin*, 259 Ark. 4, 5, 531 S.W.2d 26, 27–28 (1975); *Jones*, 67 Ark. App. at 343, 1 S.W.3d at 36.

176. ARK. CODE ANN. § 18-11-103 (LEXIS Supp. 2009).

177. *Id.* § 18-11-103 (LEXIS Supp. 2003).

178. *Schmeltzer v. Scheid*, 203 Ark. 274, 277, 157 S.W.2d 193, 195 (1941).

179. See *infra* App. “A,” for the proposed text of the amendments.

180. *Petrus v. Nature Conservancy*, 330 Ark. 722, 726, 957 S.W.2d 688, 689 (1997); *St. Louis Union Trust Co. v. Hillis*, 207 Ark. 811, 813, 182 S.W.2d 882, 883 (1944); *Steele v. Blankenship*, 2010 Ark. App. 86, at 13, ___ S.W.3d ___, ___; *Clark v. Clark*, 4 Ark. App.

only part of a larger enclosed tract, her constructive possession of the whole enclosed tract qualifies for adverse possession as well.¹⁸¹ However, if the claimant has neither color of title nor an enclosure, she is limited to the area over which she has exercised actual possession.¹⁸²

Where the claimant's only action was to place stakes at the four corners of a field, and the true owner's uncle first planted row crops and later cut hay on the property, the court stated that even if the true owner's actions amounted only to constructive possession, they still were superior to the act of placing the stakes.¹⁸³

2. *Color of Title*

The color of title requirement was added in 1995.¹⁸⁴ Persons claiming adverse possession of noncontiguous property must have color of title for at least seven years.

Color of title is not, in law, title at all. It is a void paper, having the semblance of a muniment of title, to which, for certain purposes, the law attributes certain qualities of title. Its chief office or purpose is to define the limits of the claim under it.

Nevertheless, it must purport to pass title.¹⁸⁵

Examples of color of title include a warranty deed purporting to convey title originally deraining from a tax redemption deed that quite possibly was void,¹⁸⁶ a deed conveying property that had already been conveyed three years prior,¹⁸⁷ and a deed from a cotenant purporting to convey a fee simple.¹⁸⁸ A tax deed that was void because it conveyed land owned by the United States, and thus not subject to taxation, nonetheless constituted color of title.¹⁸⁹ A deed from the trustee at a power of sale foreclosure is color of title.¹⁹⁰

153, 160, 632 S.W.2d 432, 437 (1982).

181. Kieffer v. Williams, 240 Ark. 514, 517, 400 S.W.2d 485, 487 (1966); Boyd v. Roberts, 98 Ark. App. 385, 391, 255 S.W.3d 895, 899 (2007).

182. DeClerk v. Johnson, 268 Ark. 868, 870, 596 S.W.2d 359, 360 (1980); Clark v. Clark, 4 Ark. App. 153, 159, 632 S.W.2d 432, 436–37 (1982).

183. Boyd v. Meador, 10 Ark. App. 5, 11, 660 S.W.2d 943, 946 (1983).

184. Act of Mar. 24, 1995, No. 776, 1995 Ark. Acts 776 (codified at ARK. CODE ANN. § 18-11-106 (LEXIS Supp. 2009)).

185. Jones v. Barger, 67 Ark. App. 337, 1 S.W.3d 31 (1999) (quoting Weast v. Hereinafter Described Lands, 33 Ark. App. 157, 803 S.W.2d 565 (1991)).

186. Bratton v. Wilson, 2009 Ark. App. 126, at 5, 2009 WL 476071, at *2–3 (unpublished). This unpublished opinion contains one of the lengthier discussions of color of title.

187. Jones, 67 Ark. App. at 344, 1 S.W.3d at 36.

188. Marshall v. Gadberry, 303 Ark. 534, 536, 798 S.W.2d 99, 100 (1990); Welder v. Wiggs, 31 Ark. App. 163, 167, 790 S.W.2d 913, 915 (1990).

189. Horn v. Blaney, 268 Ark. 885, 887, 597 S.W.2d 109, 110 (1980).

190. Buckner v. Sewell, 216 Ark. 221, 229, 225 S.W.2d 525, 530 (1949).

However, a deed purporting to pass title but that is void on its face cannot be color of title. For example, a deed with an indefinite legal description is not color of title.¹⁹¹ Thus, while a tax deed is color of title,¹⁹² a tax deed with an indefinite legal description would not constitute color of title. A deed with a legal description that can be construed to be reasonable, however, such that land can be located with the description, is not void on its face.¹⁹³ In *Belcher v. Stone*, the appellants had purchased their property in 1988 with a description and survey that the court stated indicated that they were “owners of the disputed tract.”¹⁹⁴ The appellee claimed superior title by virtue of a property description that had appeared unchanged in his chain of title back to 1910. Appellee argued that his deed gave him color of title. Appellants argued that the description was indefinite and uncertain, and therefore void. However, a surveyor was able to locate the tract from the description, and the court found that the deed did constitute color of title, which, coupled with possession and maintenance of a fence, was sufficient proof of adverse possession.¹⁹⁵

Nor can a claimant successfully prove color of title when the claimant has forged a deed or will or has actual knowledge of her lack of title.¹⁹⁶ The most recent appellate decision treating color of title in the most detail was unfortunately not “published” officially.¹⁹⁷ In *Bratton v. Wilson*, the claimant’s predecessor in title had redeemed his property from the state after a tax sale and received a redemption deed. Seven years later, he sold the land to the claimant, conveying a warranty deed. The opposing party argued that the tax deed could not constitute color of title, and it may have been void on its face because of an indefinite legal description. But the court did not have to answer that question, because it ruled that the warranty deed constituted color of title.¹⁹⁸

Unsuccessful claims of color of title have been found with respect to a handwritten notation on a plat,¹⁹⁹ a certificate of purchase issued at a tax sale,²⁰⁰ and a contract for the sale of land.²⁰¹

191. *Darr v. Lambert*, 228 Ark. 16, 20, 305 S.W.2d 333, 335 (1957); *Belcher v. Stone*, 67 Ark. App. 256, 259–60, 998 S.W.2d 759, 761 (1999). For example, deeds containing indefinite “part” descriptions are invalid. *See, e.g., Higginbottom v. Higginbottom*, 247 Ark. 694, 447 S.W.2d 149, 152 (1969).

192. *Thorne v. Magness*, 34 Ark. App. 39, 44, 805 S.W.2d 95, 97 (1991).

193. *Belcher*, 67 Ark. App. at 259–60, 998 S.W.2d at 761.

194. *Id.* at 259, 998 S.W.2d at 761.

195. *Id.* at 260–61, 998 S.W.2d at 761–62.

196. *Weast v. Hereinafter Described Lands*, 33 Ark.App. 157, 159, 803 S.W.2d 565, 566 (1991).

197. *Bratton v. Wilson*, 2009 Ark. App. 126, 2009 WL 476071 (unpublished).

198. *Id.* at 5–6, 2009 at *5–6.

199. *Rio Vista, Inc. v. Miles*, 2010 Ark. App. 190, at 5, ___ S.W.3d ___, ___. “The handwritten notation was an interpretation of the boundary line, not a description of the property conveyed.” *Id.*

200. *Thorne v. Magness*, 34 Ark. App. 39, 44, 805 S.W.2d 95, 97 (1991). The certificate of purchase is replaced by a deed from the Commissioner of State Lands after the statutory period for redemption has expired.

201. *Willm v. Dedman*, 172 Ark. 783, 787, 290 S.W.361, 363 (1927).

As stated above, Arkansas Code section 18-11-103 confers a presumption of color of title on the claimant who pays taxes on wild, unimproved, and unenclosed property for fifteen consecutive years.²⁰² This constructive color of title relates back to the beginning of the fifteen-year period.²⁰³ The 1995 amendments clarified that such a payment will not be effective if the true owner either pays taxes or makes a good-faith effort to pay taxes during this time period.²⁰⁴ Similarly, payment of taxes on wild, unimproved, and unenclosed property by one with color of title for seven years confers constructive possession.²⁰⁵

The color of title requirement has served to reduce claims of adverse possession of noncontiguous property, as have the requirements of payment of taxes by the claimant and nonpayment by the true owner. The color of title requirement infers by necessity good faith, as one cannot create her own color of title—to do so would be fraud.

3. *Payment of Property Taxes*

Requiring payment of property, or *ad valorem*, taxes discourages would-be claimants and encourages tax payment. Problems can arise, however, if the true owner never receives the tax bill or believes that he is paying the taxes all along, and it turns out that he has been paying for some other tract. To meet this requirement, the taxes must be paid over the seven or fifteen-year period; simply purchasing the property at a tax sale and paying back taxes at that time does not fulfill the statutory requirement.²⁰⁶ A claimant following a non-tax-paying entity in possession cannot “tack” her years onto the years the non-tax-paying entity was in possession, but must start over.²⁰⁷

In 2005, the General Assembly amended Arkansas Code section 18-11-106 by inserting a new (b), dealing with tax-exempt persons or entities and relieving them of the requirement of paying taxes. Typically, persons and entities are exempt from property taxes on land used for churches, cemeteries, school buildings, libraries and buildings and grounds used for public charity.²⁰⁸

In *Moore v. Dunsworth*, the claimants purchased a portion of a five-acre tract in question from Jose, one of the heirs of the decedent owner.²⁰⁹ The property had never gone through probate, and several of the heirs lived out of state. Three of these heirs quieted title in their names, paying back

202. ARK. CODE ANN. § 18-11-103 (LEXIS Repl. 2003).

203. *Id.*

204. *Id.* § 18-11-106(a)(1)(B) (LEXIS Supp. 2009).

205. *Id.* § 18-11-102 (LEXIS Supp. 2009).

206. *Burbridge v. Bradley Lumber Co.*, 214 Ark. 135, 143, 215 S.W.2d 710, 716 (1948).

207. *Kelley Trust Co. v. Lundell Land & Lumber Co.*, 159 Ark. 218, 222–23, 251 S.W. 680, 681 (1923); *Hunter v. Robinson*, 73 Ark. App. 178, 40 S.W.3d 337, 340 (2001).

208. ARK. CONST., art. XVI, § 5.

209. *Moore v. Dunsworth*, 2010 Ark. App. 446, at 1, 2010 WL 2103533, at *1.

taxes from 1994 through 2000, and then paying all taxes since.²¹⁰ The claimants moved two trailers onto the property around 1999, and argued that because homesteads receive a \$350 tax credit, they should fall under the tax-exempt exception. They had also unsuccessfully tried to change the assessment over to their names.²¹¹ On appeal, the court of appeals ruled that even if the claimants had received the tax credit, they did not qualify under the statute because the heirs had paid property taxes and the claimants had not, despite occupying the property.²¹²

E. Statutory Requirements—Contiguous Tracts

Adversely claimed tracts that are contiguous to land already owned by the claimant are subject to different statutory requirements. The common-law requirements still apply, but the claimant need only show “color of title” and taxes paid with respect to his property owned and not the adjacent property claimed. It makes sense not to require a showing of taxes paid on land that is usually less than a legally described tract, because the assessor’s office taxes land by parcels, and typically, parcels coincide (or should coincide) with legal descriptions on deeds, be they lots on a plat or survey descriptions. However, the color of title requirement is an error and should be amended.

