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ADVERSE POSSESSION AND SUBJECTIVE INTENT

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According to the dominant view among commentators on the law of real property, the requirements for acquiring title by adverse possession come down to a simple test. Has the adverse possessor so acted on the land in question as to give the record owner a cause of action in ejectment against him for the period defined by the statute of limitations? It matters not what the motives or the state of mind of the possessor are. What matters is the possessor's physical relationship to the land over a sufficient length of time. Of course, if the possessor has the record owner's permission, that changes the picture. The possession is then no longer hostile in a legal sense, and no right to title will accrue to the possessor. But this, the argument runs, is precisely because the record owner has no cause of action against one whom he has permitted to occupy the land. The special situation shows the correctness of the underlying test.

The attractions of this view of adverse possession are great. It is securely tied to the statute of limitations, the foundation of the doctrine, which defines the period after which the record owner will lose his cause of action to recover the land from the trespasser. This view provides a workable test. By excluding inquiry into the possessor's state of mind, it confines attention to external and verifiable facts. It may even promote the settling of land titles and the alienability of land

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by more easily resolving disputes over title.[1] By focusing on the record owner's failure to exercise a cause of action and forsaking argument on the actual intent or knowledge of the possessor, adverse possession comes to depend upon a simple, and even an elegant, formulation of law. It is no wonder that the test is approved by authorities of the highest stature. The American Law of Property,[2] the Restatement,[3] law review articles,[4] and presentations in standard hornbooks[5] all advance it.

There is, however, one difficulty with this test, and it is a substantial difficulty. The test is contradicted by the case law. Whatever its attraction, the validity of the test must stand or fall on its acceptance in practice, and the bulk of recent cases require a different formulation of the rule, one which recognizes the relevance of the subjective intent of the possessor in determining whether or not he may validly acquire title by the passage of the statutory period. The cases, taken as a whole, do not show that the adverse possessor must plead and prove that he acted in good faith. It is enough that the question may be raised under the rubric "claim of right." But the cases do clearly show that the trespasser who knows that he is trespassing stands lower in the eyes of the law, and is less likely to acquire title by adverse possession than the trespasser who acts in an honest belief that he is simply occupying what is his already. The view according to which pure, non-permissive possession and the consequent accrual of a cause of action in ejectment provide the determinative test finds little support in the case law of recent years. The view does not adequately explain the complexity of questions of intent found in the actual cases; nor does it account for the persistence of ethical values in the opinions of judges. Both deserve a

1. That this is the proper object of the doctrine was persuasively argued long ago by Ballantine, *Title by Adverse Possession,* 32 HARV. L. REV. 135 (1918). *See also* Epstein, *Possession as the Root of Title,* 13 GA. L. REV. 1221 (1979).

2. 3 AMERICAN LAW OF PROPERTY §§ 15.2, 15.4 (A. Casner ed. 1952). *See also* R. POWELL & P. ROHAN, POWELL ON REAL PROPERTY § 1015 (1968); 4 H. TIFFANY, THE LAW OF REAL PROPERTY §§ 1132-34 (1975 & Supp. 1983).

3. RESTATEMENT OF PROPERTY § 458 (1944).

4. J. AMES, *The Nature of Ownership,* in LECTURES ON LEGAL HISTORY 192, 197-207 (1913); Bordwell, *Mistake and Adverse Possession,* 7 IOWA L. BULL. 129 (1922); Goodman, *Adverse Possession of Land—Morality and Motive,* 33 MOD. L. REV. 281 (1970); Sternberg, *The Element of Hostility in Adverse Possession,* 6 TEMP. L.Q. 207 (1932); Stoebuck, *The Law of Adverse Possession in Washington,* 35 WASH. L. REV. 53 (1960); Walsh, *Title by Adverse Possession,* 16 N.Y.U. L.Q. REV. 532 (1939), 17 N.Y.U. L.Q. REV. 44 (1939).

5. W. BURBY, HANDBOOK OF THE LAW OF REAL PROPERTY § 112 (3d ed. 1965); J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 304-06 (2d ed. 1975).

more prominent place in the scholarly literature on the subject than they currently receive. Subjective factors make a difference in litigation whenever they are shown or suggested by external manifestations.

I. SCOPE OF THE SURVEY

The occasion for this study has been the writer's desire to understand developments in this area of the law. The relevant recent cases are abundant. In fact they are over-abundant. Many of them involve relatively insignificant pieces of land, backyard boundary disputes being depressingly common. Since it seems certain that the appellate cases are only the "tip of the iceberg" of actual litigation, it follows that the law in this area has failed to achieve the clarity apparently facilitated by the view which looks to pure possession as the relevant test. Why should this be? One obvious possibility is that subjective factors have played a greater role in the decision of cases than commentators have allowed for. The notion that there is something wrong in permitting a knowing trespasser to gain good title may have continued to exert an influence over judges, giving rise to uncertainty in the law and consequent litigation. This ethically based notion is mentioned in academic treatments of the subject, but is commonly treated as an obsolete view, one on the way out, distinctly a minority position.[6] The writer, seeing the large volume of litigation on the subject, wondered whether subjective factors might not be at the root of a significant part of the litigation.

To test the possibility that subjective factors have continued to play an important role in litigation, the writer examined the bulk of cases dealing with adverse possession since 1966.[7] Many of the cases bore no relation to the subject. They turned on other questions, procedural and evidentiary points, or matters like whether there had been the privity of interest necessary for "tacking" between successive possessors. The va-

6. *See, e.g.*, C. CALLAHAN, ADVERSE POSSESSION 73 (1961). Callahan argues that the willingness to look to the possessor's state of mind is, "in the process of giving way to the theory that the entire matter is simply one of the application of the statutes of limitations." *Id.*

7. The author read all cases indexed under key numbers in the Dicennial Digest which bore on the subject of what title the adverse possessor claimed. He also read a considerable number of cases found under less likely headings. He used Lexis to locate cases dealing with the subject. In all he examined about 850 appellate opinions. The cases surveyed came from every part of the United States, although there was perhaps a slight predominance in favor of the Western and "Sunbelt" states. No cases from Louisiana were included because of the civil law foundation of their system of prescription.

riety and complexity of many of the cases disappointed the writer's hopes of adopting a statistical approach. Nevertheless, a great many cases did deal with problems associated with the possessor's intent, enough that distinct patterns emerged. A common concern for problems stemming from this old question was manifest despite the existence of special rules in some jurisdictions and special problems such as those related to "tacking" of periods of possession. Intention remains a continuing and a fruitful source of uncertainty and dispute.

II. THE IRRELEVANCE OF THE ACCRUAL OF A CAUSE OF ACTION

The recent cases on adverse possession seldom approach the subject by asking when a cause of action accrued against the possessor. If this is the "basic question," as the American Law of Property insists it is,[8] then it is a question the courts are practically unanimous in disregarding.[9] Instead, they focus on whether or not the trespasser has fulfilled the five positive requirements of adverse possession: that is, hostility under claim of right, actual possession, openness and notoriety, exclusivity, and continuity.[10] In other words, the judges routinely ask the question: Has the trespasser met a series of affirmative tests? They regularly refrain from asking: When could the record owner have brought suit to oust the trespasser? If the cases of the eighteen year period covered are any guide, the attempts by commentators to induce judges to focus on the latter question must be counted a miserable failure.

In some jurisdictions, the commonly adopted approach to problems of adverse possession is encouraged, if it is not required, by the existence of prescriptive title statutes, which define the means of acquiring

8. 3 AMERICAN LAW OF PROPERTY § 15.4, at 774.

9. This was the theme of an influential article published fifty years ago. Bordwell, *Disseisin and Adverse Possession,* 33 YALE L.J. 1 (1923).

10. The first requirement, hostility under claim of right, means simply that the adverse possessor must not hold the land in subservience to the rights of the record owner. He must treat the land as his own. The second, openness or notoriety, requires only that the hostile possession be manifested to the world at large, in part to alert the record owner to the availability of a cause of action against the possessor. The third, actual possession, means that the adverse possessor must physically occupy the land in the same fashion the average owner would. The fourth, exclusivity, holds that adverse possession cannot be claimed by a person who shares the use of the land with the record owner or one claiming under him. The reason for the fourth requirement is not greatly different from that underlying the others. The adverse possessor must make manifest his intention to claim title. The fifth requirement, continuity, also fulfills this function. It means no more than that the possessor's claim must be maintained throughout the statutory period.

title by adverse possession.[11] They typically spell out the five affirmative requirements for prescriptive title, restating the required length of possession found in the statute of limitations.[12] However, even where such statutes do not exist, the courts have regularly adopted the approach prescriptive title statutes set out. That is, courts look to the fulfillment of the affirmative requirements necessary to acquire prescriptive title. The fundamental distinction, frequently made by commentators, between title by prescription and title by adverse possession simply does not exist in the case law. Judges do not approach their cases by looking for the accrual of a cause of ejectment, even where the statute of limitations is the only relevant statute.

