St. Mary's Law Journal

Volume 7 | Number 1 Article 6

3-1-1975

Adverse Possession: The Three, Five and Ten Year Statutes of Limitation Student Symposium - Texas Land Titles: Part II.

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ADVERSE POSSESSION: THE THREE, FIVE, AND TEN YEAR STATUTES OF LIMITATION

The purpose of adverse possession statutes is to quiet titles openly and consistently asserted to land possessed without interruption and for a given length of time.[144] With very few exceptions, a claim of adverse possession may be asserted by or against any individual or organization. The class of those who may acquire limitation title includes corporations,[145] government bodies,[146] minors,[147] two or more persons acting jointly,[148] persons without disabilities under the law,[149] and persons holding for another.[150] Correspondingly, all classes of landowners may have adverse title asserted against them with the exception of government entities[151] and persons with certain disabilities.[152] The law provides that, based on the merits of his claim, the claimant may assert adverse possession against the record owner under the 3, 5, or 10-year statutes.[153] Assertion of title under each statute requires proof of

144. Republic Nat'l Bank v. Stetson, 390 S.W.2d 257, 262 (Tex. 1965); *see* Bordages v. Stanolind Oil & Gas Co., 129 S.W.2d 786, 791 (Tex. Civ. App.—Galveston 1938, writ dism'd jdgmt cor.).

145. *See* Buchanan v. Houston & T.C.R.R., 180 S.W. 625, 627 (Tex. Civ. App.—San Antonio 1915, no writ).

146. Stanley v. Schwalby, 162 U.S. 255, 272 (1896).

147. *See* Wier Lumber Co. v. Conn, 156 S.W. 276, 279 (Tex. Civ. App.—Galveston 1913, no writ).

148. Myers v. Frey, 102 Tex. 527, 529-30, 119 S.W. 1142, 1143-44 (1909); Henderson v. Goodwin, 368 S.W.2d 800, 803 (Tex. Civ. App.—Beaumont 1963, no writ); Anzaldua v. Richardson, 287 S.W.2d 299, 301 (Tex. Civ. App.—San Antonio 1956, writ ref'd n.r.e.).

149. *See* Esterling v. Murphey, 11 S.W.2d 329, 332 (Tex. Civ. App.—Waco 1928, writ ref'd).

150. *See* Atchison, T. & S.F. Ry. v. Abraham, 209 S.W. 265, 267-68 (Tex. Civ. App.—El Paso 1919, no writ); Beaumont Wharf & Terminal Co. v. McFaddin, 178 S.W. 722, 723 (Tex. Civ. App.—Galveston 1915, writ ref'd).

151. Weatherly v. Jackson, 123 Tex. 213, 222, 71 S.W.2d 259, 264 (1934).

152. *See* discussion p. 105 *infra.*

153. The 3-year statute, TEX. REV. CIV. STAT. ANN. art. 5507 (1958), requires that the claimant assert title under a regular chain of transfers from or under the sovereign of the soil or under color of title. Color of title, as defined by TEX. REV. CIV. STAT. ANN. art. 5508 (1958), is a consecutive chain of transfers which may lack regularity, though such does not include the want of intrinsic fairness and honesty.

There are four requirements for acquiring title under the 5-year limitation statute, TEX. REV. CIV. STAT. ANN. art. 5509 (1958): a claimant must be able to prove peaceable and adverse possession of the land; payment of taxes on the land; a claim under deed or deeds; and recordation of the deed or deeds.

Under the 10-year statute, TEX. REV. CIV. STAT. ANN. art. 5510 (1958), there are three alternatives to proceed under a claim of right: a claim under a duly registered memorandum of title (deed), actual enclosure (fencing), and mere entry onto the premises, where the possession is limited to 160 acres. The 10-year statute does not require showing the payment of taxes.

peaceable and adverse possession, as defined in articles 5514 and 5515.[154]

Adverse possession is actual possession commenced and continued under a claim of right, hostile and exclusive to all, continuously asserted, and not interrupted for the statutory period.[155] The principal issue in proving a hostile and exclusive claim of right is whether the claimant's acts or declarations were sufficient to give the owner notice of the claim asserted.[156] Any prior relationships with the owner or owners, such as cotenancy or a landlord-tenant relationship, must be clearly repudiated by the claimant.[157] The statutory period commences upon notice to the owner, provided that at that time he could have maintained a cause of action to recover the land.[158] The most difficult burden on the claimant is the requirement of proving by clear and satisfactory evidence that peaceable and adverse possession was asserted continuously by or for him during the statutory period.[159] The claimant must show that peaceable and adverse possession was uninterrupted either by his own acts or by those of the record owner.[160] A

154. "Peaceable possession" is such as is continuous and not interrupted by adverse suit to recover the estate. TEX. REV. CIV. STAT. ANN. art. 5514 (1958). "Adverse possession" is an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another. TEX. REV. CIV. STAT. ANN. art. 5515 (1958).

155. Rick v. Grubbs, 147 Tex. 267, 269, 214 S.W.2d 925, 926 (1948); *see* Killough v. Hinds, 161 Tex. 178, 180, 338 S.W.2d 707, 710 (1960); Pearson v. Doherty, 143 Tex. 64, 71, 183 S.W.2d 453, 456 (1944); Lundelius v. Thompson, 461 S.W.2d 153, 160 (Tex. Civ. App.—Austin 1970, writ ref'd n.r.e.).