1. *The Mistaken Requirement of Color of Title*

Color of title is a piece of paper that transfers no title at all, but in virtually all contiguous adverse possession cases, the adverse possession claimant has good title to the property adjacent to that being claimed. Unfortunately, this misuse of the phrase “color of title” in contiguous adverse possession cases has not been discussed by any commentators or courts. Nonetheless, it is a flaw in the statute and should be amended. It leads to such errors as a trial court stating of a claimant owning property and claiming contiguous property, “it is undisputed that the Robertses had color of title to their property,” when in fact the Robertses had *title* to their property.²¹³

What should the requirement be? The statute could require “title” to the property contiguous to that being claimed. However, consider the situation, albeit uncommon, of Carol Claimant who is claiming both a noncontiguous tract (“Blackacre”) and a strip along the side because, let us say, the fence line on the eastern side of Blackacre is actually ten feet over on her neighbor Bob’s side. Carol would have color of title (to Blackacre) and would have paid taxes (on Blackacre). We will also assume, and this is most likely true, that Bob has not paid the taxes on Carol’s Blackacre for the seven years in question. Requiring Carol to have “title” to Blackacre to also claim the ten-foot-wide strip will preclude a successful claim. However,

210. *Id.* at 1, 2010 WL 2103533, at *1.

211. *Id.*, 2010 WL 2103533, at *1.

212. *Id.*, 2010 WL 2103533, at *1.

213. *Boyd v. Roberts*, 98 Ark. App. 385, 387, 255 S.W.3d 895, 896 (2007).

requiring “title or color of title” will enable such claims. Thus, the authors propose “title or color of title” to be the new requirement for contiguous claims.²¹⁴

2. Interpretations of “Contiguous”

Several decisions have dealt with the meaning of “contiguous.” Two tracts separated by a road are not contiguous for purposes of the adverse possession statute.²¹⁵ Similarly, a claimed strip separated from the owned parcel by a navigable river is not contiguous by definition.²¹⁶ On the other hand, where western neighbors claimed a strip to the east of a fence that a survey showed was theirs, but there was a further “gap” between the strip and the eastern neighbor’s property that did not appear on either’s deed, the court of appeals has held that the eastern neighbor can successfully claim adverse possession of a contiguous parcel of both the gap and the neighbor’s land further to the west.²¹⁷

IV. BOUNDARY BY ACQUIESCENCE

In addition to adverse possession, the law also recognizes that it may be equitable to fix boundary lines that are agreed to by the parties. The doctrine of boundary by agreement fixes the boundary if the parties expressly agree to recognize a boundary when there is some uncertainty or disagreement about the true boundary.²¹⁸ The doctrine of boundary by acquiescence fixes the boundary when the parties tacitly agree to recognize a boundary other than the true surveyed boundary.²¹⁹

Adverse possession occurs when one party takes and occupies another’s property in a “hostile” manner.²²⁰ Boundary by acquiescence and boundary by agreement are essentially the opposite of adverse possession. Instead of hostile intent, these doctrines require the parties to mutually agree and recognize the boundary.²²¹ The required intent is not to “take”—but to “agree.”²²²

Boundary by acquiescence is distinguished from boundary by agreement. Boundary by agreement requires an express written or oral agreement to establish the boundary, rather than the mere actions of the parties over a long period of time establishing the boundary.²²³ Boundary by agreement requires four elements: “(1) there must be an uncertainty or dispute about the boundary line; (2) the agreement must be between the adjoining lan-

214. See *infra* App. “A” for the full text of the proposed adverse possession statute.

215. *Patrick v. McSperitt*, 64 Ark. App. 310, 983 S.W.2d 455 (1998).

216. *Rio Vista, Inc. v. Miles*, 2010 Ark. App. 190, at 8, ___ S.W.3d ___, ___.

217. *Roberts v. Boyd*, 94 Ark. App. 345, 230 S.W.3d 301, 304 (2006).

218. *Lammey v. Eckel*, 62 Ark. App. 208, 211, 970 S.W.2d 307, 309 (1998).

219. *Rabjohn v. Ashcraft*, 252 Ark. 565, 570, 480 S.W.2d 138, 141 (1972).

220. *Fulkerson v. Van Buren*, 60 Ark. App. 257, 260, 961 S.W.2d 780, 782 (1998).

221. *Walker v. Walker*, 8 Ark. App. 297, 299, 651 S.W.2d 116, 117 (1983).

222. See, e.g., *Rabjohn*, 252 Ark. at 570, 480 S.W.2d at 141.

223. *Lammey*, 62 Ark. App. at 211, 970 S.W.2d at 309.

downers; (3) the line fixed by the agreement must be definite and certain; and (4) there must be possession following the agreement.”²²⁴ Boundary by agreement is effective immediately upon the agreement and does not require the passage of time.²²⁵

The following portion of this article will examine the doctrine of boundary by acquiescence, which is harder to determine than boundary by agreement because the theory is premised on a tacit, rather than an explicit, agreement. Boundary by acquiescence requires three key elements: 1) a tacit agreement between the parties;²²⁶ 2) recognition of the boundary for a long period of time;²²⁷ and 3) a fixed line that is definite and certain.²²⁸ Boundary by acquiescence does not require a prior dispute between the parties and does not require adverse usage of the land up to the fence.²²⁹ Boundary by acquiescence does not require uncertainty as to the true location of the boundary line.²³⁰ In boundary by acquiescence, it is irrelevant whether one or both parties held a mistaken belief that the recognized boundary was in fact the true boundary.²³¹

A. A Tacit Agreement Between the Parties

Boundary by acquiescence requires a tacit agreement by the parties to recognize a fence or other monument as the dividing line between the tracts.²³² The agreement cannot be unilateral because the recognition of the boundary line must be mutual.²³³ However, silence can be interpreted as agreement.²³⁴

A boundary line by acquiescence is inferred from the landowners’ conduct over many years implying the existence of an agreement about the location of the boundary line; in such cir-

224. *Id.*; see also *Miller v. Neil*, 2010 Ark. App. 555, ___ S.W.3d ___, *Bramlett v. Brumble*, 2003 WL 21278279, at *1 (Ark. Ct. App. June 4, 2003) (unpublished); *McWilliams v. Schmidt*, 76 Ark. App. 173, 181, 61 S.W.3d 898, 905 (2001).

225. *Rabjohn*, 252 Ark. at 570, 480 S.W.2d at 141.

226. *Thurkill v. Wood*, 2010 Ark. App. 319, at 2, ___ S.W.3d ___, ___.

227. *Id.*; ___ S.W.3d at ___.

228. *Follett v. Fitzsimmons*, 103 Ark. App. 82, 86, 286 S.W.3d 742, 746 (2008).

229. *Kittler v. Phillips*, 246 Ark. 233, 237, 437 S.W.2d 455, 456–57 (1969); *Thurkill*, 2010 Ark. App. 319, ___ S.W.3d ___, *Barnett v. Gomance*, 2010 Ark. App. 109, ___ S.W.3d ___.

230. *Charles R. Griffith Farms, Inc. v. Grauman*, 2009 Ark. App. 515, at 6, ___ S.W.3d ___, ___.

231. *Gregory v. Jones*, 212 Ark. 443, 445, 206 S.W.2d 18, 19 (1947); cf. *Hamlin v. Niedner*, 955 A.2d 251, 254 (Me. 2008) (discussing Maine’s rule that boundary by acquiescence cannot be established if the parties mistakenly believed the boundary line to be the true boundary).

232. *Thurkill*, 2010 Ark. App. 319, at 2, ___ S.W.3d at ___.

233. *Chambliss v. Watts-Sanders*, 2008 WL 241288, at *2 (Ark. Ct. App. Jan. 30, 2008) (unpublished).

234. *Tull v. Ashcraft*, 231 Ark. 928, 929, 333 S.W.2d 490, 491 (1960); *Boyster v. Shoemaker*, 101 Ark. App. 148, 152, 272 S.W.3d 139, 143 (2008).

cumstances, the adjoining owners and their grantees are precluded from claiming that the boundary so recognized and acquiesced in is not the true one, although it may not be.²³⁵

Although neither the mere existence of a fence nor one party's subjective belief that a fence is the boundary line will sustain a finding of acquiescence, express recognition or agreement between the parties is not necessary. Tacit acceptance will suffice, and silent acquiescence is sufficient where mutual recognition of the boundary line can be inferred from the conduct of the parties over a period of years.²³⁶

However, voicing objections to the use of the disputed property should be sufficient to refute the requirement that there be mutual consent to the line because an objection implies lack of consent (though objecting after many years may not be sufficient, because the new boundary line may have already vested because of the preceding years of silence).²³⁷

One of the major recurring issues in Arkansas's case law is whether a fence originally constructed for a purpose other than marking a boundary may become the foundation for a tacit agreement if the parties at some point in the future act like the fence is the boundary. Farmers and other landowners often erect "fences of convenience" to contain livestock or serve other purposes unrelated to marking boundaries. Over time, however, the adjoining landowners (or their successors) may begin to treat these fences of convenience like a boundary line.

The cases are clear that "the fact that a landowner puts a fence inside his boundary line does not mean that he is acquiescing in the fence as the boundary, thereby losing title to the strip on the other side."²³⁸ However, the cases are equally clear that just because a fence was originally built to be a fence of convenience, it does not preclude the fence from later becoming a boundary line to be acquiesced to.²³⁹

The key question often becomes the intent of the parties with regard to the fence line. As stated by the Arkansas Supreme Court, "The basic question is one of intention: Did the adjoining landowners mean to recognize the fence as the boundary?"²⁴⁰ Because boundary by acquiescence requires mutual tacit agreement to recognize the boundary, it seems logical that a fence of convenience can never morph into a boundary if at least one of the par-

235. *Thurkill*, 2010 Ark. App. 319, at 2, ___ S.W.3d at ____.

236. *Id.*, ___ S.W.3d at ____.

237. *Erler v. Curbow*, 1995 WL 311532, at *4 (Ark. Ct. App. May 10, 1995) (holding that a boundary line was not acquiesced to when one of the parties objected on several occasions to the other party using the disputed land).

238. *Robertson v. Lees*, 87 Ark. App. 172, 182, 189 S.W.3d 463, 470 (2004).

239. *Camp v. Liberatore*, 1 Ark. App. 300, 302, 615 S.W.2d 401, 403 (1981).

240. *Fish v. Bush*, 253 Ark. 27, 29, 484 S.W.2d 525, 527 (1972).

ties still considers the fence to just be a fence of convenience with no further meaning attached.²⁴¹

The problem manifests itself when one party considers the fence a boundary line and the other party takes no actions inconsistent with this belief. The parties may treat the fence as the line for decades with both operating under a different impression of the meaning of the fence. Neither party may ever have cause to express his or her belief regarding the nature of the fence to the other party. However, a fence that was originally installed for a purpose other than marking a boundary may evolve into a boundary marker through the conduct of the parties over many years.²⁴²

In many recent cases, the courts have faced situations where one party claims the fence is just present for convenience, which may be the convenient response to a lawsuit by the claimant even though years have passed with the claimant operating under the belief that the fence was the boundary. Faced with these situations, the courts have either ignored the requirement for mutual recognition or decided not to believe the statement that the fence was just in place for convenience.²⁴³ This recent series of decisions seems to be developing a new doctrine that a party may be estopped from calling a fence a fence of convenience when the claimant treats the fence as a boundary and the true owner's actions are not inconsistent with the claimant's interpretation of the fence's meaning.