The facts of many of the litigated cases suggest one reason this has been so. Often the facts simply do not lend themselves to analysis in terms of the accrual of a cause of action. One man plants grass on land abutting his and mows it for the statutory period.[13] Another uses a lot to park cars for patrons whenever there is a baseball game at a nearby stadium.[14] A third plants trees on another's land; they grow until they block the other's access to the land.[15] Has title been acquired in any of these cases? To approach that question by asking about the availability of ejectment is to invite laughter. Theoretically, of course, it might be attempted. One might ask whether the mower of grass or the planter of trees could have been sued in ejectment. But that is an unreal question, particularly when, as is usually the case, the record owner assumed that the trespasser had a right to be there until a later survey turned up a more accurate state of the title. Therefore, the absence of judicial use of the question of the availability of ejectment, even in cases where the facts would allow it to be more naturally applied, is not very surprising. Even where buildings or fences intrude onto the land of the record owner, judges rarely analyze the situation in terms of pure possession and the accrual of a cause of action. They routinely ignore that approach.

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11. *See* Taylor, *Titles to Land by Adverse Possession,* 20 IOWA L. REV. 551, 551-54 (1935).

12. This is not true in every instance, however; Alabama law requires twenty years adverse possession to acquire prescriptive title, but its limitations period for actions to recover real property is only ten years. This creates the anomalous situation where the possessor could not be ejected, but would not have valid title. *See* Note, *Adverse Possession in Alabama,* 28 ALA. L. REV. 447, 455 (1977).

13. Conwell v. Allen, 21 Ariz. App. 383, 519 P.2d 872 (1974).

14. Burnett v. Knight, 428 S.W.2d 470 (Tex. Civ. App. 1968 writ ref'd n.r.c.).

15. Hemon v. Rowe Chevrolet Co., 108 N.H. 11, 226 A.2d 792 (1967).

To this virtual rule there is one exception: cases involving future interests, disabilities, and, to a lesser extent, cotenancies. In these situations the accrual of a cause of action marks the essential moment for starting the statutory period in a way not relevant to most adverse possession cases. Remaindermen after an existing life estate have no present right to possession, so it would normally be unfair to bar them until the death of the life tenant, whatever the extent of the trespasser's use of the property.[16] Likewise, the record owner under a statutory disability, such as minority or mental incompetence, should have his rights measured from the time when his disability is removed. That removal marks the accrual of the cause of action against him.[17] Also the tenant in common out of possession should not be barred by his contenant's activities, no matter how long continued, until the cotenant in possession disavows the tenancy by an unequivocal act.[18] In these situations it makes sense to analyze the case in terms of the accrual of a cause of action. The courts have generally,[19] although not uniformly,[20] followed that approach. However, these are the rare cases. They have given rise to comparatively small amounts of litigation. In the vast majority of cases, judges have begun with the question of whether the possessor had occupied the land under "claim of right" for the statutory period, and they have not hesitated to enter into the murky waters of determining the possessor's state of mind, his subjective intent. An inquiry into the subjective intent of the possessor is the one thing advocates of the objective test of pure possession have most hoped to avoid.

16. *See* P. BAYSE, CLEARING LAND TITLES § 55 (2d ed. 1970).

17. *See* 7 R. POWELL, LAW OF REAL PROPERTY § 1014[3] (rev. ed. 1982).

18. *See id.* § 1013[2], at 91-36; Annot., 82 A.L.R.2d 5 (1962).

19. Cases involving life tenants and remaindermen include Duncan v. Johnson, 338 So. 2d 1243 (Ala. 1976); Kubiszyn v. Bradley, 292 Ala. 570, 298 So. 2d 9 (1974); Melliere v. Kaufmann, 93 Ill. App. 2d 242, 236 N.E.2d 147 (1968); Piel v. Dewitt, 170 Ind. App. 63, 351 N.E.2d 48 (1976); Possien v. Higgins, 421 S.W.2d 327 (Mo. 1967); Stone v. Conder, 46 N.C. App. 190, 264 S.E.2d 760 (1980); Hayhurst v. Hayhurst, 421 P.2d 257 (Okla. 1966). Disabilities have occasioned surprisingly little litigation during the period surveyed. *See, e.g., Adverse Possession: the Twenty-Five Year Statutes of Limitation and Disabilities Which Toll Limitations,* 7 ST. MARY'S L.J. 97 (1975). Illustrative cases involving co-tenancies include Brown v. Floyd, 202 So. 2d 215 (Fla. App. 1967); Jordan v. Robinson, 229 Ga. 761, 194 S.E.2d 452 (1972); City and County of Honolulu v. Bennett, 57 Haw. 195, 552 P.2d 1380 (1976); Handy v. Handy, 207 N.W.2d 245 (N.D. 1973); Hardeman v. Mitchell, 444 S.W.2d 651 (Tex. Civ. App. 1969).

20. *See, e.g.,* Wallace v. Magie, 214 Kan. 481, 522 P.2d 989 (1974); Armstrong v. Cities Serv. Gas Co., 210 Kan. 298, 502 P.2d 672 (1972); Cave City Masonic Lodge #790 v. Caverna Bd. of Educ., 520 S.W.2d 323 (Ky. App. 1975); St. Regis Pulp and Paper Corp. v. Floyd, 238 So. 2d 740 (Miss. 1970); Washington v. Crowson, 222 So. 2d 137 (Miss. 1969).

III. THE RELEVANCE OF HONEST POSSESSION

In cases where adverse possessors' claims are successful, judges often mention that the possessor acted in good faith as one reason for their decision. In some cases this is required of them. By statute[21] or by long-line of decisions in particular jurisdictions,[22] some cases require a finding of good faith on the part of the possessor. Entry under "color of title" is probably the most common such case. Normally the person who enters under an apparently valid muniment of title is entitled to acquire the property by occupying it for a shorter period than one who enters without such muniment, even though it turns out that the muniment is insufficient to convey good record title. But he must do so in good faith. If he knows that the muniment is a nullity when he enters, he acquires no title under the shorter statute. "Color of title" is held to require a title the possessor honestly thinks to be a good title.[23] However, this is a special situation and problem. Most adverse possession cases involve no special requirement other than the five requirements so commonly reiterated in the treatises. In these cases, despite the absence of any necessity, it is remarkable how frequently judges cite the existence and the relevance of good faith.

Most judges put the matter in a negative way. Because the term "hostility" might, to the untutored mind, be thought to mean what it says, judges stress that in law it does not. Hostility is "a term of art and does not imply ill will."[24] "For possession to be hostile in its inception, no spirit of animosity or hostility is required."[25] The hostility requirement is consistent with belief on the part of the adverse possessor that the title is rightfully his. As long as the possession does not originate

21. *See, e.g.*, N.M. STAT. ANN. § 37-1-22 (1978).

22. The law of the State of Washington furnishes the best example. *See, e.g.*, Howard v. Kunto, 3 Wash. App. 393, 477 P.2d 210 (1970); Rognrust v. Seto, 2 Wash. App. 215, 467 P.2d 204 (1970). A recent case held, however, that this doctrine requires only that the initial entry be made in good faith. Wickert v. Thompson, 28 Wash. App. 516, 624 P.2d 747 (1981). *See generally* Stoebuck, *supra* note 4.

23. See, for example, Eddings v. Black, 602 S.W.2d 353 (Tex. Civ. App. 1980 writ ref'd n.r.e.), in which it was held that where the adverse possessor took the deed knowing of an outstanding equitable claim in the property, he could not claim protection of the three-year limitation statute. The court noted "a want of intrinsic fairness and honesty" in the claim. *Id.* at 358. Compare *In re* Estate of Williams, 73 Cal. App. 3d 141, 140 Cal. Rptr. 593 (1977), in which the court stressed the good faith belief of the claimant and her predecessor in title in the unencumbered status of the title and their actions consistent with this good faith belief.

24. Mumrow v. Riddle, 67 Mich. App. 693, 698, 242 N.W.2d 489, 492 (1976).

25. Wijas v. Clorfene, 126 Ill. App. 2d 315, 320, 262 N.E.2d 83, 86 (1970).

with the permission of the record owner,[26] hostility, the first and seemingly negative requirement of the law on the subject, is perfectly compatible with a good faith belief on the possessor's part that he has a right to be there.