156. Where the claimant verbally asserts adverse possession against the true owner, he is said to have given *actual* notice. In absence of actual notice, the claimant's possessory acts must be of such an open and visible nature that constructive notice may be found. The central issue in adverse possession is quite often whether there was constructive notice. Porter v. Wilson, 389 S.W.2d 650 (Tex. 1965). For example, the acts of planting flowers, trimming grass, keeping the tract clean, as the holder had, did not give actual or constructive notice. Miller v. Fitzpatrick, 418 S.W.2d 884, 890 (Tex. Civ. App.—Corpus Christi 1967, writ ref'd n.r.e.). In a more recent case, the court found that the acts of plowing and gardening the disputed tract and construction of an outhouse and chicken-house thereon, were such compelling circumstances as to give the owner "constructive" notice of adverse claim. Gilbreath v. Yarborough, 472 S.W.2d 185, 188, 189 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.).

157. Calverley v. Gunstream, 497 S.W.2d 110, 115 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.); *see* Roosevelt v. Davis, 49 Tex. 463, 473 (1878).

158. *See* Alamo Lumber Co. v. Guajardo, 315 S.W.2d 672, 677 (Tex. Civ. App.—Eastland), *aff'd*, 159 Tex. 225, 317 S.W.2d 725 (1959).

159. *See* Balli v. McManus, 311 S.W.2d 933, 937 (Tex. Civ. App.—San Antonio 1958, writ ref'd n.r.e.); Howell v. Garlington, 270 S.W. 269, 271 (Tex. Civ. App.—Beaumont 1925, no writ).

160. *See* Bruni v. Vidaurri, 140 Tex. 138, 166 S.W.2d 81 (1942); Cobb v. Robertson, 99 Tex. 138, 147, 86 S.W. 746, 749 (1905); Ballingall v. Brown, 226 S.W.2d 165, 168, 169 (Tex. Civ. App.—Fort Worth 1949, writ ref'd n.r.e.).

showing of continuous peaceable and adverse possession satisfies the basic requirement for the successful assertion of a claim of title by adverse possession, but the claimant must also meet the additional special requirements of the applicable limitation statute.

The possession must be hostile and exclusive and must include notice to the record owner of a claim of right, the intent of the claimant to claim the land as his own.[161] The claim may be made verbally, and, thus, constitute actual notice to the owner. Without actual notice the claimant must act so openly and visibly in his possession of the land that the owner's knowledge of the claim will be presumed, thus constituting constructive notice.[162] The circumstances of possession and any relationship between the owner and the claimant combine to produce the necessary notice, after which the limitation period begins to run. Between strangers the limitation period may commence upon entry on the premises since the claimant's exclusive possession cannot be reconciled with the rights of the record owner and is, therefore, sufficient notice of adverse possession.[163]

One situation in which the relationship between the owner and the claimant is important, however, is in a shared ownership. When a co-owner of property attempts to claim the property entirely as his own through adverse possession, the notice requirement is necessarily very stringent, requiring a repudiation by the claimant of the co-ownership.[164] The repudiation must be clearly indicated to the other co-owners, either expressly or by acts which are so visible, notorious, distinct, and hostile that notice will be presumed.[165]

The most common example of a shared ownership situation is a cotenancy. The cotenant-claimant must clearly repudiate the shared title and this must be "brought home" to each of the other cotenants.[166]

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161. Orsborn v. Deep Rock Oil Corp., 153 Tex. 281, 290, 267 S.W.2d 781, 787 (1954); Burnett v. Knight, 428 S.W.2d 470, 472 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.).

162. Orsborn v. Deep Rock Oil Corp., 153 Tex. 281, 291, 267 S.W.2d 781, 787 (1954); Hoppe v. Sauter, 416 S.W.2d 912, 914 (Tex. Civ. App.—Texarkana 1967, writ ref'd n.r.e.); *see* Houston Oil Co. v. Jones, 109 Tex. 89, 90, 198 S.W. 290 (Tex. 1917).

163. Hickman v. Ferguson, 164 S.W. 1085, 1087 (Tex. Civ. App. 1914, writ ref'd). "Strangers" are parties having no previous interest in the land. *Id.* at 1087.

164. Poenisch v. Quarnstrom, 361 S.W.2d 367, 370 (Tex. 1962).

165. In Rio Bravo Oil Co. v. Hunt Petroleum Corp., 455 S.W.2d 722 (Tex. 1970), the record owner's predecessors in title conveyed a right-of-way to the railroad whereupon the railroad leased portions of the owner's land for agricultural purposes and fenced certain portions. The court held there was no clear repudiation of owner's title, as such operations by the railroad were permitted by statute. *Id.* at 727; *see* Poenisch v. Quarnstrom, 361 S.W.2d 367, 370 (Tex. 1962).