This evolving estoppel doctrine is illustrated in the case of *Boyster v. Shoemaker*.²⁴⁴ In *Boyster*, the disputed property was originally used as a dairy farm.²⁴⁵ One corner of the property contained a rugged cliff.²⁴⁶ A fence was constructed at some point near the cliff, but no one remained who knew the true reason for the construction of the fence, though the record owner of the property claimed the fence was built to keep cattle from wandering off the cliff.²⁴⁷ The neighbor claimed that the fence represented the border between the tracts.²⁴⁸ The disputed area was so rugged that it was rarely visited by either party.²⁴⁹ Evidence indicated that an intervening record owner believed the fence to be the boundary, but the alleged acquies-

241. See *Putnam v. Cox*, 2009 Ark. App. 304, at 1, 2009 WL 1076825 at *1 (unpublished), where one of the parties unsuccessfully argued that the fence existed only to confine livestock and not establish a border, *Morris v. Young*, 2006 WL 1266409 at *4 (Ark. Ct. App. May 10, 2006) (unpublished), where the defendant unsuccessfully argued that the disputed fence was merely "a fence of convenience used to keep livestock off their property," and *Mayes v. Massery*, 2005 WL 605611, at *4 (Ark. Ct. App. Mar. 16, 2005) (unpublished), where the defendant tried to argue the fence was a fence of convenience but had "nothing" to dispute whether the fence was used as a boundary line."

242. *Clay v. Cole*, 2007 WL 2713584, at *6 (Ark. Ct. App. Sept. 19, 2007); *Boyette v. Vogelpohl*, 92 Ark. App. 436, 441–42, 214 S.W.3d 874, 878–79 (2005).

243. See, e.g., *Boyster v. Shoemaker*, 101 Ark. App. 148, 152, 272 S.W.3d 139, 143 (2008).

244. *Boyster*, 101 Ark. App. 148, 272 S.W.3d 139.

245. *Id.* at 150, 272 S.W.3d at 142.

246. *Id.* at 154, 272 S.W.3d at 144 (Hart, J., dissenting).

247. *Id.* at 154–55, 272 S.W.3d at 144–45 (Hart, J., dissenting).

248. *Id.* at 150–51, 272 S.W.3d at 141–42.

249. *Id.* at 150, 272 S.W.3d at 141.

cence occurred fewer than seven years before the new record owner asserted ownership over the disputed area.²⁵⁰ Despite a stinging dissent by Judge Josephine Linker Hart, the majority in the case found sufficient evidence to support the belief that the previous record owners had acquiesced through silence even though there was no evidence to indicate the previous owners (except the one recent owner) knew that the neighbor considered the fence to be a border.²⁵¹

Judge Hart has written two thoughtful dissents in boundary by acquiescence cases. In *Boyster v. Shoemaker*²⁵² and *Hattabaugh v. Housley*,²⁵³ Judge Hart raised the concern that the recent decisions are making it difficult to build a convenience fence without risking the loss of land on the other side through a misconstrued belief that the fence was meant to be more than just a fence. As she stated in *Hattabaugh v. Housley*:

I am deeply troubled by the holding of this case, which supports the notion that a landowner, by putting up a fence, can lose title to his own property. Certainly, this case suggests that a landowner who wishes to put up a fence of convenience for such purposes as fencing in cattle must either expend funds and pay for a survey or err on the side of caution by placing the fence on his neighbor's land.²⁵⁴

If the courts are not creating a new estoppel doctrine against claiming that a fence is just a fence of convenience, then the decisions are at least creating an evidentiary conundrum. If one man's boundary line could be "just a fence" to another man, how can mere silence ever support a boundary by acquiescence if mutual agreement to recognize the line is still required? Should there be some overt act by both parties required to establish acquiescence? In the absence of an overt act by both parties, should there be some "notorious" act by the adverse party that would put a reasonable person on notice that the other side may consider the boundary more than "just a fence"? For instance, in *Snow v. Camp*, a neighbor considered an old fence with many holes to be the boundary while the record owner considered the old fence to be of no consequence.²⁵⁵ At some point, the neighbor had workers clearing sprouts along the border.²⁵⁶ When the workmen ventured near the old fence, the record owner told the workmen that they were on his land.²⁵⁷ The court found that the mere presence of the workmen near

250. *Boyster*, 101 Ark. App. at 155, 272 S.W.3d at 145 (Hart, J., dissenting).

251. *Id.* at 149–53, 272 S.W.3d at 141–43; *see also* *Warren v. Collier*, 262 Ark. 656, 657, 559 S.W.2d 927, 928 (1978).

252. 101 Ark. App. 148, 272 S.W.3d 139 (2008).

253. 93 Ark. App. 167, 217 S.W.3d 132 (2005).

254. *Id.* at 172, 217 S.W.3d at 136 (Hart, J., dissenting).

255. *Snow v. Camp*, 2007 WL 2782825 at *2 (Ark. Ct. App. Sept. 26, 2007) (unpublished).

256. *Id.*

257. *Id.*

the old fence in an isolated incident was not enough to put the record owner on notice that the neighbor was claiming the old fence as a boundary.²⁵⁸

The cases imply two possible conclusions: 1) it is almost impossible to prove a party's intent to claim a fence to be a fence of convenience without giving actual notice to the neighbor or 2) there is a new estoppel standard that can bar someone from claiming a fence is merely a fence of convenience if the fence exists for a long time. Either way, the classic "mutual agreement" requirement seems to be eroding.

B. Recognition of the Boundary for a Long Period of Time

Most boundary-by-acquiescence cases involve time periods of at least twenty years.²⁵⁹ The Arkansas Supreme Court requires a minimum acquiescence period of at least seven years.²⁶⁰ However, many recent cases state that acquiescence does not have to occur "over a specific length of time."²⁶¹ Or, as one case stated, "Unlike the seven-year period required to acquire land by adverse possession, the period of acquiescence need not last for a specific length of time This period varies with the facts of each case, just as all circumstantial evidence does."²⁶² Instead, the recent decisions seem to require the boundary line to be in existence for a "long period of time"²⁶³ or "many years," even though it is not really clear what this means.²⁶⁴

The concept of "a long period of time" seems to have started with *Jennings v. Burford*, which states, "The period of acquiescence need not last for a specific length of time, but it must be for 'many years' or 'a long period of time' sufficient to sustain the inference that there has been an agreement concerning the location of the boundary line."²⁶⁵ The *Jennings* case cites *Seidenstricker v. Holtzendorff* for support in this statement.²⁶⁶ However, the *Seidenstricker* case specifically requires acquiescence to the boundary line

258. *Id.*

259. *Wingmead, Inc. v. Lee*, 2005 WL 2542944, at *5 (Ark. Ct. App. Oct. 12, 2005) (unpublished); *Lammey v. Eckel*, 62 Ark. App. 208, 212, 970 S.W.2d 307, 309 (1998).

260. *Harris v. Robertson*, 306 Ark. 258, 260, 813 S.W.2d 252, 253 (1991); *Rabjohn v. Ashcraft*, 252 Ark. 565, 570, 480 S.W.2d 138, 141 (1972).

261. *Chiodini v. Lock*, 2010 Ark. App. 340, at 18, ___ S.W.3d ___, ___; *Brown v. Stephens*, 2009 Ark. App. 614, at 6, ___ S.W.3d ___, ___; *Charles R. Griffith Farms, Inc. v. Grauman*, 2009 Ark. App. 515, at 11, ___ S.W.3d ___, ___; *LTB Land & Timber Co., Inc. v. Eggleston*, 2006 WL 3020886, at *6 (Ark. Ct. App. Oct. 25, 2006) (unpublished); *Morris v. Young*, 2006 WL 1266409, at *3 (Ark. Ct. App. May 10, 2006) (unpublished); *Hattabaugh v. Housley*, 93 Ark. App. 167, 170, 217 S.W.3d 132, 134–35 (2005); *McWilliams v. Schmidt*, 76 Ark. App. 173, 181, 61 S.W.3d 898, 905 (2001).

262. *Randall v. Ward*, 2004 WL 435096, at *1 (Ark. Ct. App. Mar. 10, 2004) (unpublished).

263. *Barnett v. Gomance*, 2010 Ark. App. 109, at 6, ___ S.W.3d ___, ___.

264. *Thurkill v. Wood*, 2010 Ark. App. 319, at 3, ___ S.W.3d ___, ___.

265. 60 Ark. App. 27, 31, 958 S.W.2d 12, 14 (1997).

266. *Id.*, 958 S.W.2d at 14; *Seidenstricker v. Holtzendorff*, 214 Ark. 644, 217 S.W.2d 836 (1949).

“for more than seven years.”²⁶⁷ The question is whether the “long period of time” language adopted in many recent decisions could theoretically permit acquiescence in fewer than seven years. There do not appear to be any reported cases permitting acquiescence in fewer than seven years, but the language is vague enough to be theoretically possible.

Thurkill v. Wood is a stereotypical case that illustrates the “long period of time” concept.²⁶⁸ The parties owned property in an irregular range (i.e., a range that is shortened from the standard 640 acres to accommodate the curvature of the earth).²⁶⁹ This resulted in an “anomaly in the General Land Office Plat filed in 1845,” creating an offset of 164.12 feet to the east of the plaintiff’s land.²⁷⁰ A fence was constructed along the disputed boundary line at some unknown time, but the defendant testified that the fence existed since at least 1953 when she married the then-owner’s son.²⁷¹ The defendant also offered evidence that the defendant’s predecessor planted crops and timber on the disputed property since at least the late 1950s.²⁷² While the evidence was disputed, the trial court was persuaded by the defendant “that the parties and their predecessors had occupied their respective tracts based on their mistaken belief . . . [about the location of] their common corner.”²⁷³ Because the mistake lasted for at least fifty years, this satisfied the “long period of time” requirement.

Other typical cases include *Brown v. Stephens*, where someone erroneously erected a fence along the wrong property line because of another surveying error caused by an irregular range.²⁷⁴ Several elderly residents testified that the fence had existed since at least the 1940s if not longer, making the fence at least sixty years old.²⁷⁵ In *Chambliss v. Watts-Sanders*, the court found that a row of pine trees was maintained as the tacit boundary for nearly fifty years.²⁷⁶ In *Gregory v. Jones*, the court found boundary by acquiescence when the parties recognized a fence line as the boundary for thirty-four years even though both parties mistakenly believed the fence was constructed along the true boundary.²⁷⁷ In *Southall v. Hill*, the court found acquiescence when the fence existed for at least thirty-three years and the disputed property was maintained by the claimant for at least twenty years.²⁷⁸ In *Summers v. Dietsch*, the court found acquiescence after at least twenty-one years of silence by the parties.²⁷⁹ In *Disney v. Kendrick*, the court found boundary by acquiescence when the boundary line was recog-

267. *Seidenstricker*, 214 Ark. at 647, 217 S.W.2d at 837.

268. 2010 Ark. App. 319, ___ S.W.3d ____.

269. *Thurkill*, 2010 Ark. App., at 4, ___ S.W.3d at ____.

270. *Id.*, ___ S.W.3d at ____.

271. *Id.*, ___ S.W.3d at ____.

272. *Id.*, ___ S.W.3d at ____.

273. *Id.*, ___ S.W.3d at ____.

274. 2009 Ark. App. 614, at 1–2, 2009 WL 3029308, at *1–2.

275. *Id.*, 2009 WL 3029308, at *1–2.