Indeed, this is the normal case. Honest mistake about the extent of one's property has provided the most fertile source of dispute. The courts have, for the most part, stressed its perfect consistency with adverse possession. *Reeves v. Metropolitan Trust Company*, decided by the Supreme Court of Arkansas, is a fair example.[27] It arose out of a dispute between neighbors. Two small parcels of land were claimed by both parties. The defendant was the record owner of the two parcels, but the plaintiff had been using both of them. The first parcel the court awarded to the plaintiff, who had "enclosed and possessed the tract for twenty years in the good faith belief that [he] owned it."[28] The second the court awarded to the defendant. The plaintiff had enclosed the parcel in order to house his dog, but he "admit[ted] candidly that he knew the land did not belong to him."[29] The distinction in treatment of the two parcels thus depended on the existence of an honest mistake about the first parcel, as against a knowing trespass on the second.[30] The availability of ejectment test was not mentioned. Instead in this, and in other like cases,[31] the judges have treated the possessor's actual belief

26. Hostility does not mean or imply enmity or wrongful intent, " 'but rather that the claimant's possession be unaccompanied by any recognition, express or inferable from the circumstances, of the real owner's right to the land.' " Blickenstaff v. Bromley, 243 Md. 164, 174, 220 A.2d 558, 563 (1966).

27. 254 Ark. 1002, 498 S.W.2d 2 (1973).

28. *Id.* at 1003, 498 S.W.2d at 3.

29. *Id.* at 1003, 498 S.W.2d at 4.

30. The plaintiff had occupied the second parcel for 11 years; this was not a material fact since only seven years possession was required under Arkansas law. *See* ARK. STAT. ANN. § 37-101 (1962).

31. The refrain found in many cases is set out succinctly in Robbins v. Eotoff, 39 Mich. App. 589, 590, 197 N.W.2d 912, 913 (1972) ("While defendant did not hold title to [the disputed plot], she believed it to be hers."), and in less colloquial terms in Barclay v. Tussey, 259 Ark. 238, 240, 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."). *See also* Chapman v. Moser, 532 F.2d 426 (5th Cir. 1976); Gary v. Dane, 411 F.2d 711 (D.C. Cir. 1969); Knapp v. Wise, 122 Ariz. 327, 594 P.2d 1023 (Ariz. App. 1979); Clark v. Mathis, 253 Ark. 416, 486 S.W.2d 77 (1972); Anderson v. Cold Spring Tungsten, Inc., 170 Colo. 7, 458 P.2d 756 (1969); Niles v. Churchill, 29 Colo. App. 283, 482 P.2d 994 (1971); Allen v. Thomas, 215 So. 2d 882 (Miss. 1968); Walker v. Walker, 509 S.W.2d 102 (Mo. 1974); Cash v. Gilbreath, 507 S.W.2d 931 (Mo. Ct. App. 1974); Calfee v. Duke, 544 S.W.2d 640 (Tex. 1976); Root v. Mecom, 542 S.W.2d 878 (Tex. Civ. App. 1976).

that the property belonged to him as a positive and relevant factor.

The judicial proclivity for making a relevant issue out of actual belief is clearly seen in developments in the conflict between the so-called Maine and Connecticut rules in boundary disputes. This area is said to pose a conflict between a "subjective" and an "objective" test, and to some extent it does. But the cases which reject, for good reasons, the "subjective" test of the Maine rule stop well short of embracing a purely "objective" test required by the "availability of ejectment" theory of adverse possession. Indeed it appears that it is the importance of good faith which has fueled development in this area.

Briefly, the conflict is between what is said to be the older view (the Maine view) that when a landowner occupies land beyond his true boundary line under the mistaken belief that in fact it lies within his boundary, his possession cannot be adverse and cannot ripen into title. Because the possessor is acting through ignorance or mistake, and would amend his occupation were the true boundary line known to him, his possession lacks the element of hostility necessary for adverse possession.[32] Against this rule is a newer, but now the majority view (the Connecticut rule) that the possession is hostile even though the possessor would not have used the land had he known the location of the record boundary.[33] Under this view, the possessor's lack of actual hostility or desire to appropriate his neighbor's property is irrelevant. The external occupation itself creates the presumption of hostility.

The older view is open to several objections, the most significant is that it requires the courts to inquire into the state of mind of the possessor, who almost certainly never gave the matter a thought until the time of the dispute. The rule has been severely and justifiably criticized by judges and legal commentators alike.[34] The courts have also moved away from it, preferring the more satisfactory and objective Connecticut rule. However, the results have not amounted to a vindication of

32. The leading case is Preble v. Maine Cent. R.R., 85 Me. 260, 27 A. 149 (1893). It may well be that the difference is often more formal than substantive, changing merely the nature of the testimony offered. *See, e.g.,* Howe v. Natale, 451 A.2d 1198 (Me. 1982).

33. The leading case is French v. Pearce, 8 Conn. 439 (1831).

34. *See* Kubiszyn v. Bradley, 292 Ala. 570, 298 So. 2d 9 (1974); Predham v. Holfester, 32 N.J. Super. 419, 108 A.2d 458 (1954); West v. Tilley, 33 A.D.2d 228, 306 N.Y.S.2d 591 (1970); Threet v. Polk, 620 P.2d 467 (Okla. App. 1980); 3 AMERICAN LAW OF PROPERTY § 15.5; Darling, *Adverse Possession in Boundary Disputes,* 19 OR. L. REV. 117 (1940); Day, *The Validation of Erroneously Located Boundaries by Adverse Possession and Related Doctrines,* 10 U. FLA. L. REV. 245, 253-60 (1957).

the view that simple possession is all that matters, because the cases show that it is the very absence of a desire to trespass upon another's land that makes the Connecticut rule preferable.

An important New Jersey case well illustrates this point. Prior to 1969 the courts of that state had been long-time, if sometimes reluctant, adherents of the Maine rule.[35] In *Mannillo v. Gorski*, however, the New Jersey Supreme Court overruled these prior cases and adopted the Connecticut rule.[36] The decision cites as the main reason for doing so that the older doctrine favors the willful trespasser over the honest but mistaken trespasser. The Maine rule has the effect of rewarding knowingly wrongful conduct. In the court's stated view, no distinction should be drawn between them. In the actual case the trespass was *not* willful and all subsequent discussion in the case assumes his innocence from intentional wrongdoing. The innocent trespasser is the possessor for whom the change in New Jersey law was designed.[37]

This same judicial reaction is what one finds in cases of the last eighteen years from other jurisdictions which have approved the Connecticut rule. A New York court took a similar position in 1970, permitting the acquisition of title by mistaken possession and specifically distinguishing a prior case in which adverse possession was not made out where the possessor, "knew at the time of construction that the building was not on his land."[38] As a Colorado court put the matter, "The hostility requisite to establishing adverse possession in such circumstances is merely that of a person occupying property with the belief that the property is his own."[39] An Oregon court, also approving the Connecticut rule, held that there were two requirements for hostility in the boundary mistake cases: the adverse possessor must believe

35. *See* Rullis v. Jacobi, 79 N.J. Super. 525, 192 A.2d 186 (1963); Predham v. Holfester, 32 N.J. Super. 419, 108 A.2d 458 (1954).

36. 54 N.J. 378, 255 A.2d 258 (1969).

37. The example of New Hampshire is also instructive. Starting from a position which seemingly required that the adverse possessor be aware of the outstanding claim, Hoban v. Bucklin, 88 N.H. 73, 184 A. 362 (1936), the New Hampshire courts have now rejected the approach which purports to make the question of intent the relevant factor. *See* Hewes v. Bruno, 121 N.H. 32, 424 A.2d 1144 (1981). However, at least so far as appears from the reports, they have not faced a case of provable bad faith since the adoption of the new standard.

38. West v. Tilley, 33 A.D.2d 228, 232, 306 N.Y.S.2d 591, 595 (1970). *See also* 16 N.Y.L. FORUM 671, 675 (1970) (noting as the reason for the decision the need to protect the honest landowner).

39. Brehm v. Johnson, 531 P.2d 991, 993 (Colo. Ct. App. 1974).

the land is his and he must have "had a basis for that belief."[40] In other words, although the courts have used the unfairness of allowing the bad faith trespasser an advantage over the innocent trespasser as a reason for adopting the Connecticut rule, when those courts have come to describe in affirmative terms what is required under the Connecticut rule, they have done so in terms of permitting the acquisition of title by honest, though mistaken, belief.

It is thus the equity in favor of the good faith trespasser as much as the simplicity of the pure possession standard that has influenced judicial opinions on the point. The very homeliness of some of the testimony appellate judges have chosen to insert in their opinions makes the point. "I figured it was mine, it was in my fence line," testified one successful adverse possessor.[41] "Why yes, [I] didn't know anything different but [that] it belonged to that place," testified another.[42] "I thought it was my property or I wouldn't have been mowing it," said a third.[43] In all these cases title was acquired by possession, and, at least if we can judge by the language of the opinions, the apparent honesty of the mistaken appropriation made the significant difference in the application of the Connecticut rule. Any reader of the cases must feel some sympathy with the Mississippi judge who complained wearily in 1970, "This is another one of those cases based upon the misconception that possession of property is sufficient to sustain a claim of ownership by adverse possession."[44] Honest belief seems to matter.[45]

IV. Cases of Bad Faith Possession

On the other hand, it is true that the holdings in cases of honest but mistaken belief are formally consistent with the doctrine that pure possession is what starts the statute of limitations running and what per-

40. Breuer v. Covert, 47 Or. App. 225, 230, 614 P.2d 1169, 1172 (1980). *See also* Loewenberg v. Wallace, 151 Conn. 355, 197 A.2d 634 (1964); Patient v. Stief, 49 Ill. App. 3d 99, 363 N.E.2d 927 (1977); Ewald v. Horenberger, 37 Ill. App. 3d 348, 345 N.E.2d 524 (1976); Ford v. Eckert, 406 N.E 2d 1209 (Ind. Ct. App. 1980).