166. Walton v. Hardy, 401 S.W.2d 614, 616 (Tex. Civ. App.—Waco 1966, writ ref'd

The proof of repudiation is purposefully stringent to prevent situations in which one tenant who actually controls the land might claim exclusive title by adverse possession without giving prior notice to the other family members.[167] Although notice of repudiation is a question of fact, the courts do not seem inclined to relax the stringency of proof required to show repudiation as between cotenants.[168] One possible exception arises when a cotenant attempts to convey the entire tract, as distinguished from his own undivided interest, to a stranger. This results in a repudiation of the cotenancy and the grantee may, by taking possession and performing the required acts, acquire title to the whole.[169]

Another situation in which the relationship between the claimant and owner is important involves subordinate relationships. If the claimant possesses the land in subordination to another, as in a landlord-tenant relationship, the claimant must repudiate the tenancy before the limitation period will commence.[170] Repudiation consists of acts which are of "unequivocal notoriety" and proof merely of notice is insufficient.[171] The strict burden on the claimant protects the landlord in his reliance on the tenancy relationship, and properly requires the tenant to prove repudiation.

A second subordinate relationship situation arises when a grantor remains in possession and attempts to assert adverse possession against his grantee. Such continued possession is held to be in subordination to the grantee, absent repudiation of the subordinate nature of the grantor's possessory interest.[172] The grantee under these circum-

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n.r.e.); *see* Poenisch v. Quarnstrom, 361 S.W.2d 367, 370 (Tex. 1962).

167. Todd v. Bruner, 365 S.W.2d 155, 159-60 (Tex. 1963); Poenisch v. Quarnstrom, 361 S.W.2d 367, 370 (Tex. 1962); *see* Smith v. Temple Indus., 485 S.W.2d 605, 607 (Tex. Civ. App.—Houston [1st Dist.] 1972, no writ).

168. *See* Todd v. Bruner, 365 S.W.2d 155, 159-60 (Tex. 1963).

169. Gossett v. Tidewater Associated Oil Co., 436 S.W.2d 416, 420-21 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.); Page v. Pan American Petroleum Co., 327 S.W.2d 469, 471 (Tex. Civ. App.—Waco 1959, writ ref'd n.r.e.); Parr v. Ratisseau, 236 S.W.2d 503, 506 (Tex. Civ. App.—San Antonio 1951, writ ref'd n.r.e.). For the effect of a cotenant's conveyance of his undivided interest see Meaders v. Moore, 134 Tex. 127, 133-34, 132 S.W.2d 256, 259 (1939).

170. Killough v. Hinds, 161 Tex. 178, 183, 338 S.W.2d 707, 711 (1960); Archille v. Baird, 361 S.W.2d 439, 442 (Tex. Civ. App.—Houston 1962, writ ref'd n.r.e.); *see* Sweeten v. Park, 154 Tex. 256, 259, 276 S.W.2d 794, 797 (1955); Tyler v. Davis, 61 Tex. 674, 676 (1884); Baten v. Price, 489 S.W.2d 931, 932 (Tex. Civ. App.—Eastland 1972, no writ).

171. Archille v. Baird, 361 S.W.2d 439, 442 (Tex. Civ. App.—Houston 1962, writ ref'd n.r.e.).

172. Toscano v. Delgado, 506 S.W.2d 317, 320 (Tex. Civ. App.—San Antonio 1974, no writ). Where the grantor is divested of title by judgment, his continued possession

stances may presume that the grantor recognizes superior title in him so that actual possession by the grantee becomes unnecessary.[173] Because of this relationship the burden is on the claimant-grantor to prove the necessary repudiation.

Once the period of limitation has begun, the peaceable and adverse possession asserted must be continuous.[174] The burden of showing continuous possession insures that the record owner must, at some time, have had notice of the adverse claim.[175] If the claimant can prove that all elements of peaceable and adverse possession continued for the statutory period, and additionally proves that the special requirements of the particular statute asserted have been met, then he has satisfied the requirements of a legal claim.[176] The proof of continuous possession must be clear and satisfactory, although the particular evidence required varies with the nature and circumstances of each case.[177]

In order to establish continuous possession for the requisite number of years the claimant may tack his own possession to that of previous occupants.[178] The prior occupant's possession, however, must also have been peaceable and adverse.[179] For example, an adverse claimant may transfer his claimed interest in the property to another, and the subsequent grantee may, in computing his years of adverse possession, include all the time which the original claimant adversely possessed the land. The essential element in the transfer of the claim is the passage of possession by mutual consent without abandonment of the claim; a paper transfer is not necessary.[180] If, however, a deed is not

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is considered a tenancy at will or tenancy at sufferance. Steed v. Barefield, 348 S.W.2d 205, 207 (Tex. Civ. App.—Eastland 1961, writ ref'd n.r.e.).

173. Evans v. Templeton, 69 Tex. 375, 378, 6 S.W. 843, 844 (Tex. 1887); *see* Jackson v. Genecov, 471 S.W.2d 589, 593 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.), in which the court held that the grantor's continued possession of the tract was considered at best a tenancy at sufferance or tenancy at will. The court noted that even where the previous owner had executed an oil lease on the tract, there was no repudiation absent a showing of grantee's knowledge of such instrument. *Id.* at 593.

174. TEX. REV. CIV. STAT. ANN. art. 5514 (1958).

175. *See generally* Hooper v. Acuff, 159 S.W. 934, 935 (Tex. Civ. App.—Amarillo 1913, no writ).

176. *See* Balli v. McManus, 311 S.W.2d 933, 937 (Tex. Civ. App.—San Antonio 1958, writ ref'd n.r.e.); Howell v. Garlington, 270 S.W. 269, 270 (Tex. Civ. App.—Beaumont 1925, no writ).

177. *See* Howell v. Garlington, 270 S.W. 269, 270 (Tex. Civ. App.—Beaumont 1925, no writ).