276. 2008 WL 241288, at *3 (Ark. Ct. App. Jan. 30, 2008) (unpublished).

277. 212 Ark. 443, 445, 206 S.W.2d 18, 19 (1947).

278. 2007 WL 466804, at *5 (Ark. Ct. App. Feb. 14, 2007) (unpublished).

279. 41 Ark. App. 52, 56, 849 S.W.2d 3, 5 (1993).

nized for approximately ten years.²⁸⁰ In *Vaughn v. Chandler*, the court found boundary by acquiescence when a fence and driveway existed for only eight years without dispute.²⁸¹

The “long period of time” factor is not enough to overcome a lack of intent to recognize the line as the boundary. The mere fact that a fence is old is insufficient to establish a boundary by acquiescence if the evidence is insufficient to prove the existence of an explicit or tacit agreement to recognize the fence as the boundary line.²⁸² In *Warren v. Collier*, a fence was built around 1946 to control cattle.²⁸³ The testimony at trial showed that all parties knew the fence was merely one of convenience and did not mark the boundary.²⁸⁴ Suit was brought in 1976, thirty years after initial construction of the fence, to establish the fence as the boundary line by acquiescence.²⁸⁵ The Arkansas Supreme Court reversed the trial court’s finding, stating, “Hence the chancellor’s finding of acquiescence rests essentially upon the mere existence of the fence”²⁸⁶

Another frequent issue in boundary by acquiescence cases is whether a new landowner is bound by the many years of acquiescence by the prior owner. A boundary by acquiescence that occurred before the current landowners took title is nevertheless binding on the new owners, even if no suit established the line before the conveyance.²⁸⁷ As stated by the Arkansas Supreme Court,

When the adjoining owners occupy their respective premises up to the line they mutually recognize and acquiesce in as the boundary for a long period of time, they and their grantees are precluded from claiming that the boundary thus recognized and acquiesced in is not the true one, although it may not be.²⁸⁸

A party is not required to bring a suit as soon as his right to claim the new boundary is established; thus, the doctrine of laches is generally inapplicable to boundary by acquiescence cases.²⁸⁹

C. A Fixed Line That Is Definite and Certain

The third key component to proving boundary by acquiescence is establishing a fixed line that is definite and certain. “A fence, by acquiescence, may become the accepted boundary even though it is contrary to the

280. 249 Ark. 248, 256, 458 S.W.2d 731, 735 (1970).

281. 237 Ark. 214, 217, 372 S.W.2d 213, 215 (1963).

282. *Hodge v. Cozad*, 2006 WL 477636, at *5 (Ark. Ct. App. Mar. 1, 2006) (unpublished).

283. 262 Ark. 656, 658, 559 S.W.2d 927, 928 (1978).

284. *Id.*, 559 S.W.2d at 928.

285. *Id.*, 559 S.W.2d at 928.

286. *Id.*, 559 S.W.2d at 928.

287. *Myers v. Yingling*, 372 Ark. 523, 531, 279 S.W.3d 83, 90 (2008).

288. *Rabjohn v. Ashcraft*, 252 Ark. 565, 570–71, 480 S.W.2d 138, 141 (1972).

289. *Id.* at 571–72, 480 S.W.2d at 142.

survey line.”²⁹⁰ However, it is the intention of the parties (possibly subject to estoppel) and the significance they attach to the fence, rather than the location or condition of the fence, that ultimately controls.²⁹¹ The mere existence of a fence will not establish boundary by acquiescence.²⁹² The fence or line does not have to be maintained.²⁹³ However, maintaining the fence can “strongly indicate” the existence of a boundary by acquiescence.²⁹⁴

The fence line is merely the visible means by which the acquiesced boundary is located.²⁹⁵ Therefore, the boundary can be marked by structures other than fences. The boundary can be established by an imaginary line running between two marks such as concrete markers and trees,²⁹⁶ but the line has to be substantial enough that the parties would reasonably agree that the physical marker is a boundary line.²⁹⁷ “Approximate points are not sufficient,”²⁹⁸ but the distance between the marks is irrelevant.²⁹⁹ The boundary line can be represented by almost any type of monument including a fence, turnrow, lane ditch or line of trees.³⁰⁰ “However, Arkansas law does not support the establishment of a boundary by acquiescence along an invisible line between two large land forms, such as levees, that are not truly capable of being used as accurate markers of a boundary.”³⁰¹

In *LTB Land & Timber Co. v. Eggleston*, the court found that a faded white line painted on a row of trees that roughly aligned with an erroneously placed survey marker (that may not have been placed by a licensed surveyor) and a “pine knot” was a sufficient boundary line.³⁰² In *Harris v. Robertson*, the court found the line running between two iron pins set by the parties to be a sufficient boundary line.³⁰³ In *Billingsley v. Harvey Smith Revocable Trust*, the court found a tree line to be the boundary and contin-

290. *Barnett v. Gomance*, 2010 Ark. App. 109, at 6, ___ S.W.3d ___, ___ (citing *Summers v. Dietsch*, 41 Ark. App. 52, 849 S.W.2d 3 (1993)).

291. *Id.*, ___ S.W.3d at ___.

292. *Warren v. Collier*, 262 Ark. 656, 657, 559 S.W.2d 927, 928 (1978); *Barnett*, 2010 Ark. App., at 7, ___ S.W.3d at ___.

293. *Johnson v. Lawton*, 2009 Ark. App. 226, at 8, 2009 WL 863975, at *4 (unpublished).

294. *Hoskins v. Cook*, 239 Ark. 285, 286, 388 S.W.2d 914, 915 (1965).

295. *Hattabaugh v. Housley*, 93 Ark. App. 167, 170, 217 S.W.3d 132, 134 (2005).

296. *Hedger Bros. Cement & Materials, Inc. v. Stump*, 69 Ark. App. 219, 223, 10 S.W.3d 926, 929 (2000).

297. *Follett v. Fitzsimmons*, 103 Ark. App. 82, 86, 286 S.W.3d 742, 746 (2008) (finding a drainage ditch not to be a sufficient monument to establish a line for acquiescence).

298. *Lammey v. Eckel*, 62 Ark. App. 208, 214, 970 S.W.2d 307, 310 (1998).

299. *Randall v. Ward*, 2004 WL 435096, at *6 (Ark. Ct. App. Mar. 10, 2004) (unpublished) (upholding the trial court’s finding of a boundary along an invisible line that may have extended up to 500 feet and specifically noting a case that was based on boundary line of thirty feet did not limit the length of an invisible boundary line).

300. *Chambliss v. Watts-Sanders*, 2008 WL 241288, at *2 (Ark. Ct. App. Jan. 30, 2008) (unpublished) (finding a line of pine trees to be a sufficient boundary line).

301. *Hedger Bros.*, 69 Ark. App. at 223, 10 S.W.3d at 929. However, a levee (as opposed to the line between levees) can be an appropriate boundary line. See *Hamilton v. McCaughan Props. Ltd. P’ship*, 2004 WL 345720, at *6 (Ark. Ct. App. Feb. 25, 2004) (unpublished).

302. 2006 WL 3020886, at *6 (Ark. Ct. App. Oct. 25, 2006) (unpublished).

303. 306 Ark. 258, 261, 813 S.W.2d 252, 254 (1991).

ued the boundary beyond the end of the tree line because the respective parties stopped their farming operations on either side of a line extending from the tree line.³⁰⁴ In *Clark v. Casebier*, the court found an irrigation ditch to be a sufficient line even though the ditch did not extend the entire length of the boundary.³⁰⁵

In *Hicks v. Newton*, the appellant attempted to claim a boundary line created by an abandoned wagon road.³⁰⁶ The Arkansas Supreme Court found that the evidence was insufficient to establish a boundary when the testimony showed the “road” had been abandoned in 1928, over forty years before the case, and was now just rutted terrain with trees as much as five inches in diameter.³⁰⁷ In *Fish v. Bush*, the court found that a boundary was not meant to be the dividing line when the fence in question was irregularly constructed along a tree line.³⁰⁸

D. Interaction with the Covenant of Seisin

An interesting, and potentially frightening, consequence of boundary by acquiescence is the potential for title claims against a seller of property. A landowner may have no idea that his or her property could become the subject of a boundary-by-acquiescence suit because people are often unaware that a fence line is not on the surveyed boundary. An improperly located fence could sit for decades without dispute. A seller of property may think nothing of the fact (or simply not realize) that the improperly located fence could someday spark a lawsuit with the neighbors. However, if a lawsuit does arise, a seller could be subject to a title claim.

If a lawsuit does arise in the future over a fence line, what rights does the buyer have against the seller? If the statute of limitations has yet to run, the buyer could have the right to sue the seller for breach of the covenant of seisin.³⁰⁹

When does the statute of limitations begin to run for such title claims? A title claim for breach of a grantor's covenant of seisin is broken as soon as the deed is delivered if the grantor does not have possession, the right of possession, and complete title.³¹⁰ However, when does the grantor lose the right of possession? When the silent acquiescence runs for a “long period of time” or when a court declares that the land has been ceded through acquiescence?

In *Riddle v. Udouj*, the court addressed this situation and determined that the cause of action began to run the instant the deed was granted because the grantor did not have title to the land on the ceded side of the fence

304. 2004 WL 2102003, at *3 (Ark. Ct. App. Sept. 22, 2004) (unpublished).

305. 92 Ark. App. 472, 479, 215 S.W.3d 684, 688 (2005).

306. 255 Ark. 867, 868–69, 503 S.W.2d 472, 473 (1974).

307. *Id.*, 503 S.W.2d at 473.

308. 253 Ark. 27, 30, 484 S.W.2d 525, 527 (1972).

309. *Bosnick v. Hill*, 292 Ark. 505, 507, 731 S.W.2d 204, 206 (1987).

310. *Id.*, 731 S.W.2d at 206.

at the time the deed was delivered.³¹¹ This decision highlights two difficult issues: 1) knowing when a breach occurred and 2) the practical problem that many fences do not sit exactly on the true property line and very few deeds contain exceptions for fence line variances.

1. *Knowing a Breach Occurred*

In the *Riddle* case, because no dispute existed over the location of the fence until two years after delivery of the deed, and a court order was not issued confirming the boundary by acquiescence until six years after delivery of the deed, how were the parties to know that the covenant of seisin was already breached when the deed was delivered? The dissent to the court of appeals' decision in *Riddle* had a telling observation:

[T]he appellants in this case had no visible and obvious means of realizing that they might not be entitled to full possession of the property conveyed to them. While the fences themselves were obvious, that they represented a boundary line was not. A boundary by acquiescence is established through silence. Who can say in the present case, without benefit of the trial court's factual finding, whether the fences were boundaries by acquiescence?³¹²

2. *Practical Problem*

The practical problem is the frequency with which unwitting sellers breach the warranty of seisin. Many, if not most, residential deeds contain no exceptions for variations in the location of fence lines, and it is safe to say that the average person has no idea what a "warranty of seisin" is.³¹³

311. 371 Ark. 452, 460–61, 267 S.W.3d 586, 592 (2007); *Riddle v. Udouj*, 99 Ark. App. 10, 14, 256 S.W.3d 556, 558–59 (2007).

312. *Riddle*, 99 Ark. App. at 18, 256 S.W.3d at 561 (Glover, J., dissenting).