41. Butler v. Hanson, 455 S.W.2d 942, 951 (Tex. 1970) (Smith, J., dissenting) (full text of transcript relied upon by majority).

42. Crane v. Loy, 436 S.W.2d 739, 742 (Mo. 1968).

43. Miller v. Fitzpatrick, 418 S.W.2d 884, 889 (Tex. Civ. App. 1967).

44. Coleman v. French, 233 So. 2d 796, 796 (Miss. 1970).

45. *See, e.g.*, Penn Cent. Transp. Co. v. Martin, 170 Ind. App. 519, 353 N.E.2d 474 (1976); Morehead v. Parks, 213 Kan. 806, 518 P.2d 544 (1974); Ross v. McNeal, 618 S.W.2d 224 (Mo. Ct. App. 1981); Leach v. West, 504 P.2d 1233 (Okla. 1972); Somon v. Murphy Fabrication & Erection Co., 232 S.E.2d 524 (W. Va. 1977); Beasley v. Knoczal, 87 Wis. 2d 233, 275 N.W.2d 634 (1979).

mits the possessor eventually to acquire title. The stress laid on the honesty of the possessor's belief in many of those opinions may be uncomfortable for the doctrine, but it is not directly contrary to it. Discussions of honesty can be described as mere *obiter dicta*, and they may be countered by language sometimes found in the opinions to the effect that the motive of the possessor is legally irrelevant.

This possibility is, however, undermined by the great majority of recent cases where there was actual evidence showing that the adverse possessor knew he was trespassing on the land of another at the time of the initial appropriation. Most such cases hold that the willful trespasser has acquired no title. We must leave aside, of course, all cases involving permissive possession. Where the record owner allows the trespasser to occupy his land, as under a lease or even a more informal arrangement, no question of acquisition of title can arise. The possession is not adverse. But even so, this leaves a considerable body of recent case law, and most of it does not fit the pure possession theory of adverse possession. The notion that "acquiring title by larceny does not go in this country,"[46] though largely disapproved by commentators, has a considerable and continuing judicial following. It seems, in fact, to be the majority rule.

The means judges have taken to reach this result have varied. It has seldom been by direct adoption of a requirement of good faith. That would be contrary to hornbook law. Furthermore, it is legally unnecessary. Because under any formulation of the law the possession must be taken under "claim of right," judges always have the opportunity to distinguish knowing trespass from honest, but mistaken, appropriation. The very elasticity of the rubric "claim of right" provides the opportunity to distinguish good from bad faith trespass. American judges continue to seize the opportunity.

One common way of refusing to reward the bad faith possessor has been to describe his possession as somehow less than sufficient to acquire title. A pejorative description can be fastened onto it. It may be described as "scrambling possession"[47] or "provisional and contingent" occupancy.[48] It may be called "naked possession"[49] or "mere occu-

46. Jasperson v. Scharnikow, 150 F. 571, 572 (9th Cir. 1907), *cited in* O. BROWDER, R. CUNNINGHAM, J. JULIN & A. SMITH, BASIC PROPERTY LAW 47 (3d ed. 1979).

47. M.C. Dixon Lumber Co. v. Mathison, 289 Ala. 229, 236, 266 So. 2d 841, 848 (1972).

48. Moss v. James, 411 S.W.2d 104, 107 (Mo. 1967) (dictum) (quoting State *ex rel.* Edie v. Shain, 348 Mo. 119, 124, 152 S.W.2d 174, 177 (1941)).

pancy."[50] It can be said to stand no higher than "squatter's rights"[51] and therefore to lack the "claim of right" necessary to establish adversity. The invocation of such terms somehow seems sufficient itself to permit the judge to deny title to the dishonest possessor.

Commentators sometimes treat the phrase "claim of right" as a pure term of art, meaning no more than physical occupation inconsistent with the rights of the true owner, and they write off terms like "squatter's rights" as meaning no more than the absence of some necessary physical connection with the land.[52] But the recent cases suggest the contrary. "Claim of right" normally means what it says, and mere possession of "squatter's rights" is not enough to permit title to accrue, precisely because "squatter's rights" are taken without honest intent. This may be, as a Washington court recently put it, "derived from the early American belief that the squatter should not be able to profit by his trespass."[53] But simply because the belief is old does not mean that it is outmoded. It evidently continues to be held.

Something like the reverse approach, taken in order to reach the same result, has also been used by judges in refusing to allow the possession of a person who knows that he is trespassing on the land of another to ripen into title. This approach characterizes the knowing trespasser's possession as permissive, although there is no affirmative evidence of the record owner's actually having consented to it. The line between possession with the consent of the record owner and possession with clear knowledge that one does not have good title is, in any event, not always easy to draw. And courts have seized upon this ambiguity to deny title to the possessor. One finds cases where possession did not ripen into title where the claimant, "entered upon the land in recognition of the title of the church," this without any positive agreement between the parties.[54] Possession which can be described as

49. *See, e.g.,* Miller v. Fitzpatrick, 418 S.W.2d 884, 889 (Tex. Civ. App. 1967 writ ref'd n.r.e.) ("The naked possession unaccompanied with any claim of right will never constitute a bar.") (quoting Houston Oil Co. v. Stepney, 187 S.W. 1078, 1084 (Tex. Civ. App. 1916 writ ref'd n.r.e.)). *See also* DeArman v. Surls, 618 S.W.2d 88, 92 (Tex. Civ. App. 1981 writ ref'd n.r.e.).

50. DeCola v. Bochatey, 161 Colo. 95, 100, 420 P.2d 395, 397 (1966).

51. Wilton Boat Club v. Hazell, 502 S.W.2d 273, 276 (Mo. 1973).

52. 3 AMERICAN LAW OF PROPERTY § 15.4, at 776 states: "In these cases, however, the possession is generally doubtful and equivocal in fact. . . ."

53. Howard v. Kunto, 3 Wash. App. 393, 399, 477 P.2d 210, 214 (1970).

54. Spring Branch Indep. School Dist. v. Lilly White Church, 505 S.W.2d 620, 623 (Tex. Civ. App. 1973).

"neighborly"[55] or "friendly"[56] or "peaceable"[57] has been held insufficient to bar the record owner's claim even where there has been no evidence of any agreement or understanding between the parties that would suggest permissive possession.

The results in these cases do not seem wrong in common sense terms. Where two neighbors are getting along well, sometimes one will use the other's property and not a word will be said about it. Later there is a disagreement between them and a dispute over the property. Should the possessor be able to take advantage of his neighbor's good will, or his timidity, by pointing to his own physical possession and the absence of any evidence of consent on the part of his neighbor? One's instinctive reaction is that he should not. Where he never thought that the property belonged to him, why should he be allowed to change his mind? If some judges have "stretched" the concept of permissive possession to preserve the rights of the record owner in these situations, surely no one will blame them. In these cases, subjective intent is deservedly a relevant factor.[58]

In the majority of recent cases which have dealt with the problem, however, judges have not felt obliged to resort to any special characterization to deny the claim of the bad faith possessor. They have simply found that it lacked the requisite "claim of right" or (paradoxically) "hostility" when begun with knowledge of the true state of the title. For example, in a 1967 Texas case, testimony was given that the adverse possessor had said during the prescriptive period, that "he had more land under fence than he had bought, but that he was claiming the excess by limitation."[59] Such knowingly wrongful possession, the

55. Lundelius v. Thompson, 461 S.W.2d 153, 158 (Tex. Civ. App. 1970 writ ref'd n.r.e.).

56. Roth v. Flieg, 536 S.W.2d 39, 41 (Mo. 1976).

57. Wolgamot v. Corley, 523 S.W.2d 491, 495 (Tex. Civ. App. 1975 writ ref'd n.r.e.).

58. *See* Wolgamot v. Corley, 523 S.W.2d 491, 495 (Tex. Civ. App. 1975 writ ref'd n.r.e.) (" 'Peaceable possession,' even when accompanied with acts whose prima facie import is that of hostility may not, in truth, be adverse, for the intent of the possessor may bring his acts and conduct into consonance with recognition of the privileges of the true owner. Intent, then, is a controlling factor."). Other cases where permissive possession was apparently found without demonstrative evidence of actual permission include Courtney v. Boykin, 356 So. 2d 162 (Ala. 1978); Leon v. Byus, 115 Ariz. 451, 565 P.2d 1312 (1977); Massey v. Price, 252 Ark. 617, 480 S.W.2d 337 (1972); Gameson v. Remer, 96 Idaho 789, 537 P.2d 631 (1975); Shishilla v. Edmonson, 61 Ill. App. 3d 187, 377 N.E.2d 1115 (1978); Hood v. Denny, 555 S.W.2d 337 (Mo. Ct. App. 1977); Roman v. Roman, 485 Pa. 196, 401 A.2d 361 (1979); Runnels v. Whitfield, 593 S.W.2d 388 (Tex. Civ. App. 1979); Gray v. Fitzhugh, 576 P.2d 88 (Wyo. 1978). *Contra* Aleotti v. Whitaker Bros. Business Mach., 427 A.2d 919 (D.C. 1981).