178. Odem v. Leahy, 264 S.W. 218, 219 (Tex. Civ. App.—San Antonio 1924, no writ).

179. Hardeman v. Mitchell, 444 S.W.2d 651, 655 (Tex. Civ. App.—Tyler 1969, no writ); *see* Miller v. Gist, 91 Tex. 335, 340-41, 43 S.W. 263, 265 (1897).

180. *Compare* Whittle v. Johnston, 392 S.W.2d 867 (Tex. Civ. App.—Texarkana 1965, writ ref'd n.r.e.) *with* Sterling v. Tarvin, 456 S.W.2d 529, 534-35 (Tex. Civ.

used to show the succession, then proof of the actual transfer of possession is required.[181] The required continuous claim of right may be lost or interrupted by the claimant's own acts or by the acts of others.[182] The claimant may lose his claim of right by abandoning it, or he may interrupt it by recognizing the superior title of the owner.[183]

There is, however, no requirement that the claimant remain in constant possession of the tract claimed, so long as any vacancies or absences are of such short duration that a reasonably prudent person would not assume that the claim had been abandoned.[184] The burden is on the claimant to prove that any vacancy was merely "temporary" and not unreasonable.[185] If the adverse claimant possesses the land through tenants holding under him, a period of temporary vacancy is also allowed for the changing of tenants.[186] The temporary vacancy rule has been applied under the 5 and 10-year statutes requiring continuous cultivation and use of the disputed tract for the required period. A distinction, however, is to be drawn between seasonal cultivation and seasonal use. If the tract is cultivated by the claimant during each year of the statutory period, his possession is continuous even though there may be a lapse of occupancy between seasons.[187] On the other hand, occasional use will not suffice.[188] Even regular and consistent use of the land for each year of the statutory period is insufficient if there are also substantial periods of nonuse.[189]

App.—Fort Worth 1970, writ ref'd n.r.e.). *See generally* McAnally v. Texas Co., 124 Tex. 196, 204-205, 76 S.W.2d 997, 1001 (1934).

181. McAnally v. Texas Co., 127 Tex. 196, 198, 76 S.W.2d 997, 1002 (1934); Brown v. Dorough, 224 S.W.2d 752, 754 (Tex. Civ. App.—Dallas 1954, writ ref'd); Abramson v. Sullivan, 103 S.W.2d 229, 231, 232 (Tex. Civ. App.—Austin 1937, no writ).

182. *See* Bruni v. Vidaurri, 140 Tex. 138, 147-48, 166 S.W.2d 81, 87 (1942); Cobb v. Robertson, 99 Tex. 138, 147, 86 S.W. 746, 749 (1905); Ballingall v. Brown, 226 S.W.2d 165, 168, 169 (Tex. Civ. App.—Fort Worth 1949, writ ref'd n.r.e.).

183. Bruni v. Vidaurri, 140 Tex. 138, 147-48, 166 S.W.2d 81, 87 (1942); *see* Butler v. Hanson, 455 S.W.2d 942, 946 (Tex. 1970).

184. Wickizer v. Williams, 173 S.W. 1162 (Tex. Civ. App.—Austin 1915, writ ref'd); *see* Hankamer v. Sumrall, 257 S.W.2d 827, 830 (Tex. Civ. App.—Beaumont 1953, writ ref'd n.r.e.).

185. Vaughan v. Anderson, 495 S.W.2d 327, 332-33 (Tex. Civ. App.—Texarkana 1973, writ ref'd n.r.e.) (conclusions such as "we retook possession" not sufficient to prove continuous holding).

186. A 5-months vacancy between change of tenants was held to be reasonable in Hardy v. Bumpstead, 41 S.W.2d 226, 227 (Tex. Comm'n App. 1931, jdgmt adopted). A year, however, may be too long if the land is unoccupied and uncultivated. Stevens v. Pedregon, 106 Tex. 576, 579, 173 S.W. 210, 211 (1915).

187. Hardy v. Bumpstead, 41 S.W.2d 226, 227 (Tex. Comm'n App. 1931, jdgmt adopted).

188. Crosby v. Davis, 421 S.W.2d 138, 143 (Tex. Civ. App.—Tyler 1967, writ ref'd n.r.e.); Hutcheson v. Chandler, 104 S.W. 434, 435 (Tex. Civ. App. 1907, no writ).

189. Vaughan v. Anderson, 495 S.W.2d 327, 332 (Tex. Civ. App.—Texarkana 1973,

As a general rule, if the claimant gives some recognition of the owner's title, then his adverse possession is interrupted.[190] The offer to purchase title from the record owner may constitute recognition of superior title sufficient to interrupt the statutory period,[191] depending on whether the offer was made merely as an attempt to strengthen the claimant's position by quieting title, or whether it was an acknowledgment of title in the record owner.[192] The purchase of an undivided interest by the claimant does not, as a matter of law, constitute recognition of outstanding title as long as the claimant continues to openly and consistently assert limitation title during the transaction.[193] A circumstance strongly considered is whether the recognition was of one who had an actual interest in the land. In *Patten v. Rogers*[194] the supreme court held the claimant's recognition of title in persons not having a property interest in the land was not sufficient to interrupt the running of the statutory period.[195] In *Patten* the record owners had promised to give their attorneys an undivided interest in any land recovered from trespassers. The claimant thereafter transferred his interest in the land in question by quitclaim to the attorney, stating in the quitclaim that he had not held adversely as to the attorney. The statement was not held to have constituted recognition of title since the attorney's interest had not vested at the time the quitclaim was given.[196]