313. To demonstrate this anecdotally, the Cherry Creek Addition in the City of Little Rock, Arkansas was randomly selected on a search of the Pulaski County real estate records. The ten most recent warranty deeds contained the following exceptions to the warranty of title (the Instrument Number refers to the real property records of Pulaski County, Arkansas):

Instrument No. 2010030273, recorded May 25, 2010: ("subject to existing easements, building lines, restrictions and assessments of record, if any").

Instrument No. 2010024815, recorded May 3, 2010: ("subject to existing easements, building lines, restrictions and assessments of record, if any").

Instrument No. 2010021019, recorded April 15, 2010: (no exceptions).

Instrument No. 2009079040, recorded November 24, 2009: ("subject to existing easements, building lines, restrictions and assessments of record, if any").

Instrument No. 2009063127, recorded September 16, 2009: ("Subject to any restrictions, easements, right-of-ways or covenants which may appear of record. Subject to any oil, gas and mineral rights of former owners, if any.").

Instrument No. 2009062299, recorded September 11, 2009: (no exceptions).

Instrument No. 2009008274, recorded February 9, 2009: ("subject to existing easements, building lines, restrictions and assessments of record, if any").

Instrument No. 2008068180, recorded October 6, 2008: ("SUBJECT TO all easements, rights-of-way, mineral reservations of record and protective covenants, if any.").

There are probably thousands of properties in Arkansas with minor fence overlaps that may have ripened into a boundary by acquiescence. Because deeds rarely except for this, there could be literally thousands of potential suits. Sellers would be wise to include an exception in deeds for “potential boundary by acquiescence claims arising from the location of fence lines.”

E. Conflation of Adverse Possession and Boundary by Acquiescence

1. *Cases Finding Both Adverse Possession and Boundary by Acquiescence*

Boundary-by-acquiescence cases are reviewed *de novo* on appeal, but the appellate court is required to affirm the trial court's finding of fact with regard to the location of a boundary line unless the finding is clearly erroneous.³¹⁴ The location of the boundary line is a question of fact.³¹⁵ To reverse the trial court, the appellate court must be “left with a definite and firm conviction that a mistake has been committed.”³¹⁶ However, this standard has not stopped cases from being reversed at the appellate level.³¹⁷

Many boundary by acquiescence cases in Arkansas raise both adverse possession and boundary by acquiescence as theories in the case.³¹⁸ For example, in *Stewart v. Bittle*, the Arkansas Supreme Court affirmed the finding of the trial court that the claimant acquired title through both theories.³¹⁹

After hearing testimony on both sides, the trial court found that appellees were “*** [sic] entitled to and are hereby vested with title to ***” [sic] the land west of, and up to, the fence. The trial court's finding and decree were based on seven years adverse possession by appellees, and also on “long acquiescence” by the owners of two parcels of land.³²⁰

Instrument No. 2008061248, recorded September 5, 2008: (“Subject to any restrictions, easements, right-of-ways or covenants which may appear of record.”).

Instrument No. 2008041424, recorded June 17, 2008: (“Subject to covenants, conditions, easements, exceptions, reservations, restrictions, rights of way of record, if any.”).

314. *Boyette v. Vogelpohl*, 92 Ark. App. 436, 440, 214 S.W.3d 874, 877 (2005).

315. *Poston v. Saunders*, 2005 WL 2160778, at *3 (Ark. Ct. App. Sept. 7, 2005) (unpublished); *Hedger Bros. Cement & Materials, Inc. v. Stump*, 69 Ark. App. 219, 222, 10 S.W.3d 926, 928 (2000).

316. *Carson v. Cnty. of Drew*, 354 Ark. 621, 625, 128 S.W.3d 423, 425 (2003).

317. *See, e.g., Hattabaugh v. Housley*, 93 Ark. App. 167, 168, 217 S.W.3d 132, 133 (2005); *Boyette*, 92 Ark. App. at 443–44, 214 S.W.3d at 879–80 (2005); *Mayes v. Massery*, 2005 WL 605611, at *4 (Ark. Ct. App. Mar. 16, 2005) (unpublished).

318. A Westlaw search performed on December 14, 2010 for the terms “adverse possession” and “boundary by acquiescence” in the AR-CS database resulted in ninety-nine documents. A search in the same database for the terms “boundary by acquiescence” but not “adverse possession” resulted in forty-six documents.

319. 236 Ark. 716, 717, 370 S.W.2d 132, 134 (1963).

320. *Id.*, 370 S.W.2d at 133–34.

In *LTB Land & Timber Co. v. Eggleston*, the court found that the plaintiff both adversely possessed the disputed tract and acquired it through boundary by acquiescence.³²¹ In this case, a painted white line on a row of trees served as the disputed border.³²² The adverse claimant owned adjoining land, and the court found that the claimant satisfied the elements for adverse possession by conducting timber operations and by leasing the disputed property for hunting purposes.³²³ The court also found that the parties had acquiesced to the boundary marked by the painted white line because it had existed for at least thirty years and timber was cut from it on at least three occasions over twenty-five years with both parties present during the timber operations to be sure the cutting did not cross the white line.³²⁴

The appellant in *LTB Land & Timber Co.* raised the argument that finding both adverse possession and boundary by acquiescence is contradictory.³²⁵ The court of appeals stated, “appellant cited no legal authority for its position and made no compelling argument that the trial court had erred in that regard.”³²⁶ The court of appeals cited the 1963 Arkansas Supreme Court decision in *Vaughn v. Chandler* for authority that finding both adverse possession and boundary by acquiescence is not contradictory.³²⁷

In *Vaughn*, a driveway was built down the surveyed boundary line and a fence was constructed on the other side of the driveway, approximately fourteen feet further into the adjoining owner's property.³²⁸ The driveway and fence existed without dispute from 1947 until 1955.³²⁹ The Arkansas Supreme Court determined that the use and existence of the driveway and fence for this undisputed eight year period fulfilled the requirements for both adverse possession and boundary by acquiescence.³³⁰ The court did not explain how these theories are not contradictory. Subsequently, the holding in this decision has now become the basis for Arkansas courts not finding the theories contradictory.

However, one has to ask how the theories of adverse possession and boundary by acquiescence are not contradictory. The question is whether boundary by acquiescence and adverse possession are mutually exclusive theories. Adverse possession is inherently “hostile,” which is one of the essential elements of the theory.³³¹ Conversely, boundary by acquiescence is inherently peaceful, requiring that the parties to mutually recognize the boundary.³³² If the parties mutually recognize the boundary, how can the

321. 2006 WL 3020886, at *6 (Ark. Ct. App. Oct. 25, 2006).

322. *Id.*

323. *Id.* at *5.

324. *Id.* at *6.

325. *Id.*

326. *Id.*

327. *LTB Land & Timber Co.*, 2006 WL 3020886, at *6.

328. *Vaughn v. Chandler*, 237 Ark. 214, 215, 372 S.W.2d 213, 214 (1963).

329. *Id.* at 217, 372 S.W.2d at 215.

330. *Id.* at 217–18, 372 S.W.2d at 214–15.

331. *Fulkerson v. Van Buren*, 60 Ark. App. 257, 260, 961 S.W.2d 780, 782 (1998).

332. *Chambliss v. Watts-Sanders*, 2008 WL 241288, at *2 (Ark. Ct. App. 2008) (unpublished).

adverse party also hold in a notorious and hostile manner to the boundary? The key would seem to be the nature of hostility. If a wrongful intent is required for hostility, then it would seem that the two would have to be mutually exclusive. However, if “hostility” involves no subjective intent at all, but merely acts that are inconsistent with permission, then it would seem conceivable for both of the doctrines to apply to a given fact situation.

In *Boyette v. Vogelpohl*, the disputed property was once under common ownership.³³³ While under common ownership, the owner built a barbwire fence to contain cattle.³³⁴ The owner sold a portion of the property sometime in the 1950s.³³⁵ The barbwire fence encroached onto the tract conveyed outside of the family.³³⁶ The new owners and the heirs of the original owner both mowed up to the edge of the fence and neither side attempted to assert control to the other side of the fence.³³⁷ The court of appeals found that the barbwire fence had become the boundary by acquiescence because both sides effectively treated it like the boundary for at least forty years.³³⁸ The court also found that the heirs of the original seller had established a claim of adverse possession because they “openly and continuously used and occupied the property on the east side of the fence line since the 1960s, thus their adverse claim would have accrued well before 1995.”³³⁹ The court did not explain how the claimant’s use also met the “hostile” and “with the intent to hold against the true owner” elements of adverse possession, thus it seems to be following either the mistaken intent or the objective intent approach.

This decision illustrates the problem created by not viewing the two theories as contradictory. If the parties in *Boyette* mutually agreed to recognize the fence line and treat it like the boundary, then where is the hostility element needed for adverse possession? Alternatively, if the appellant did act in a hostile manner with the intent to hold against the true owner, then how did the parties have the mutual agreement necessary for boundary by acquiescence? The theories have to be contradictory unless the courts have departed from the traditional elements for one or both theories.

2. Cases Finding One but Not the Other

Courts often distinguish between the theories of adverse possession and boundary by acquiescence when both have been raised as a theory in the case, but not always.³⁴⁰ For instance, in *Brown v. Stephens*, the court

333. 92 Ark. App. 436, 442, 214 S.W.3d 874, 878 (2005).

334. *Id.* at 439, 214 S.W.3d at 876–77.

335. *Id.* at 442, 214 S.W.3d at 878.

336. *Id.*, 214 S.W.3d at 878.

337. *Id.*, 214 S.W.3d at 878.

338. *Id.*, 214 S.W.3d at 878.

339. *Boyette*, 92 Ark. App. at 443–44, 214 S.W.3d at 879.

340. In *Thurkill v. Wood*, 2010 Ark. App. 319, ___ S.W.3d ___, the defendant counter-claimed under both theories, but the court decided the case only on the basis of boundary by acquiescence.

ruled that an old fence line was the boundary by acquiescence even though both theories were raised in the case.³⁴¹ The court was persuaded primarily by two facts: 1) the long term existence of the fence and 2) testimony that one of the prior owners did not believe the fence was in the right place and objected to the construction of a pond in the disputed area but took no action to change the location of the fence.³⁴² The court did not explain why these acts constituted boundary by acquiescence instead of adverse possession. Theoretically, this would have to be adverse possession because there was no mutual agreement to recognize the boundary, but the decision was not clear.

Charles H. Griffith Farms, Inc. v. Grauman is a case where the court was clearer in explaining why it selected one theory over the other.³⁴³ In *Griffith Farms*, the trial court found the plaintiff had adversely possessed the disputed land by farming it for over forty years.³⁴⁴ The appellate court reversed the trial court because there was no fence between the tracts and the area that was farmed varied somewhat from year-to-year making it impossible to establish actual possession of all parts of the disputed property exclusively or continuously for the statutory period required for adverse possession.³⁴⁵ However, the appellate court found the disputed property actually belonged to the plaintiff on the theory of boundary by acquiescence.³⁴⁶ The appellate court determined that farming the disputed property to “the ditch or low spot” over forty years established an acquiesced boundary line between the parties’ property.³⁴⁷

In *Peterson v. Wagner*, a fence divided two tracts, and there was evidence that the parties mowed up to the fence line for many years.³⁴⁸ Based on the claimant's testimony, the court determined that the claimant could not establish an adverse possession claim because he did not intend to take the area in question.³⁴⁹ However, the court found that the parties’ predecessors had tacitly agreed to accept the fence line as the boundary for many years, thus establishing boundary by acquiescence.³⁵⁰

In *Morton v. Hall*, the Arkansas Supreme Court considered a case where the question was whether ownership to the boundary line had been established by adverse possession and boundary by acquiescence.³⁵¹ The issue in the case was whether the trial court had erroneously instructed the jury that the claimant had to prove actual adverse holding up to the boundary fence to establish boundary by acquiescence.³⁵² The Arkansas Supreme

341. 2009 Ark. App. 614, at 1, 2009 WL 3029308, at *1.