59. Hoppe v. Sauter, 416 S.W.2d 912, 914 (Tex. Civ. App. 1967 writ ref'd n.r.e.).

court held, was no real claim of right, and was therefore insufficient to permit title to ripen. In a 1978 Illinois case, the possessor's deed specifically excluded the property in dispute. He knew what his deed covered, but went ahead and used the land anyway. When the matter came to court, the judge refused to recognize his title. "When an adverse claimant comes into possession of land thinking that he is not the record title holder, such possession lacks the requisite hostility for obtaining title by adverse possession."[60] A 1981 Illinois case disapproved this language, but in this later case the possessor was honestly mistaken about the location of the boundry line.[61] If the possessor knows the actual boundry line, but disregards it, the language of the earlier case represents the more common judicial approach. Often, there is affirmative proof that the possessor knew he was trespassing, but the events surrounding the possession are suspicious enough for courts to infer bad faith on his part. They then refuse to find adverse possession. Such holdings, often coupled with a statement of the rule that the burden of proving adverse possession lies on the claimant and that no presumptions will be indulged against the title of the record owner, represent a clear majority of recent cases where knowing trespass on the part of the possessor has been shown.[62]

The same conclusion emerges from examination of recent cases involving offers to purchase. Virtually all show the continuing importance of subjective intent. Sometimes the record owner will present

60. Hansen v. National Bank of Albany Park, 59 Ill. App. 3d 877, 879, 376 N.E.2d 365, 367 (1978).

61. Joiner v. Janssen, 85 Ill. 2d 74, 79, 421 N.E.2d 170, 173 (1981).

62. *See also* Hill v. Cape Coral Bank, 402 So. 2d 945 (Ala. 1981); Black v. Westwood Properties, Inc., 618 S.W.2d 169 (Ark. Ct. App. 1981); Dillaha v. Temple, 590 S.W.2d 331 (Ark. Ct. App. 1979); Vick v. Berg, 251 Ark. 573, 473 S.W.2d 858 (1971); Carpenter v. Ruperto, 315 N.W.2d 782 (Iowa 1982); Shives v. Niewoehner, 191 N.W.2d 633 (Iowa 1971); Whitehall Leather Co. v. Capek, 4 Mich. App. 52, 143 N.W.2d 779 (1966); SSM Inv. v. Siemers, 291 N.W.2d 383 (Minn. 1980); Wodall v. Ross, 317 So. 2d 892 (Miss. 1975); Monnig v. Lewis, 617 S.W.2d 492 (Mo. Ct. App. 1981); John v. Turner, 542 S.W.2d 293 (Mo. Ct. App. 1976); Martin v. Randono, 175 Mont. 321, 573 P.2d 1156 (1978); Barnes v. Milligan, 200 Neb. 450, 264 N.W.2d 186 (1978); Foos v. Reuter, 180 Neb. 301, 142 N.W.2d 552 (1966); Baker v. Benedict, 92 N.M. 283, 587 P.2d 430 (1978); Gerwitz v. Gelsomin, 69 A.D.2d 992, 416 N.Y.S.2d 127 (1979); Lewis v. Village of Lyons, 54 A.D 2d 488, 389 N.Y.S.2d 674 (1976); Lutz v. Van Valkenburgh, 27 A.D.2d 735, 277 N.Y.S.2d 42 (1967), *aff'd* 21 N.Y.2d 937, 237 N.E.2d 84, 289 N.Y.S.2d 767 (1968); Venator v. Quier, 285 Or. 19, 589 P.2d 731 (1979); Grimstad v. Dordan, 256 Or. 135, 471 P.2d 778 (1970); Spangler v. Schaus, 106 R.I. 795, 264 A.2d 161 (1970); Francis v. Stanley, 574 S.W.2d 629 (Tex. Civ. App. 1978); Root v. Mecom, 542 S.W.2d 878 (Tex. Civ. App. 1976); Hensz v. Linnstaedt, 501 S.W.2d 463 (Tex. Civ. App. 1973); Holbrook v. Carter, 19 Utah 2d 288, 431 P.2d 123 (1967).

evidence at trial to show that the claimant offered to pay him for the land in dispute at some point during the time before the statutory period had expired. Such offers furnish the most manifest evidence that the possessor knew of a conflicting right; and if they are fatal to his claim, they are also contrary to the doctrine that pure possession is what matters for purposes of determining title. Therefore, it is said by proponents of the pure possession standard, such offers are not fatal to the claim unless they result in inducing the record owner to forego asserting his rights. If they do not, particularly if the offer is refused, they are to be treated as mere offers to compromise a doubtful claim. Hence they are legally irrelevant, and they are not inconsistent with the "claim of right" necessary for adverse possession. That is what the proponents of the doctrine say. But it is not what the recent cases say. In virtually every instance where such evidence has been introduced, it has been held fatal to adverse possession. The judges have found the offer to be more than a rejected compromise. Thus where the possessor claimed that the payment to the record owner was made simply "to get rid of them, to get them off my back,"[63] the court nevertheless found that it amounted to a recognition of the record owner's paramount title and sufficed to defeat the adverse possession claim. Even where the offer to purchase was indignantly rejected, it has been held fatal. As a Montana court put it, "the question of adverse possession is one of intention,"[64] and where the evidence shows that the possessor knew enough of the true state of the title to offer money to the record owner, this has regularly been held inconsistent with the intention necessary to acquire title by adverse possession. That is the clear lesson of the recent cases.[65]

63. Ayers v. Day & Night Fuel Co., 451 P.2d 579, 582 (Alaska 1969).

64. Magelssen v. Atwell, 152 Mont. 409, 414, 451 P.2d 103, 105 (1969) (quoting Lamme v. Dodson, 4 Mont. 560, 591, 2 P. 298, 303 (1883)).

65. Kerlin v. Tensaw Land & Timber Co., 390 So. 2d 616 (Ala. 1980); Kittrell v. Scarborough, 287 Ala. 155, 249 So. 2d 814 (1971); Gurganus v. Kiker, 286 Ala. 442, 241 So. 2d 113 (1970); Davis v. Mayweather, 255 Ark. 966, 504 S.W.2d 741 (1974); Hungerford v. Hungerford, 234 Md. 338, 199 A.2d 209 (1964); Dunlop v. Twin Beach Park Ass'n, 111 Mich. App. 261, 314 N.W.2d 578 (1981); Whitehall Leather Co. v. Capek, 4 Mich. App. 52, 143 N.W.2d 779 (1966); People's Realty & Dev. Corp. v. Sullivan, 336 So. 2d 1304 (Miss. 1976); Brylinski v. Cooper, 95 N.M. 580, 624 P.2d 522 (1981); Campano v. Scherer, 49 A.D.2d 642, 370 N.Y.S.2d 237 (1975); Tindle v. Linville, 512 P.2d 176 (Okla. 1973); Beaver v. Davis, 275 Or. 209, 550 P.2d 428 (1976); White v. Chandler, 52 Or. App. 951, 630 P.2d 372 (1981); Spinks v. Estes, 546 S.W.2d 390 (Tex. Civ. App. 1977 writ ref'd n.r.e.); McDonald v. Batson, 501 S.W.2d 449 (Tex. Civ. App. 1973); Nagel v. Hopingardner, 464 S.W.2d 472 (Tex. Civ. App. 1971); Leon v. Dansie, 639 P.2d 730 (Utah 1981). *Contra* Macias v. Guymon Indus. Found., 595 P.2d 430 (Okla. 1979).