A tenant holding under an adverse claimant may also recognize title in the true owner, thus defeating the claim of adverse possession: when the tenant of the claimant, in good faith and without notice, attorns to the owner of record, this breaks the claimant's continuity of possession.[197] Attornment to a third party under the same circum-

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writ ref'd n.r.e.). Although claimant used beach lots as part of a concession business for 6 months out of the year, the court held that this was not sufficient to raise a fact issue as to notice of adverse possession to the owners. Winchester v. Porretto, 432 S.W.2d 170, 175 (Tex. Civ. App.—Houston [1st Dist.] 1968, writ ref'd n.r.e.).

190. Ballingall v. Brown, 226 S.W.2d 165, 168-69 (Tex. Civ. App.—Fort Worth 1949, writ ref'd n.r.e.). For example, the taking of a lease from or paying rent to the owner is sufficient recognition of title. Thurmond v. Trammell, 28 Tex. 372 (1866).

191. Bruni v. Vidaurri, 140 Tex. 138, 147-48, 166 S.W.2d 81, 87 (1942); Meaders v. Moore, 134 Tex. 127, 133, 132 S.W.2d 256, 259 (1939). A question of fact is presented.

192. Meaders v. Moore, 134 Tex. 127, 133, 132 S.W.2d 256, 259 (1939). If the claimant expressly concedes that title is in the record owner when he makes the offer, this concession is a sufficient recognition of superior title. *Id.* at 133, 132 S.W.2d at 259.

193. *Id.* at 134, 132 S.W.2d at 260.

194. 430 S.W.2d 479 (Tex. 1968).

195. *Id.* at 482.

196. *Id.* at 482.

197. Powell Lumber Co. v. Nobles, 44 S.W.2d 774, 777 (Tex. Civ. App.—Beaumont

stances, however, is ineffective to render the tenant's continued possession adverse to the landlord.[198]

Even if the claimant does not abandon his claim and does not recognize superior title in the owner, the owner may interrupt the claimant's continuous possession by obtaining a judgment against the claim[199] or by entering the premises.[200] The running of the limitation period is stopped as of the filing of the petition, even though the claimant may continue in actual possession of the land. The suit against the claimant must be prosecuted to a final judgment, however, if it is dismissed for a lack of prosecution or abandoned, it has the effect of having never been instituted.[201] In a suit against multiple claimants, the owners must secure a judgment against all to stop the running of the limitation period.[202] Therefore, the running of the statute is suspended pending final judgment,[203] but if judgment is reached for the record owner, the period is considered interrupted as of the date of the filing of the petition.[204]

The second means by which the owner may interrupt possession is by entering any part of the land in dispute. The entry must be open and notorious and coupled with an intent to take and hold possession.[205] The test applied is whether the owner's entrance to the disputed tract would amount to an exclusion of use such that a reasonably

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1931, no writ); Louisiana & Tex. Lumber Co. v. Alexander, 154 S.W. 233, 234 (Tex. Civ. App.—Galveston 1913, no writ).

198. Hufstedler v. Barnett, 182 S.W.2d 504, 507 (Tex. Civ. App.—Amarillo 1944, writ ref'd w.o.m.).

199. Ballingall v. Brown, 226 S.W.2d 165, 168-69 (Tex. Civ. App.—Fort Worth 1949, writ ref'd n.r.e.).

200. Cobb v. Robertson, 99 Tex. 138, 147, 86 S.W. 746, 749 (1905); Sterling v. Tarvin, 456 S.W.2d 529, 533 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.); Col lins v. Jones, 79 S.W.2d 175, 177-78 (Tex. Civ. App.—Beaumont 1935, writ ref'd).

201. Gibbs v. Lester, 41 S.W.2d 28, 30 (Tex. Comm'n App. 1931, jdgmt adopted); Poole v. Goode, 442 S.W.2d 810, 812-13 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.).

202. *See* Cobb v. Robertson, 99 Tex. 138, 139, 86 S.W. 746, 748 (1905); Stovall v. Carmichael, 52 Tex. 383, 389-90 (1880).

203. Gibbs v. Lester, 41 S.W.2d 28, 31 (Tex. Comm'n App. 1931, jdgmt adopted).

204. Poole v. Goode, 442 S.W.2d 810, 812-13 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.). The judgment of the justice of the peace court against the claimants on a forcible entry and detainer suit was nullified when trial de novo was sought in county court. The owner must again assume the burden of prosecuting the case to a final judgment. Adams v. Slattery, 156 Tex. 433, 453, 295 S.W.2d 859, 872 (1956). The court notes that for interruption to occur, the suit must be prosecuted in accordance with the due forms of law. Richards v. Smith, 67 Tex. 610, 612, 4 S.W. 571, 572 (Tex. 1887).

205. Kirby Lumber Corp. v. Smith, 305 S.W.2d 829, 830 (Tex. Civ. App.—Beaumont 1957, writ dism'd).

prudent man would realize that he had been ousted.[206]

Thus, the claimant should be aware that mere proof of continuous possession is insufficient in light of abandonment or some form of interruption. When the claimant has established the basic requirement of uninterrupted peaceable and adverse possession, the question then becomes how long he must maintain it and what additional requirements exist under each of the adverse possession statutes.