342. *Id.*, 2009 WL 3029308, at *1.

343. *Charles R. Griffith Farms, Inc. v. Grauman*, 2009 Ark. App. 515, ___ S.W.3d ___.

344. *Id.* at 5, ___ S.W.3d at ___.

345. *Id.*, ___ S.W.3d at ___.

346. *Id.* at 5–6, ___ S.W.3d at ___.

347. *Id.* at 5, ___ S.W.3d at ___.

348. 2005 WL 1399291, at *3 (Ark. Ct. App. June 15, 2005) (unpublished).

349. *Id.* at *4.

350. *Id.* at *5.

351. *Morton v. Hall*, 239 Ark. 1094, 396 S.W.2d 830 (1965).

352. *Id.* at 1098, 396 S.W.2d at 833.

Court determined that the trial court improperly instructed the jury to consider whether there was actual adverse holding.³⁵³ Because adverse use is not required for boundary by acquiescence, the court concluded that the trial court “evidentially confused adverse possession . . . with boundary by acquiescence” and remanded the case for further consideration.³⁵⁴

These cases demonstrate that courts can, and do, distinguish between the doctrines of adverse possession and boundary by acquiescence. The distinction, however, between the concepts seems to be blurring somewhat because a number of cases have used both theories when the court feels that the claimant should win but is not exactly sure which theory makes it happen.

V. CONCLUSION

The common-law requirements for adverse possession in Arkansas are the customary elements of possession—actual, open and notorious, continuous, exclusive, and hostile. To this, Arkansas adds “with the intent to hold against the true owner.” The intent element of adverse possession is the most confusing, as there are three basic positions: 1) bad-faith intent is required; 2) good-faith, or mistaken, intent is required; and 3) the only evidence of intent necessary is evidence of acts similar to those of a true owner—no inquiry into subjective intent is necessary. Arkansas case law supports all three of these positions. To ignore subjective intent and focus on acts alone is the majority rule among the states. The disadvantage of this approach is that the occasional bad-faith claimant is rewarded. The advantage is that the evidence is more objective. Also, in cases where the original adverse possession began decades ago, there may no longer be any evidence of subjective intent one way or the other. This interpretation should be followed, except in cases of extreme bad faith. Arkansas could extend the length of time needed to prove adverse possession where it originated in bad-faith actions. As it stands, Arkansas has one of the shortest periods of adverse possession.

The statutory amendment in 1995 added color of title and payment of taxes (and nonpayment by the true owner) as additional requirements to prove adverse possession of noncontiguous property. These amendments made it virtually impossible for bad-faith claimants to gain title by adverse possession, as one cannot fabricate color of title for oneself. However, the amendments also confused “color of title” with “title” and required that a claimant owning property who wished to claim adjacent property had to have “color of title” to her own property, whereas the statute ideally should read “title or color of title.” Additionally, for almost one hundred years, one statute has imputed possession to the claimant of unimproved and unenclosed land who pays taxes for seven years, and another creates a presump-

353. *Id.* at 1099, 396 S.W.2d at 833.

354. *Id.*, 396 S.W.2d at 833.

tion of color of title in a claimant of wild and unimproved land who pays taxes for fifteen years. The two categories of land are the same, and the statute should be amended accordingly.

Boundary by acquiescence, a similar but simpler doctrine, traditionally requires three elements: 1) a tacit agreement between the parties; 2) recognition of the boundary for a long period of time; and 3) a fixed line that is definite and certain. The first element requires that both parties agree that the line is the border. While silence can be interpreted as agreement, if one of the parties does not believe that the line is the boundary (unless already established by the agreement of a predecessor in interest), then this required element is not satisfied. The second element requires recognition of the boundary for "a long time." The Arkansas Supreme Court has established a minimum of seven years to satisfy this requirement, though this requirement is rarely cited in recent cases and the trend is toward an ambiguous "long time" that varies on a case-by-case basis. The third element requires a line, typically a fence, that the parties can recognize. This element can be satisfied by an imaginary line connecting two monuments.

Plaintiffs claiming adverse possession in boundary dispute cases seem to be increasingly pleading adverse possession and boundary by acquiescence in the alternative. The latter requires no proof of intent but only of actions (or lack of actions). This approach is similar to the majority rule for adverse possession. In addition, adverse possession has more elements to prove than does boundary by acquiescence. Thus, boundary by acquiescence is replacing adverse possession as the "claim of choice." Boundary by acquiescence can cause problems for owners of large tracts of rural land where one man's cattle fence may be viewed as a boundary fence by a neighbor. Rhode Island allows the recordation of a warning notice to a claimant, in order to preempt adverse possession. Arkansas could consider a similar statute. Boundary by acquiescence can also cause problems in cities for sellers who convey lots with fences inside of the boundary line, but whose deeds contain warranties of title. Some thought should be given to whether warranties of title should be disclaimed with respect to a situation where neighbors have encroached over the seller's boundary lines.

The most confusion in boundary by acquiescence cases surrounds the requirement to prove a tacit agreement between the parties. Because there is confusion over whether mistaken intent suffices to prove adverse possession in Arkansas, courts have increasingly turned to boundary by acquiescence to reach a seemingly just result in fixing the boundary between neighbors. However, to do this, the courts are slowly eroding the requirements for mutual recognition of the boundary. In the last decade, the decisions have established an estoppel concept that puts the burden on the party who believes the fence is just a fence of convenience to make that belief known or risk being estopped from later claiming the fence was other than a mutually recognized boundary.

This erosion of the mutual recognition standard could be reversed if Arkansas amended its adverse possession laws to remove the subjective intent requirement. In removing the intent requirement, courts would no

longer have to fall back on (and consequently erode) boundary by acquiescence as a means to effect a just result.

APPENDIX A

PROPOSED AMENDMENTS TO ADVERSE POSSESSION STATUTES

18-11-102 Repeal

18-11-103 Repeal

18-11-106

(a) To establish adverse possession of real property, the person, and those under whom the person claims, must have actual or constructive possession of the property and either:

(1)(A) Held color of title to the property for a period of at least seven (7) years, and during that time have paid ad valorem taxes on the property. If the property is wild, unimproved and unenclosed, fulfillment of this requirement will be deemed to constitute possession. The requirement of paying ad valorem taxes is only met provided the true owner has not also paid the ad valorem taxes or made a bona fide good faith effort to pay the ad valorem taxes which were misapplied by the state and local taxing authority;

(B) For purposes of this subdivision (a)(1), color of title will be presumed on behalf of the person claiming adversely to the true owner by paying the ad valorem taxes for a period of at least fifteen (15) years for wild, unimproved and unenclosed land, provided the true owner has not also paid the ad valorem taxes or made a bona fide good faith effort to pay the ad valorem taxes which were misapplied by the state and local taxing authority; or

(2) Held title to real property contiguous to the property being claimed by adverse possession for a period of at least seven (7) years, and during that time have paid ad valorem taxes on the contiguous property to which the person has title.

(b)(1) The requirements of subsection (a) of this section with regard to payment of ad valorem taxes shall not apply to a person or entity exempt from the payment of ad valorem taxes by law.

(2) For the person or entity exempt from the payment of ad valorem taxes to establish adverse possession of real property, the person or entity must have:

(A) Actual or constructive possession of the property being claimed and held color of title to the property for a period of at least seven (7) years; or

(B) Actual or constructive possession of the property being claimed and held title to the real property contiguous to the property being claimed by adverse possession for a period of at least seven (7) years.

(c) The requirements of this section are in addition to all other requirements for establishing adverse possession.

(d) This section shall not repeal any requirement under existing case law for establishing adverse possession, but shall be supplemental thereto.

Appendix B
Summary of State Adverse Possession Laws

State	Code Citation	Statute of Limitations Period	Common Law Requirements	Payment of Taxes Required	Color of Title Required	Contiguous Property	Disabilities	Time Period for Tolling of Statute	Registration
Alabama	ALA. CODE § 6-5-200 (LexisNexis 2005).	10 years with taxes paid and color of title; 20 years without	actual, exclusive, open, notorious, hostile, and under claim of right for 20 years. <i>Lynn v. Kelley</i> , 974 So.2d 309, 310 (Ala. Civ. App. 2007).	must have "listed the land for taxation"	for shorter statute of limitations ("SOL"); must be recorded	no special requirement	no	no	no
Alaska	ALASKA STAT. §§ 9.10.030, -10.140, -45.052 (2010).	7 years if color of title; 10 years if in good faith but mistaken, or otherwise	continuous, open and notorious, exclusive and hostile to the true owner. <i>Glover v. Glover</i> , 92 P.3d 387, 392 (Alaska 2004).	no	for shorter SOL	no special requirement	under age of majority, incompetent	2 years after disability removed	no
Arizona	ARIZ. REV. STAT. ANN. §§ 12-521 to -529 (2003).	3 years if claimant has title or color of title; 5 years if city lot and claimant has recorded deed and has paid taxes; 5 years if claimant is using property, has recorded deed and has paid taxes; 10 years otherwise	actual, visible and continuous for at least ten years, hostile, under a claim of right and exclusive. <i>Spaulding v. Paulson</i> , 181 P.3d 243, 246-47 (Ariz. Ct. App. 2008).	for shorter SOL	for shorter SOL	no special requirement	under 18, unsound mind, in prison	statute doesn't run until disability removed	no
Arkansas	ARK. CODE ANN. §§ 18-11-101 to -106 (LEXIS Repl. 2003 & Supp. 2009); <i>id.</i> § 18-61-101 (LEXIS Repl. 2003).	7 years	actual, open, notorious, continuous, exclusive, hostile, and with intent to hold against the true owner. <i>Fulkerson v. Van Buren</i> , 60 Ark. App. 257, 264, 961 S.W.2d 780, 784 (1998).	yes, for noncontiguous property payment of taxes on wild, unimproved and unenclosed land for 15 years deemed possession, if true owner has paid no taxes	yes, for noncontiguous property color of title presumed if taxes paid for 15 years on wild, unimproved and unenclosed land, and true owner paid no taxes	must have "color of title" to real property contiguous to property being claimed for 7 years and paid taxes on real property to which claimant has "color of title"	under 21, unsound mind	3 years after disability removed	no