There seems little doubt that what underlies these cases is the feeling that it is wrong to allow someone who has acted in bad faith to profit thereby. Courts have rarely adopted good faith as an affirmative requirement. In fact, they assert that it is not a prerequisite; that is what the treatises say. But the results of most cases show that where courts allow adverse possession to ripen into title, bad faith on the part of the possessor seldom exists. Where the possessor knows that he is trespassing, valid title does not accrue to him simply by the passage of years. Courts thus admit the possibility of a truly hostile claimant acquiring valid title, but they do so chiefly to contrast the unfairness of treating him better than the honest possessor. Their purpose in making the contrast is to permit the honest possessor to acquire title. But when they encounter the actual bad faith claimant, they have been hesitant to favor his claim. In a 1970 Missouri case, the record owner's lawyer was allowed to argue to a jury that the adverse possessor "reminded him of a vulture watching for its prey."[66] In an Iowa case decided in 1982, the court reasoned that to allow title to accrue to a person who entered knowing he had no right to do so "would put a premium on dishonesty."[67] An Arkansas judge remarked incidentally in one such case: "A willful trespasser is hardly in a position to assert equitable rights."[68] We may leave aside the obvious objection that adverse possession has nothing to do with equitable rights if the accrual of a cause of action under the statute of limitations controls the question. "Equitable" considerations have found a way of creeping in.

"Equitable" considerations have also played an important part in most of the cases decided since 1965 which have awarded title to adverse possessors who knew, or should have known, that the land in question belonged to someone else at the time they entered. A number of cases have so held. They are consistent with the principle that the state of mind of the possessor is irrelevant. The judicial propensity for finding an absence of "claim of right" where bad faith is shown is a proclivity, not an invariable rule. However, on closer inspection, the right interpretation of these cases is not so clear. Many involved the conjunction of four "equitable" factors: a sympathy-inducing possessor, an unsympathetic record owner who had knowingly slept on his

66. Sandy Ford Ranch, Inc. v. Dill, 449 S.W.2d 1, 7 (Mo. 1970) (Held not reversible error, affirming jury finding against adverse possessor).

67. Carpenter v. Ruperton, 315 N.W.2d 782, 785 (Iowa 1982).

68. Hansen v. Pratt, 240 Ark. 746, 750, 402 S.W.2d 108, 110 (1966).

rights, the passage of a considerable period of time, and improvements made on the land by the hostile possessor. For example, in an Alaska case of 1974, the claimant was an Indian man of low mentality, the record owner was an absentee corporation, and forty years had passed since the claimant had entered.[69] In a Connecticut case of 1976, the possessor was a woman deserted by her husband. She had spent large amounts of money on improving the property, and there had been a long delay in initiating suit on the part of the record owner.[70] In a 1967 Arizona case, title was awarded to an old woman who spoke little English and had no experience in business affairs, who had made considerable improvements to the property. She had an oral assurance of title, this against a record owner who had delayed about twenty-five years before bringing suit.[71] In these, and in a few cases like them,[72] claimants who knew of a prior claim long before the expiration of the statutory period did in fact prevail over the record owner. But in these cases one suspects that the courts were as influenced by the equities favoring the claimant, as they were by the doctrine that the possessor's state of mind is irrelevant. The care with which the courts in these cases spelled out the equities suggests as much.

Three or four of the cases decided during the period do, however, truly fit the pure possession model of adverse possession. In them the possessor knew he had no title at the time he entered and he nonetheless prevailed. In a 1980 Nebraska decision, for instance, the claimant "had some knowledge of adverse possession" and set out to acquire land he knew was not his by using the doctrine. The Supreme Court of Nebraska overruled a grant of summary judgment against him, holding that the possibility of his acquiring title was not foreclosed.[73] In a 1979 Oklahoma case, a letter from the record owner to the adverse possessor, alerting the latter to the record owner's rights, was held not fatal to the possessor's ultimate claim to title.[74] There are also cases where the mistaken belief that title was in the government has been held compati-

69. Peters v. Juneau-Douglas Girl Scout Council, 519 P.2d 826 (Alaska 1974).

70. Ruick v. Twarkins, 171 Conn. 149, 367 A.2d 1380 (1976).

71. Phoenix Jewish Community Council v. Leon, 102 Ariz. 187, 427 P.2d 138 (1967).

72. Lobro v. Watson, 42 Cal. App. 3d 180, 116 Cal. Rptr. 533 (1974); Guinzy v. Kratz, 28 Ill. App. 3d 500, 328 N.E.2d 699 (1975); Kevil v. Casey, 459 S.W.2d 84 (Ky. App. 1970); Olson v. Nordan, 6 Mich. App. 132, 148 N.W.2d 528 (1967); Teeples v. Key, 500 S.W.2d 452 (Tenn. Ct. App. 1973); Junkermann v. Carruth, 620 S.W.2d 165 (Tex. Civ. App. 1981).

73. Pettis v. Lozier, 205 Neb. 802, 290 N.W.2d 215 (1980).

74. Macias v. Guymon Indus. Found., 595 P.2d 430 (Okla. 1979).

ble with the "claim of right" requirement.[75] But these cases stand as a small minority during the eighteen years surveyed.[76] The truly hostile possessor has been a rare claimant during that period, compared with the possessor who is honest, but mistaken. When he has appeared, mostly he has lost. His victories are therefore more theoretical than real; they are used in the cases principally to justify awarding title to the honest claimant.

V. Cases Involving Special Situations

The conclusion reached by working through recent adverse possession cases is that the relevance of the actual state of the possessor's mind has played a greater role in the decision of cases than most commentators allow. However, a full inquiry should not be limited to cases raising the issue directly. There are special cases which test the conclusion, which incidentally reveal a good deal about the reasons underlying recent decisions on adverse possession. Sometimes the best way of assessing the strength of a conclusion is to see how well it squares with legal rules applied in different or in difficult situations.

A. Tax Sale Cases

Perhaps the most conceptually difficult of these special situations is presented by tax sales. When a person purchases a tax deed to real property, that is, property sold under state statute for non-payment of taxes, he knows by definition that there is another record owner. He receives good title if, and only if, the statutes which provide protection against forfeiture of the rights of that record owner have been complied with.[77] There may also be other defects in the tax deed which make it open to attack. Therefore, the purchaser enters the property knowing that he has a "precarious" sort of title. When it turns out, as it sometimes does, that the statutes were not complied with, that the tax deed is in fact invalid to convey title, the possessor may seek to rely on adverse

75. Newman v. Cornelius, 3 Cal. App. 3d 279, 83 Cal. Rptr. 435 (1970); City of South Greenfield v. Cagle, 591 S.W.2d 156 (Mo. Ct. App. 1979). *Contra* Jackson v. Pennington, 11 Wash. App. 638, 525 P.2d 822 (1974).

76. Other cases of apparently bad faith possession ripening into title: Shaw v. Solari, 8 Mass. App. Ct. 151, 392 N.E.2d 853 (1979); Quates v. Griffin, 239 So. 2d 803 (Miss. 1970); Nedry v. Morgan, 284 Or. 65, 584 P.2d 1381 (1978); Garrett v. Lundgren, 41 Or. App. 23, 596 P.2d 1318 (1979); Walton v. Rosson, 216 Va. 732, 222 S.E.2d 553 (1976).

77. 3 American Law of Property § 13.20(e).

possession if he has occupied the property long enough. Then the crucial question becomes whether or not his possession, taken under color of the title supplied by the tax deed, has been sufficient to bar the record owner. The case is distinguishable from the ordinary "color of title" case, because in the ordinary case the purchaser is unaware of any outstanding claim. He believes that the instrument under which he claims gives him valid title and he knows of no other right. This is not true of the purchaser of the tax title.

In general, American courts have held that adverse possession may successfully be claimed by the purchaser of the defective tax title.[78] The tax sale, although void, gives color of title and hence the protection of a short statute of limitations period. These cases in some measure support the theory that pure possession which gives rise to a cause of action in ejectment is the dispositive test. The possessor acquires valid title by the passage of time even though he knows, or has reason to know, that there is someone with a potentially better claim.

On the other hand, inquiry into the possessor's *bona fides* is not absent from these cases. Where the tax deed was obtained by fraud or even in suspicious circumstances, it furnishes no color of title and hence no protection to the possessor. In an Illinois case from 1980, the judge found that the possessor's claim that he "used due diligence" in trying to discover the record owners was not believable in light of the facts he knew at the time he purchased the tax deed.[79] Hence, the judge held, he acquired no title. Good faith at the time of acquiring the tax deed in complying with statutory formalities is, in other words, essential to the claim that the deed furnishes "color of title" for adverse possession purposes.[80]

This points to what seems the most likely understanding of tax sale cases. They do raise special problems. It is important to the law that purchasers of tax deeds be able to place reliance on them. Otherwise, there will be no market for them. People also widely assume that one can gain title to property by purchasing it at a tax sale. Such a widely held assumption itself deserves protection. There must, however, be a

78. *See* Annot., 38 A.L.R.2d 986, at 993-1002 (1954).