3-YEAR STATUTE

The 3-year statute requires that the claim be established under "title" or "color of title."[207] Under this statute the claimant is protected if he can trace his deed through each link in the title to the sovereign.[208] Generally, each link in the claimant's chain of title must be regular, or sufficient on its face to form a purported conveyance and constitute title.[209] Irregular transfers, however, so long as they are not intrinsically unfair or dishonest, may form a sufficient basis of the claimant's chain of title as "color of title."[210] The claimant maintaining peaceable and adverse possession under title or color of title is therefore protected from the grantees of prior sovereigns.[211] The statute permits the repose of title in favor of the possessor-claimant, although in priority of claim his is not the better right.[212]

One hundred and thirty years have passed since the statute was enacted, and, for the most part, the problems it sought to ameliorate no longer exist.[213] One of the principal drawbacks under the 3-year statute is that the claimant must prove, at least equitably, each link of a regular chain of transfers.[214] Proving links in the chain of title is stand-

206. American Nat'l Bank v. Wingate, 266 S.W.2d 934, 945 (Tex. Civ. App.—Beaumont 1953, writ ref'd n.r.e.).

207. TEX. REV. CIV. STAT. ANN. art. 5507 (1958).

208. Cole v. Grigsby, 35 S.W. 680, 686 (Tex. Civ. App. 1894), *aff'd*, 89 Tex. 223, 35 S.W. 792 (1896).

209. Burnham v. Hardy Oil Co., 108 Tex. 555, 562, 195 S.W. 1139, 1142 (1917); Grigsby v. May, 84 Tex. 240, 248, 249, 19 S.W. 343, 345 (1892); Comment, *The Texas Three Year Statute*, 19 TEXAS L. REV. 375, 393-94 (1941).

210. Williamson v. Brown, 109 S.W. 412, 413 (Tex. Civ. App. 1908, writ dism'd). The grant from the sovereign conveys only the right which the sovereign had at that time. In *Williamson*, the land commissioner made an unauthorized conveyance of land out of the public free school fund. The court held the grant void and insufficient to convey even color of title. *Id.* at 413.

211. Comment, *The Texas Three Year Statute*, 19 TEXAS L. REV. 375, 378 (1941).

212. Burnham v. Hardy, 108 Tex. 555, 562, 195 S.W. 1139, 1142 (1917).

213. *See generally* State v. Sais, 47 Tex. 307 (1877).

214. *See* Burnham v. Hardy Oil Co., 108 Tex. 555, 563-64, 195 S.W. 1139, 1143 (1917); State v. Sais, 47 Tex. 307 (1877); Comment, *The Texas Three Year Statute*, 19 TEXAS L. REV. 375, 395 (1941).

ard procedure in the law of conveyancing; the following have served as links in the chain of title: undivided interests,[215] claims under an administrator's deed,[216] a conveyance of a trustee in bankruptcy,[217] a claim under a sheriff's deed,[218] a deed subject to a vendor's lien,[219] a tax deed,[220] a bond for title as against the heirs of obligor,[221] a quit-claim,[222] a claim under a will,[223] and a claim by inheritance.[224] While these examples illustrate that links in a regular chain may be proven in many ways, a claimant who is unable to show a regular chain may alternatively attempt to prove links constituting color of title.

The irregular transfers which may qualify under color of title usually involve mere errors of form rather than affronts to intrinsic fairness and honesty.[225] Color of title prohibits a claim under an intrinsically fradulent conveyance, such as a forged deed.[226] A conveyance valid between the grantor and grantee and fraudulent only as to third parties is valid under the statute because fraud on third parties is extrinsic and therefore not considered in determining limitation title.[227]

A transfer from one who lacks the power to convey is not a muniment under the 3-year statute.[228] Thus, one who lacks the legal authority to transfer beneficial use cannot pass title or color of title under

215. Cole v. Grigsby, 35 S.W. 680, 686 (Tex. Civ. App. 1894), *aff'd*, 89 Tex. 223, 35 S.W. 792 (1896).

216. Sapp v. Newsom, 27 Tex. 537, 540, 541 (1864); Moseley v. Vander Stucken, 62 S.W. 1103, 1106 (Tex. Civ. App. 1901, writ ref'd).

217. Curdy v. Stafford, 88 Tex. 120, 124, 30 S.W. 551, 554 (1895).

218. Kennon v. Miller, 143 S.W. 986, 987 (Tex. Civ. App.—San Antonio 1912, writ ref'd).

219. Cocke v. Church, 23 S.W.2d 743, 744 (Tex. Civ. App.—San Antonio), *aff'd*, 120 Tex. 262, 37 S.W.2d 723 (1929).

220. *See* Wehrly v. Humble Oil & Ref. Co., 64 S.W.2d 396, 401 (Tex. Civ. App.—Galveston 1933, writ ref'd).

221. Downs v. Porter, 54 Tex. 59, 63 (1880).

222. Shaw v. Ball, 23 S.W.2d 291, 293-94 (Tex. Comm'n App. 1930, jdgmt adopted).

223. Charle v. Safford, 13 Tex. 94, 113 (1854).

224. Weaver v. Garrietty, 84 S.W.2d 878, 882 (Tex. Civ. App.—Dallas 1935, writ ref'd); Williams v. Fuerstenberg, 12 S.W.2d 812, 816 (Tex. Civ. App.—Amarillo 1928), *rev'd on other grounds*, 23 S.W.2d 305 (Tex. Comm'n App. 1930, jdgmt adopted).