California	CAL. CIV. PROC. CODE §§ 315-330 (West 2006 & Supp. 2011).	5 years	actual possession so as to give notice to owner, hostile, color of title or claim of right, continuous and uninterrupted, and payment of taxes, <i>Dinnick v. Dinnick</i> , 374 P.2d 824, 826 (Cal. 1962).	yes	either claim of title or color of title	if property is divided into lots, possession of one lot is not deemed possession of the other lots	under age of majority, insane, in prison	5 years after disability removed or death under disability, not exceeding 25 years total if in prison: 5 years after disability removed or death under disability, not exceeding 7 years total	no
Colorado	COLO. REV. STAT. §§ 38-41-101 to -119 (2010).	18 years; 7 years if color of title and payment of taxes	actual, adverse, hostile, under a claim of right, exclusive, and uninterrupted, <i>Hunter v. Mansell</i> , 240 P.3d 469, 474 (Colo. App. 2010).	sometimes	sometimes recorded color of title for 18 years is prima facie evidence of adverse possession no action allowed against a person in possession if deed recorded for 7 years	no special requirement	legal disability	2 years added to statute of limitations, <i>Nesbitt v. Jones</i> , 344 P.2d 949, 957 (Colo. 1959)	no
Connecticut	CONN. GEN. STAT. ANN. § 52-575 (West 2005).	15 years	open, visible, exclusive, uninterrupted, under claim of right, and without consent of owner, <i>Anderson v. Poirier</i> , 997 A.2d 604 (Conn. App. Ct. 2010).	no	no	no special requirement	minor, not of sound mind, in prison	5 years from time disability is lifted	owner may record notice to prevent CONN. GEN. STAT. ANN. § 52-575 (West 2005), but must sue within one year
Delaware	DEL. CODE ANN. tit. 10, §§ 7901-7904 (1999).	20 years	open, notorious, hostile, and exclusive, <i>State v. Phillips</i> , 400 A.2d 299, 304 (Del. Ch. 1979).	no	no	no special requirement	infant, mentally ill, in prison	10 years after disability is removed, or death under disability	no

District of Columbia	D.C. CODE ANN. § 16-1113, -3301 (LexisNexis 2008).	15 years	actual, open and notorious, exclusive, continuous, under claim of right or title. <i>Smith v. Tippet</i> , 569 A.2d 1186, 1190 (D.C. 1990).	payment of taxes for 15 years will cause property to be treated as if it were enclosed	no	no	no special requirement	infancy, legal disability	2 years after disability is lifted, not to exceed 22 years	no
Florida	FLA. STAT. ANN. §§ 95.16, .18, .191, .192 (West 2002).	7 years; 4 years if acquired by tax deed; 3 years if purchased at executor's sale	open, continuous, actual, and hostile. <i>Meyer v. Law</i> , 287 So.2d 37, 40 (Fla. 1973).	yes if no color of title	need either claim of title or color of title if no color of title, must make a return of property to appraiser w/in 1 year of possession, pay taxes thereafter for 7 years, and property must be enclosed, cultivated or improved	possession of one lot is not possession of other lots in the tract no color of title needed if contiguous and protected by a substantial enclosure	possession of one lot is not possession of other lots in the tract	no	no	no
Georgia	GA. CODE ANN. §§ 44-5-161 to -177 (2010).	20 years; 7 years if color of title, unless fraud or forgery	public, continuous, exclusive, uninterrupted, peaceable, with claim of right, and no fraud. <i>Cooley v. McRae</i> , 569 S.E.2d 845, 846 (Ga. 2002).	no	sometimes	possession under recorded deed extends to all contiguous property embraced in deed	possession under recorded deed extends to all contiguous property embraced in deed	minority, incompetent, in prison	won't run until disability is removed	no
Hawaii	HAW. REV. STAT. §§ 501-87, 657-31 to -38, 669-1 (West, West-law through 2010 amendments).	20 years and in good faith (only applies to 5 acres or less where person has not asserted any similar claim w/in past 20 years)	actual, open, notorious, hostile, continuous, and exclusive. <i>Perran v. Allencastre</i> , 985 P.2d 1112, 1123 (Haw. Ct. App. 1999).	no	yes, "deregistered land" must be recorded before SOL will begin to run	no	no	under 18, insane, in prison	5 years after disability is removed, or death under disability	Torrens land is not subject to adverse possession. HAW. REV. STAT. §§ 501-87 (West, West-law through 2010 amendments).

Idaho	IDAHO CODE ANN. §§ 5-203 to -215 (2010).	20 years	actual, open, visible, notorious, continuous, hostile, and exclusive, <i>Winn v. Eaton</i> , 917 P.2d 1310, 1313 (Idaho Ct. App. 1996).	yes	no	possession of one lot is not possession of all lots in tract	minority, insanity, in prison, married woman if husband is necessary party	20 years after disability removed or death under disability	no adverse possession if party records declaration of intent in real estate records IDAHO CODE ANN. §§-208(2) (2010).
Illinois	735 ILL. COMP. STAT. ANN. §113-101 to -122 (West 2003).	7 years if actual possession and record title; 7 years if actual possession, color of title, good faith, and payment of taxes; 7 years if vacant land and color of title, good faith, and payment of taxes; 20 years otherwise	continuous, hostile or adverse, actual, open, notorious, exclusive, and under claim of title inconsistent with true owner, <i>Stankewitz v. Boho</i> , 678 N.E.2d 1247, 1249 (Ill. App. Ct. 1997).	sometimes	sometimes	no special requirement	minority, legal disability, in prison, military service	2 years after disability is removed, or death under disability	no
Indiana	IND. CODE ANN. § 32-21-7-1 (LexisNexis 2002 & Supp. 2010); <i>Id.</i> § 34-11-1-2 (LexisNexis 2008).	10 years	open, continuous, exclusive, adverse, and notorious, <i>McClary v. Sheets</i> , 423 N.E.2d 297, 300 (Ind. 1981).	yes	no	no special requirement	no	no	no
Iowa	IOWA CODE ANN. §§ 557.5, 560.2 (West 1992); <i>Id.</i> §§ 614.8-28 (West 1999 & 2010 Supp.)	10 years (claimant must file statement with recorder w/in 10 year period)	open, exclusive, continuous, actual, hostile, under claim of right or color of title, <i>Council Bluffs Sav. Bank v. Simmons</i> , 243 N.W.2d 634, 636 (Iowa 1976).	no	claim of right or color of title color of title presumed if occupied for 5 years, purchased at judicial or tax sale, if made valuable improvements, if paid taxes for one year and owner not paid for two years	no special requirement	no	no	no

Kansas	KAN. STAT. ANN. §§ 60-503 to -509 (2005).	15 years; 5 years from date recorded if deed from execution sale or executor's sale	open, exclusive, continuous, and hostile, <i>Chesbro v. Bd. of Comm'rs</i> , 186 P.3d 829, 834 (Kan. App. 2008).	no	no	no special requirement	under 18, incapacity, in prison	2 years after disability removed or death under disability, not to exceed 23 years	no
Kentucky	KY. REV. STAT. ANN. §§ 413.010-060 (LexisNexis 2005).	15 years; 7 years if recorded title and actual occupancy	hostile and under claim of right, actual, exclusive, continuous, and open and notorious, <i>Appalachian Reg'l Healthcare, Inc. v. Royal Crown Bottling Co.</i> , 824 S.W.2d 878, 880 (Ky. 1992).	no	no	no special requirement	If 15 year SOL applies: infancy, unsound mind, military duty If 7 year SOL applies: infancy, unsound mind, military duty	If 15 year SOL applies: 3 years after disability is removed, not to exceed 30 years If 7 year SOL applies: 7 years after disability is removed, not to exceed 30 years	no
Louisiana	LA. CIV. CODE ANN. art. 3473-3488 (2008).	10 years if good faith and just title; otherwise 30 years	continuous, uninterrupted, peaceable, public, unequivocal, and with intent to possess as owner, <i>LA. CIV. CODE ANN. art. 3476</i> (2008); <i>Marks v. Zimmerman Farms LLC</i> , 13 So.3d 768 (La. Ct. App. 2009).	no	sometimes	no special requirement	no	no	no
Maine	ME. REV. STAT. ANN. tit. 14 §§ 801-816 (2003).	20 years	actual, open, notorious, hostile, under claim of right, continuous, and exclusive, <i>Glover v. Graham</i> , 459 A.2d 1080, 1085 (Me. 1983).	only if uncultivated	must have recorded deed if uncultivated	no special requirement	minority, mental illness, in prison, absent from U.S.	10 years from time disability is removed, or death under disability	no
Maryland	MD. CODE ANN., CTS. & JUD. PROC. §§ 5-103, 201 (West 2002).	20 years	actual, open, notorious, exclusive, hostile, under claim of title or ownership, and continuous or uninterrupted, <i>Hillmore Shores Improvement Ass'n v. Singleton</i> , 959 A.2d 130, 144 (Md. Ct. Spec. App. 2008).	no	no	no special requirement	minority, mentally incompetent	lesser of 3 years or applicable period of limitations after date disability is removed	no

Massachusetts	MASS. GEN. LAWS ANN. ch. 260, § 21 (West 2004).	20 years	actual, open, notorious, exclusive, adverse, and nonpermissive. <i>Ryan v. Savros</i> , 203 N.E.2d 85, 92 (Mass. 1964).	no	no	no special requirement	no	no	no
Michigan	MICH. COMP. LAWS ANN. §§ 600.5801, .5851-.5854 (West 2000).	5 years if color of title; 10 years if tax deed; 15 years otherwise	actual, visible, open, notorious, exclusive, continuous, uninterrupted, hostile, and under claim of right, <i>Canjar v. Cole</i> , 770 N.W.2d 449, 454 (Mich. Ct. App. 2009).	no	no	no special requirement	under 18, insane, or out of state/ military service, citizen of state at war with U.S.	1 year after disability removed if out of state/ military service, once back if alien, once war is over	no
Minnesota	MINN. STAT. ANN. §§ 541.02, .15, .24 (West 2010).	15 years; 4 years if recorded title from tax sale	actual, open, hostile, continuous, exclusive, <i>Roemer v. Everzman</i> , 304 N.W.2d 653, 653 (Minn. 1981).	yes, for 5 consecutive years unless action relates to boundary line adverse possession	no	no need to pay taxes if action relates to boundary line dispute	minority, insanity, non-citizen of US and citizen of country at war with US, action stayed by injunction or statutory prohibition	extended until disability is removed, not to exceed 5 years total (except with infancy) or 1 year from time disability removed	no adverse possession if Torrens registration, MINN. STAT. ANN. § 508.02 (West 2010).
Mississippi	MISS. CODE ANN. §§ 15-1-7, -13, -15 (2003).	10 years; 5 years if title from tax sale	under claim of ownership, actual or hostile, open, notorious, visible, continuous and uninterrupted, exclusive, and peaceful. <i>Jordan v. Fountain</i> , 986 So.2d 1018, 1021 (Miss. Ct. App. 2008).	no	no	no special requirement	infancy, unsound mind	If 10 year SOL applies: 10 years after disability removed or death, not to exceed 31 years If 5 year SOL applies, 5 years after removal of disability, not to exceed 31 years	no