79. Payne v. Williams, 91 Ill. App. 3d 336, 414 N.E.2d 836 (1980).

80. *See also* English v. Brantley, 361 So. 2d 549 (Ala. 1978); Stoltz v. Maloney, 129 Ariz. 264, 630 P.2d 560 (Ariz. Ct. App. 1981); Nicholas v. Giles, 102 Ariz. 130, 426 P.2d 398 (1967); Horn v. Blaney, 268 Ark. 885, 597 S.W.2d 109 (Ark. Ct. App. 1980); Ates v. Yellow Pine Land Co., 310 So. 2d 772 (Fla. Dist. Ct. App.), *cert. denied sub nom.* Humble Oil & Refining Co. v. Ates, 321 So. 2d 76 (Fla. 1975).

balance struck with the rights of the record owner; and where the statutes have not been followed, the latter's rights will weigh heavier in the balance. But if we add to that balance the fact of possession, this will tip the scale back in favor of the tax deed purchaser, as long as he did not acquire his deed by conduct amounting to fraud. As a recent New Mexico case articulated the matter, the tax deed stands lower than a deed *inter partes* for adverse possession purposes. But it does give the purchaser more rights than "mere squatters or those who seek to aggrandize their holdings by appropriation."[81] Possession under a tax deed may call for a slightly different inquiry than that used in the ordinary case. The nature of tax deeds requires it. Therefore under either a pure possession, or a good faith conception of adverse possession, tax sale cases fit awkwardly. They represent a special situation.

B. Grantor Remaining in Possession

Where the grantor remains in possession after he has conveyed his property, may he later acquire title to it by adverse possession after the statutory period runs? The rule in law and the practice is that he may, but only under very limited circumstances.[82] The law erects a strong presumption against him. His continued occupancy is presumed to be permissive and hence unavailable to allow title to accrue against the grantee. But if he announces his intention to hold adversely to the record owner, by bringing notice of his claim to the attention of the grantee or by unequivocally hostile acts, the grantor's possession will ripen into title if continued for the statutory period.

The situation creates conceptual problems for any understanding of adverse possession. On the one hand, the strength of the presumption is scarcely comprehensible if one takes a pure possession approach. The grantee may sue the grantor in ejectment at any time after the conveyance; in purely objective terms the grantor's possession is the same as that of any other possessor. Moreover, the presumption does not depend on any evidence of actual permission on the part of the grantee. It stems from the principle that a grantor should not in fairness be allowed to claim in derogation of his own deed. On the other hand, the situation also fits uncomfortably with a good faith test. Any grantor knows, or should know, the state of the title after his grant. By

81. Brylinski v. Cooper, 95 N.M. 580, 584, 624 P.2d 522, 526 (1981).

82. *See* 5 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 2555, at 588 (1957); Annot., 39 A.L.R.2d 353 (1955).

definition he must realize that record title rests in the grantee, not in him. Therefore, if the law permits him to acquire title by adverse possession by acts of actual hostility, it follows that the law must be allowing an advantage to one who possesses in bad faith. Knowing trespass seems, in fact, to be a condition precedent to the ripening of title in this situation.

The cases decided during the period surveyed, however, suggest that the difficulties inherent in this situation are more conceptual than real. There are fewer cases raising it than one might expect, given the abundance of disputes in other areas of adverse possession law. And most discussions of the problem simply apply the presumption, without discussion. On reflection this may not be surprising. Where the grantor continues in possession, the same external acts of ownership (e.g. cultivation, improvements, payment of taxes) are uniformly held to be insufficient notice of a claim to constitute hostility.[83] They merely continue prior usage, and more than this is required to constitute true hostility. Where the grantor *does* give the actual notice necessary to establish a hostile claim, it is a rare record owner who will do nothing in response.[84] That is the occasion for a law suit. At that time the statutory period will not have run. It starts then.[85] Therefore, the problem seldom arises in fact. It is notable that most of the only cases decided in favor of the grantor-possessor have been mistake cases, that is, cases where the grantor, and usually the grantee as well, believed that the deed did not cover the land in dispute. Where this has happened, the ripening of title in favor of the grantor can occur, but no bad faith exists. The grantor who seeks to impeach his own deed by adversely possessing the land conveyed may in theory overcome the presumption by hostile acts. But it is indicative of the strength of the underlying policy that the only recent cases allowing him to put this

83. *See* Brown v. Brown, 361 So. 2d 1038 (Ala. 1978); Gauker v. Eubanks, 230 Ga. 893, 199 S.E.2d 771 (1973); Wojahn v. Johnson, 297 N.W.2d 298 (Minn. 1980); Hood v. Denny, 555 S.W.2d 337 (Mo. Ct. App. 1977); Haynes v. Dunn, 518 S.W.2d 880 (Tex. Civ. App. 1975 writ ref'd n.r.e.); Toscano v. Delgado, 506 S.W.2d 317 (Tex. Civ. App. 1974); Keels v. Keels, 427 S.W.2d 913 (Tex. Civ. App. 1968); Petty v. Dunn, 419 S.W.2d 417 (Tex. Civ. App. 1967 writ ref'd n.r.e.); Gillespie v. Hawks, 206 Va. 705, 146 S.E.2d 211 (1966); Carlson v. Stair, 3 Wash. App. 27, 472 P.2d 598 (1970). *Contra* Jones v. Brown, 242 Ark. 537, 414 S.W.2d 618 (1967).

84. *Cf.* McClellan v. King, 133 Ill. App. 2d 914, 273 N.E.2d 696 (1971).

85. Colley v. Carpenter, 172 Ind. App. 638, 362 N.E.2d 163 (1977); Rider v. Pottratz, 246 Or. 454, 425 P.2d 766 (1967); Darling v. Ennis, 138 Vt. 311, 415 A.2d 228 (1980); Lindl v. Ozanne, 85 Wis. 2d 424, 270 N.W.2d 249 (Wis. Ct. App. 1978).

theory into practice have been cases of honest mistake about the extent of the land he conveyed.

C. Cases Involving Cotenants

Cases in which one cotenant claims title in fee against another by adverse possession are conceptually much like cases involving grantors remaining in possession. The law creates a presumption against the acquisition of title by adverse possession among cotenants, but it permits the presumption to be overcome by strong evidence of repudiation of the cotenancy. The situations are unlike, however, in factual complexity and in amount of litigation. Compared to the small number of disputes involving grantors and grantees, cotenancies have spawned large quantities of litigation during the last eighteen years.

By its nature, cotenancy gives each tenant the individual right to possession of the whole. Where one cotenant has exclusive possession, therefore, no inconsistency with the continuing rights of the cotenants out of possession exists, and no claim of adverse possession can arise.[86] Only where the cotenant in possession ousts his fellows, or where he repudiates the cotenancy by acts or words which give notice of his intent to claim sole ownership, can there be a possibility of adverse possession. Possession alone, therefore, can never cause title to accrue. But a cotenant may, by acts of actual hostility, disclaim the relationship and ultimately gain title. Like cases involving grantors remaining in possession, bad faith would appear to be a prerequisite for adverse possession by one cotenant against another.

Cases involving disputes between cotenants and raising the issue of adverse possession arise with relative frequency, and the vast majority of them, in line with the rule that possession by one cotenant is presumed not to be adverse, hold against the accrual of title on the basis of pure possession. The ethical basis for the rule is expressed in the opinions. As an Arkansas court put it, "The relationship between cotenants is one of trust and confidence and it would be inequitable to permit one of them to do anything which prejudiced the interests of the other."[87] The strength of that doctrine is routinely found in the unwillingness of

86. *See Property—Adverse Possession between Cotenants: the Requirement of Actual Notice,* 42 MISS. L.J. 137 (1971); *Real Property—Adverse Possession between Tenants in Common and the Rule of Presumptive Ouster,* 10 WAKE FOREST L. REV. 300 (1974).

87. Johnson v. Johnson, 250 Ark. 457, 459, 465 S.W.2d 309, 310 (1971). *See also* Guiseppe v. Cozzani, 193 So. 2d 549 (Miss. 1967); Thames v. Johnson, 614 S.W.2d 612 (Tex. Civ. App. 1981).

judges to find the requisite act of disavowal from conduct, short of express notice to the other cotenants. Actual enmity between the cotenants is not normally enough.[88] Nor is recording a deed to the fee.[89] External acts on the property, which are the normal indicia of a claim of title, generally do not suffice to start adverse possession. Sole possession, even when coupled with the "payment of mortgage and taxes, [with the] effecting [of] major improvements and repairs, [and with the] leasing out and keeping the rents, issues and profits" is generally held to be insufficient hostility.[90] The cotenant who wishes to acquire sole title by adverse possession must, the courts say, bring notice of his claim to the attention of his cotenants to start the statutory period running. That notice is the normal occasion for a lawsuit, in which by definition the statutory period will not have expired.[91]

On the other hand, more cases found in the reports of the years surveyed have held in favor of the acquisition of title by an adversely possessing cotenant than is consistent with the conclusiveness of the rule. The presumption against hostility has sometimes been overcome in litigation, and because one cotenant might be thought to understand the nature of his rights to the land in dispute, this seems to suggest that knowing violation of the rights of cotenants has been rewarded. The cases show, however, that this is not so. Although logically compelling, the argument does not take into account the factual complexity of the cases. In them, knowing disavowal of a cotenancy and acquisition of title by adverse possession is rare. Indeed, most cotenants who successfully claim title after possessing for the statutory period have held the land in an honest belief that they had a right to the fee simple.