225. Seddon v. Harrison, 367 S.W.2d 888 (Tex. Civ. App.—Houston 1963, writ ref'd n.r.e.); *see* Veeder v. Gilmer, 103 Tex. 458, 461, 124 S.W. 595, 596 (1910); Pratt v. Townsend, 125 S.W. 111, 114 (Tex. Civ. App. 1910, no writ). *See generally* Weatherred v. Kiker, 357 S.W.2d 182 (Tex. Civ. App.—Amarillo 1962, writ ref'd n.r.e.).

226. MacDonnell v. De Los Fuentes, 26 S.W. 792 (Tex. Civ. App. 1894, writ ref'd); *see* Texas Land & Mortgage Co. v. State, 23 S.W. 258, 259 (Tex. Civ. App. 1892, writ ref'd). *See generally* Neal v. Pickett, 280 S.W. 748, 750 (Tex. Comm'n App. 1926, jdgmt adopted).

227. Neal v. Pickett, 280 S.W. 748, 752 (Tex. Comm'n App. 1926, jdgmt adopted); *see* Hussey v. Moser, 70 Tex. 42, 47, 7 S.W. 606, 608 (1888).

228. *See* Burnham v. Hardy Oil Co., 108 Tex. 555, 563-64, 195 S.W. 1139, 1142 (1917).

the 3-year limitation statute.[229] This point was illustrated in the supreme court case of *Leyva v. Pacheco*.[230] In *Leyva*, the father had purchased realty using the funds of his daughter. The father then conveyed the land to the son who pleaded a 3-year limitation title against the daughter. The court found the son's claim was not supported by title or color of title because the interest conveyed by the father to the son was not that acquired from the sovereign in that beneficial interest was lacking. The transfer did not pass color of title because it was intrinsically unfair to the daughter who owned the beneficial interest, and both father and son were aware of the fact.[231]

Another situation in which the 3-year statute is applicable is in a claim by a senior line grantee who fails to record before a subsequent bona fide purchaser.[232] The conveyance to the senior line grantee consitutes color of title because it is valid between the parties and voidable only as to a third party bona fide purchaser. Therefore, if the senior line grantee takes peaceable and adverse possession of the tract for 3 years, he may perfect his title by limitation.[233]

5-YEAR STATUTE

The most obvious difference between the 3 and 5-year statutes is that the 5-year statute relaxes the substantial burden of proving title from the sovereign.[234] The 5-year statute demands that the claimant exercise normal incidents or acts of ownership over the realty, such as a claim of right under a duly registered deed which has not been forged, and the payment of taxes.[235] Mere peaceable and adverse possession is not enough;[236] he must also cultivate, use, or enjoy the

229. Leyva v. Pacheco, 163 Tex. 638, 642-43, 358 S.W.2d 547, 550 (1962); District Grand Lodge No. 25 v. Logan, 177 S.W.2d 813, 814-15 (Tex. Civ. App.—Fort Worth 1943, writ ref'd).

230. 163 Tex. 638, 358 S.W.2d 547 (1962).

231. *Id.* at 642-43, 358 S.W.2d at 550.

232. Phelps v. Pecos Valley S. Ry., 182 S.W. 1156, 1157 (Tex. Civ. App.—El Paso 1916, no writ). A senior line grantee situation is as follows: where X grantor conveys to Y grantee, who does not record before X grantor conveys to Z grantee who purchases for full value in good faith and without notice.

233. *Id.* at 1157-58.

234. Porter v. Chronister, 58 Tex. 53, 56 (1882); Castro v. Wurzbach, 13 Tex. 128, 131-32 (1854).

235. *See* Haring v. Shelton, 103 Tex. 10, 13, 122 S.W. 13, 14 (1909); Vaughan v. Anderson, 495 S.W.2d 327, 331-32 (Tex. Civ. App.—Texarkana 1973, writ ref'd n.r.e.); Crockett v. Arkansas-Louisiana Gas Co., 125 S.W.2d 1101, 1102 (Tex. Civ. App.—Amarillo 1939, no writ).

236. Vaughan v. Anderson, 495 S.W.2d 327, 331-32 (Tex. Civ. App.—Texarkana 1973, writ ref'd n.r.e.).

land.[237] Finally, the claimant must show that all these elements existed concurrently for 5 years.[238]

Before the 5-year statute may be successfully invoked the claimant must show that he claims under a recorded deed.[239] The instrument required by the statute should be valid on its face and should contain an adequate description of the land.[240] Thus, those errors which do not concern whether the deed is sufficient to give notice to the owner or are not related to defining the claim usually will not defeat a claim under a deed; however, an error such as lack of an acknowledgment in the deed will defeat the claim.[241] In addition, an erroneous deed description which cannot be corrected by construction is generally held insufficient to apprise the true owner of the extent of the claim asserted, and thus will not support a claim. Examples of descriptive errors which have resulted in failure of claims include incorrectly cited section[242] or abstract numbers[243] and misnomers in the names of locations.