Missouri	MO. ANN. STAT. §§ 516.010–.095 (West 2002).	10 years	hostile, under claim of right, actual, open and notorious, exclusive, and continuous, <i>Eddie v. Coleman</i> , 141 S.W.2d 238, 242 (Mo. Ct. App. 1940).	no	no	no special requirement	under 18, mental incapacity	3 years after disability removed or death under disability, not to exceed 21 years	no
Montana	MONT. CODE ANN. §§ 70-19-401 to -414 (2009).	5 years	open, notorious, exclusive, adverse, continuous, and uninterrupted, <i>Habel v. James</i> , 68 P.3d 743, 746 (Mont. 2003).	yes	no	possession of one lot is not others in the same tract	under age of majority, committed pursuant to state law, in prison	5 years after disability removed or death under disability	no
Nebraska	NEB. REV. STAT. ANN. §§ 25-202, -213 (LexisNexis 2004 & Supp. 2010).	10 years	actual, continuous, exclusive, notorious, and adverse under a claim of ownership, <i>Madsen v. TBT, LLC</i> , 686 N.W.2d 85, 95 (Neb. Ct. App. 2004).	no	no	no special requirement	under 21, mentally disabled, in prison	20 years from accrual, not to exceed 10 years from time disability is removed	no
Nevada	NEV. REV. STAT. ANN. §§ 11.070–.180 (West 2000).	5 years	actual, open, notorious, hostile, under exclusive claim of right, continuous, and uninterrupted, <i>Howard v. Wright</i> , 143 P. 1184, 1186 (Nev. 1914).	yes	no	possession of one lot is not other lots of the same tract	within age of majority, insane, in prison	2 years after disability removed or death under disability	no
New Hampshire	N.H. REV. STAT. ANN. §§ 508:2, :3 (LexisNexis 2009).	20 years	adverse, open, continuous, exclusive, so as to give notice, <i>Riverwood Commercial Props., Inc. v. Cole</i> , 639 A.2d 714, 715 (N.H. 1994).	no	no	no special requirement	infancy, mentally incompetent	5 years after disability removed	no
New Jersey	N.J. STAT. ANN. §§ 2A:14-30 to -32, A:62-2 (West 2000).	60 years if woodlands or uncultivated tracts; 30 years if not woodlands or uncultivated tracts or if color of title	actual, exclusive, adverse, visible or notorious, and continued and uninterrupted, <i>Patton v. N.J. Dist. Water Supply Comm'n</i> , 459 A.2d 1177, 1180 (N.J. 1983).	sometimes; must pay taxes for 5 consecutive years and have recorded deed if no peaceable possession	sometimes	actual possession of principal tract is sufficient to show possession of adjoining tract if claimant has legal title	under 21, unsound mind, absent from U.S.	5 years after disability removed	no

New Mexico	N.M. STAT. ANN. § 37-1-22 (West 2010).	10 years plus good faith	actual, visible, exclusive, hostile, and continuous, <i>Polanco v. Prudencio</i> , 242 P.3d 439, 443 (N.M. Ct. App. 2010).	yes	yes	no special requirement	under age of majority, unsound mind, in prison	1 year after disability is removed	no
New York	N.Y. REAL PROP. ACTS. LAW §§ 501-551 (McKinney 2009).	10 years	adverse, under claim of right, open and notorious, continuous, exclusive, and actual, N.Y. REAL PROP. ACTS. LAW §501 (McKinney 2009); <i>Almeida v. Wells</i> , 904 N.Y.S.2d 736, 739 (N.Y. App. Div. 2010).	no	no	possession of one lot is not possession of any other lots	no	no	no
North Carolina	N.C. GEN. STAT. ANN. §§ 1-17, -38, -40 (West 2000 & Supp. 2010).	7 years if color of title; 20 years otherwise	actual, open, visible, notorious, continuous, and hostile, <i>Newkirk v. Porter</i> , 74 S.E.2d 235, 238 (N.C. 1953).	yes	if land marked by boundaries and has been surveyed, payment of taxes creates presumption of possession	no special requirement	minority, insane, incompetent	3 years after disability removed	no
North Dakota	N.D. CENT. CODE §§ 28-01-04 to -14, 47-06-03 (2006).	20 years	actual, visible, continuous, notorious, distinct, hostile, and under claim of ownership, <i>Graebeler v. Geringer</i> , 640 N.W.2d 454, 457 (N.D. 2002).	yes	yes	no special requirement	under 18, insane, in prison	10 years after disability is removed or death under disability	no
Ohio	OHIO REV. CODE ANN. § 2305.04 (LexisNexis 2010).	21 years	open, notorious, exclusive, adverse, hostile and continuous, <i>Davis v. Konjicija</i> , 620 N.E.2d 1010, 1013 (Ohio Ct. App. 1993).	no	no	no special requirement	minority, unsound mind	10 years after disability is removed	no
Oklahoma	OKLA. STAT. ANN. tit. 12, §§ 93-94 (2000).	15 years; 5 years if recorded deed from sale	actual, open, notorious, exclusive, and hostile, <i>Hernandez v. Reed</i> , 239 P.3d 186, 189 (Okla. Civ. App. 2010).	no	no	no special requirement	legal disability	2 years after disability is removed	no

Oregon	Or. Rev. STAT. ANN. §§ 12.050, .160 (West 2003).	10 years	actual, open, notorious, exclusive, continuous and hostile under claim of right or color of title, <i>Woolfolk v. Isler</i> , 588 P.2d 632, 633 (Or. Ct. App. 1978).	no	no	no special requirement	under 18, insane	1 year after disability removed, not to exceed 5 years total	no
Pennsylvania	42 PA. CONS. STAT. ANN. §§ 5530, 5533 (West 2004 & Supp. 2010).	21 years	actual, continuous, exclusive, visible, notorious, distinct, and hostile, <i>Shaffer v. O'Toole</i> , 964 A.2d 420, 423 (Pa. Super Ct. 2009).	no	no	no special requirement	minority	21 years after disability removed	no
Rhode Island	R.I. GEN. LAWS §§ 34-7-1 to -9 (1995 & Supp. 2010).	10 years	actual, open, notorious, hostile, under claim of right, continuous, and exclusive, <i>St. Jean Place Condo. Ass'n v. DeLeo</i> , 745 A.2d 738, 742 (R.I. 2000).	no	no	no special requirement	underage, unsound mind, in prison, outside U.S.	10 years after disability removed	recording notice will stop adverse possession R.I. GEN. LAWS § 34-7-6 (1995 & Supp. 2010).
South Carolina	S.C. CODE ANN. §§ 15-67-50, -210 to -270 (2005).	10 years	continuous, hostile, open, actual, notorious, and exclusive, <i>Davis v. Monteith</i> , 345 S.E.2d 724, 726 (S.C. 1986).	no	no	possession of one lot is not possession of any other lot in same tract	minority	3 years after disability removed	no
South Dakota	S.D. CODIFIED LAWS §§ 15-3-1 to -19 (2004).	10 years if color of title, good faith, paid taxes, and actual possession; 10 years if vacant and unoccupied land, color of title, good faith, and paid taxes; 20 years otherwise	actual, open, visible, notorious, continuous, and hostile, <i>Titus v. Chapman</i> , 687 N.W.2d 918, 925 (S.D. 2004).	sometimes	sometimes	possession of one lot is not possession of any other lot in same tract	under age of 21, mentally ill, in prison	10 years after disability removed if 20 year SOL 3 years after disability removed if 10 year SOL	no

Tennessee	TENN. CODE ANN. §§ 28-2-101 to -111 (2000).	7 years if recorded color of title; 20 years otherwise	exclusive, actual, adverse, continuous, open and notorious, under a claim of right or title to property, <i>Tidwell v. Van Deventer</i> , 686 S.W.2d 899, 902 (Tenn. Ct. App. 1984).	yes, or claimant will be forever barred, unless minor or unsound mind, then have 3 years after disability removed payment of taxes for 20 years plus color of title for 20 years creates presumption that claimant is legal owner	yes, must be recorded for 7 years payment of taxes for 20 years plus color of title for 20 years creates presumption that claimant is legal owner	no special requirement	only with regard to payment of taxes	3 years after disability is removed	no
Texas	TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.022-037 (Vernon 2002 & Supp. 2010).	3 years if title or color of title; 5 years if cultivated, taxes paid, and has registered deed; 10 years if cultivated and registered deed, but is limited to greater of 160 acres or enclosed area; 25 years if cultivated, or if good faith and under deed or other instrument	actual, visible, continuous, notorious, distinct, hostile, and under claim of exclusive ownership, <i>Kazmir v. Benavides</i> , 288 S.W.3d 557, 561 (Tex. App. 2009).	sometimes owner's failure to exercise dominion or pay taxes for 25 years and claimant's exercise of dominion and payment of taxes for 25 years is prima facie evidence that claimant has title	sometimes	if claimant owns/claims 5,000 or more fenced acres that adjoins land, no adverse possession unless land separated by fence, 1/10 of land is cultivated, or claimant actually possesses land	under 18, unsound mind, military service	same time to present claim as others after termination of disability (3-25 years)	no

Utah	UTAH CODE ANN. §§ 78B-2-207 to -226 (2008 & Supp. 2010).	7 years	actual, open and notorious, and continuous, <i>Royal St. Land Co. v. Reed</i> , 739 P.2d 1104, 1106 (Utah 1987).	yes for 7 years unless tax title, in which case 4 years	no color of title creates presumption of "adverse" tax title for four years creates presumption of ownership if no color of title, land must be enclosed, cultivated, improved, and \$5 per acre has been expended to irrigate the land	no special requirement	minor, mentally incompetent	once disability is removed	no
Vermont	Vt. STAT. ANN. tit. 12, §§ 501, 551 (2002).	15 years	open, notorious, hostile, and continuous, <i>MacDonough-Webster Lodge v. Wells</i> , 834 A.2d 25, 35 (Vt. 2003).	no	no	no special requirement	minor, insane, in prison	within time otherwise allowed after disability removed	no
Virginia	VA. CODE ANN. §§ 8.01-236, -237 (2007).	15 years	actual, hostile, exclusive, visible, continuous, and under claim of right, <i>Young Kee Kim v. Dowval Corp.</i> , 529 S.E.2d 92, 95 (Va. 2000).	no	either claim of title or color of title required	no special requirement	infancy, incapacity, in prison	after disability is removed, not to exceed 25 years	No
Washington	WASH. REV. CODE ANN. §§ 7.28.050-.090 (West 2007).	7 years; 10 years if more than 20 acres of forest land	open, uninterrupted, hostile, and exclusive, <i>Danner v. Bartel</i> , 584 P.2d 463, 465 (Wash. Ct. App. 1978).	yes	yes	no special requirement	under 18, incompetent	3 years after disability removed (and must pay taxes to other party if vacant and unimproved land)	no

West Virginia	W. VA. CODE ANN. §§ 55-2-1, -3 (LexisNexis 2008).	10 years	adverse or hostile, actual, open and notorious, exclusive, continuous, and under claim of title or color of title, <i>Naab v. Nolan</i> , 327 S.E.2d 151, 154 (W. Va. 1985).	no	need either claim of title or color of title	no special requirement	infancy, insanity	5 years after disability removed	no
Wisconsin	WIS. STAT. ANN. §§ 893.16, 25-.27 (West 1997 & Supp. 2010).	20 years if actually occupied under claim of title, and either enclosed or improved; 10 years if recorded color of title; 7 years if recorded color of title and payment of taxes for 7 years	hostile, open and notorious, exclusive, and continuous, <i>Leciejewski v. Sedlak</i> , 342 N.W.2d 734, 737 (Wis. 1984).	sometimes	sometimes if no color of title, only adversely possessed if actual occupation under claim of title where land is enclosed, cultivated, or improved	possession of one lot is not possession of other lots in the same tract	under 18, mentally ill	2 years after disability ceases, not to exceed 5 years	no
Wyoming	WYO. STAT. ANN. §§ 1-3-103, -104 (2009).	10 years	actual, open, notorious, exclusive, continuous, hostile, and under claim of right or color of title, <i>Hovendick v. Ruby</i> , 10 P.3d 1119, 1122 (Wyo. 2000).	no	need either claim of title or color of title	no special requirement	legal disability	10 years after disability is removed	no

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