A good faith claim to absolute title commonly arises in one of three ways. First, many cotenancies exist between family members, usually as a result of inheritance. Brothers and sisters sometimes make an oral

88. Hemphill v. Willis, 300 So. 2d 458 (Miss. 1974) (Telling cotenant, "you don't have no part in it" held insufficient notice of adverse claim); Hampton v. Manuel, 56 Tenn. App. 95, 405 S.W.2d 47 (1965) (Divorce between parties without property settlement affecting tenancy held insufficient to start statute running); Walton v. Hardy, 401 S.W.2d 614 (Tex. Civ. App. 1966 writ ref'd n.r.e.) (Telling cotenant that, "[T]hey were not going to give her anything" held insufficient notice.)

89. Yin v. Midkiff, 481 Hawaii 537, 481 P.2d 109 (1971); Barber v. McManus, 205 So. 2d 653 (Miss. 1968); Denton v. Denton, 627 S.W.2d 124 (Tenn. Ct. App. 1981). *Contra* U.S. v. Stanton, 495 F.2d 515 (5th Cir. 1974).

90. Shives v. Niewoehner, 191 N.W.2d 633, 636 (Iowa 1971). *See also* Thomas v. Hooks, 231 Ga. 409, 202 S.E.2d 92 (1973); Livesay v. Keaton, 611 S.W.2d 581 (Tenn. Ct. App. 1980).

91. *See, e.g.,* Newman v. Newman, 451 S.W.2d 417 (Ky. 1970).

agreement or reach a "family understanding" to the effect that one of them will be entitled to the land. Later on there is disagreement, and the person out of possession insists on the invalidity of the earlier parol agreement. There may be some justice in that insistence, of course, but there is also equity on the side of the person in possession, who now finds that he must rely on a claim of adverse possession. He will honestly believe that it is he who has the best right to the land. It is, in his estimation, the other family members who are acting in bad faith by going back on the prior understanding, and it is comprehensible that judges may well agree with this assessment of the equities.[92] Legally, the judge will reach the result by holding that the "hostile" possession began on the date of the oral grant or the "family understanding." It was that which demonstrated to the other cotenants that the possessor was laying claim to sole ownership. But it is perfectly compatible with good faith on the part of the possessor.

Second, cotenancies sometimes exist without the cotenant knowing that he is a cotenant. He may think that he has the fee. Where one cotenant, usually the one in possession, purports to grant the fee simple to a stranger, the former may be acting dishonestly. The grantee, however, may well believe he is getting, and paying for, an unencumbered title. He may have been negligent in checking the state of the title, but this will not negate the honesty of his belief, particularly where, as is normally the case, he has had no experience with real estate transactions. It will come as an unwelcome surprise to him when the grantor's cotenants later appear to assert their rights; and if sufficient time has passed since the grantee went into possession, he may very well claim adverse possession without dishonesty of any sort. A number of cases have held in favor of the rights of the unknowing adverse possessor in precisely these circumstances.[93]

Third, cotenancies are the most likely cases of all the situations discussed here to involve "equities" in favor of the possessor. We noted above that many of the cases which have found acquisition of title by a possessor acting with knowledge of the true state of the title seem to have involved the conjunction of four "equities" in favor of the posses-

92. *E.g.*, Bayless v. Alexander, 245 So. 2d 17 (Miss. 1971); Cash v. Gilbreath, 507 S.W.2d 931 (Mo. Ct. App. 1974); Foss v. Paulson, 255 Or. 167, 465 P.2d 221 (1970); Petrusic v. Carson, 496 P.2d 70 (Wyo. 1972).

93. *E.g.*, Hardy v. Lynch, 258 So. 2d 414 (Miss. 1972); Collier v. Welker, 19 N.C. App. 617, 199 S.E.2d 691 (1973); Hill v. Hill, 55 Tenn. App. 589, 403 S.W.2d 769 (1966).

sor: long delay, improvements to the property, a possessor whose person evokes sympathy, and a record owner who evokes none.[94] The circumstances of cotenancy are very likely to create just such equities. Cotenants often allow one of their number to go into possession, to pay all taxes, to make improvements to the property and in fact to become generally known as the owner. The record owners, apparently heedless of their rights, do nothing until after many years have gone by. Logically, the position of these cotenants out of possession may be unassailable. They should be able to count on the presumption that the possession of the cotenant on the land is consistent with their rights. But, given enough "equitable" factors, logic may yield to fairness. Courts, therefore, sometimes find that the possessor has been possessing with implied hostility and award him title.[95]

These cotenancy disputes make difficult cases. They test the accuracy of the conclusion, derived from simpler cases, that the knowing trespasser is unlikely to acquire title by adverse possession, because they logically *require* the knowing violation of the rights of cotenants. Nevertheless, a close look at the facts of the cases shows that where adverse possessors have succeeded, other factors consistent with their *bona fides* have almost invariably been present. Without such factors, and even in most cases with them, the courts have consistently applied the presumption that one cotenant may not act to the detriment of his fellows. That presumption well expresses the normal judicial inclination to deny the claim of the adverse possessor who has sought to appropriate land he knows does not belong to him.

CONCLUSION

If the cases decided during the recent eighteen year period adequately represent the state of the law enforced in American courts, the question may fairly be asked whether good faith should be considered a prerequisite for the acquisition of title by adverse possession. Good faith was a requirement in the Roman law,[96] and remains so in modern civil law systems,[97] so that there would be nothing inherently unreason-

94. *See supra* notes 69-72 and accompanying text.

95. *E.g.*, Ruick v. Twarkins, 171 Conn. 149, 367 A.2d 1380 (1976); Guinzy v. Kratz, 28 Ill. App. 3d 500, 328 N.E.2d 699 (1975); Caywood v. January, 455 P.2d 49 (Okla. 1969); Morgan v. Dillard, 61 Tenn. App. 519, 456 S.W.2d 359 (1970).

96. *See* CODE JUST. 5.73.1; DIG. JUST. 44.3.11.

97. *See* 2 C. SHERMAN, ROMAN LAW IN THE MODERN WORLD § 652 (1917).

able or unworkable about adopting it openly. Adopting such a requirement would also be in line with the express provisions of a number of recent statutory enactments in the area.[98] In addition, many of the cases come so close to requiring good faith, apparently stopping short of doing so in express terms only because of the weight of contrary statements found in the standard treatises, that considering good faith a prerequisite would seem to make sense.

On the other hand, the question of what would be gained by expressly requiring good faith in adverse possession cases may also fairly be asked. The likely answer is that very little would be gained and that something good might be lost. In a great many adverse possession cases, there is simply no evidence of the possessor's intent, nothing to show one way or another whether he honestly thought the property belonged to him.[99] The possessor may be dead at the time of litigation. Even if he is alive, no one can read his secret thoughts. Were the law to require proof of his good faith, decision of such cases would inevitably call for even more speculative explorations of probable states of mind than is currently possible. Such explorations are not to be wished for. As things stand now, cases can be handled relatively easily. Hostility and "claim of right" can be, and are, judged by external manifestations of dominion. We should only be encouraging speculation, and even perjury, if the law were to require opening up the question of intent in all cases.

It is another matter, however, where there is actual evidence of the intent of the possessor, or where the evidence suggests very strongly that he knew that he was trespassing at the time he began using the land in dispute. Where such evidence exists, and the recent cases show that it does more often than might be thought, courts do take it into account. The elasticity of the terms "hostility" and "claim of right" allows them to do so. They regularly award title to the good faith trespasser, where they will not award it to the trespasser who knows what he is doing at the time he enters the land in dispute. Perhaps that is all that can be said.

If so, this survey nevertheless provides a salutary lesson for those who, like the present writer, presume to comment upon the law of property. We write about human beings. Though a reasonable prefer-

98. *See supra* note 21.

99. *See, e.g.,* Fadem v. Kimball, 612 P.2d 287 (Okla. Ct. App. 1979).

ence for an objective view of adverse possession militates in favor of a pure possession and an "availability of ejectment" test, if we consequently describe that test as the law, or even as the dominant rule, we underestimate the complexity of the matter. Judges and juries decide the cases. They do take "subjective factors" into account when these can be proved or inferred from the evidence. And they do regularly prefer the claims of an honest man over those of a dishonest man. If that results in more litigation than there ought to be, because it opens up questions of subjective intent, then perhaps we must simply accept the result as a fact of life. At least such a description of the state of the law seems preferable to the pretense that it is pure possession and the accrual of a cause of action in ejectment which determine the outcome in adverse possession cases.