The statute also provides that a forged deed, even if it appears valid on its face, may not be used to qualify under the 5-year statute.[244] The fact of forgery, however, must be proved, and merely an affidavit charging forgery will not nullify a deed which has all the appearances of a regular deed.[245]

Once the claimant obtains a deed valid on its face which is not forged or executed under a forged power of attorney, he is required to record it.[246] This provides yet another means of giving notice to the true

237. TEX. REV. CIV. STAT. ANN. art. 5509 (1958).

238. Love v. Magee, 378 S.W.2d 96, 99 (Tex. Civ. App.—Texarkana 1964, writ ref'd n.r.e.); Taylor v. Phillips Petroleum Co., 295 S.W.2d 738, 744 (Tex. Civ. App.—Galveston 1956, writ ref'd n.r.e.).

239. *See* Haring v. Shelton, 103 Tex. 10, 13, 122 S.W. 13, 14 (1909).

240. Wofford v. McKinna, 23 Tex. 36, 43-44 (1859).

241. Carleton v. Lombardi, 81 Tex. 355, 358, 16 S.W. 1081, 1082 (1891); Callen v. Collins, 120 S.W. 546, 549 (Tex. Civ. App. 1909, no writ). The defective acknowledgment prevented registration of the deed.

242. Broke v. McKechnie, 69 Tex. 32, 33, 6 S.W. 623, 624 (1887).

243. Hicks v. Southwestern Settlement & Dev. Corp., 214 S.W.2d 315, 318-19 (Tex. Civ. App.—Beaumont 1948, writ ref'd n.r.e.). The question presented is whether the descriptive error could have misled the true owner. W.D. Cleveland & Sons v. Smith, 156 S.W. 247, 251 (Tex. Civ. App.—Galveston 1913, writ ref'd).

244. TEX. REV. CIV. STAT. ANN. art. 5509 (1958).

245. Crockett v. Arkansas-Louisiana Gas Co., 125 S.W.2d 1101, 1103 (Tex. Civ. App.—Texarkana 1939, no writ); Todd v. Hand, 225 S.W. 770, 772 (Tex.Civ. App.—Fort Worth 1920, writ ref'd). An affidavit alleging forgery is a demand for proof of execution, not proof in itself, of forgery. Chamberlain v. Showalter, 23 S.W. 1017, 1019 (Tex. Civ. App. 1893, no writ).

246. The 5-year period commences upon registration of the deed and not before. Van Sickle v. Catlett, 75 Tex. 404, 409, 13 S.W. 31, 32 (1889).

owner of a claim against his land.[247] If, for example, the duly registered deed through which the claimant asserts limitation title lacks adequate description but refers to another deed in the chain of title which does adequately describe the disputed tract, then the other deed must also be recorded.[248] Thus, the act of recording overcomes an otherwise fatal error in a claim under the 5-year statute. By requiring the existence of a formal deed, duly recorded, the purposes of giving the owner due notice of the claim[249] and adequately defining its boundaries,[250] are accomplished.

Under the 5-year statute the claim is limited to the interest conveyed by the deed. The claimant's possession of land outside the deed description is unsupported, and no title may be acquired thereto under the 5-year statute. Furthermore, an adverse possessor's deed which conveys to him only an undivided interest will not support a claim to the whole tract under the statute.[251]

The question of whether a quitclaim given to the adverse possessor is sufficient as a deed under the 5-year statute has received much attention from the courts. The supreme court, in *Porter v. Wilson*,[252] has apparently resolved the matter by holding that a quitclaim does not purport to convey land but conveys merely the grantor's current interest.[253] In *Porter* the plaintiff-claimant, having met the other requisites of the 5-year statute, attempted to prove limitation title based on a quitclaim. The court determined that since a quitclaim is merely a relinquishment of a doubtful claim, it may not give sufficient notice of the adverse claim asserted against the owner.[254]

A deed valid on its face but later proven void does not defeat the claim under the statute. Furthermore, the claim need not be made in good faith. For example, a deed given to defraud creditors is sufficient under the 5-year statute.[255] The fact that the conveyance could

247. Taylor v. Phillips Petroleum Co., 295 S.W.2d 738, 744 (Tex. Civ. App.—Galveston 1956, writ ref'd n.r.e.).

248. McDonough v. Jefferson, 79 Tex. 535, 539, 15 S.W. 490, 491 (1891); Walker v. Maynard, 31 S.W.2d 168, 170-71 (Tex. Civ. App.—Austin 1930, no writ).

249. Taylor v. Phillips Petroleum Co., 295 S.W.2d 738, 744 (Tex. Civ. App.—Galveston 1956, writ ref'd n.r.e.).

250. Larson, *Limitations on Actions for Real Property: The Texas Five Year Statute*, 18 Sw. L.J. 385, 391 (1964).

251. Porter v. Wilson, 389 S.W.2d 650, 654 (Tex. 1965); Martinez v. Bruni, 235 S.W. 549, 551 (Tex. Comm'n App. 1921, jdgmt adopted).

252. 389 S.W.2d 650 (Tex. 1965).

253. *Id.* at 657.

254. *Id.* at 657.

255. Hartman v. Hartman, 135 Tex. 596, 600, 138 S.W.2d 802, 803 (1940); Eckert

be set aside by the judgment creditor[256] is extrinsic to the parties to the conveyance and therefore does not affect the usefulness of the deed under the statute. Thus, a lienholder has no cause of action against the claimant who receives title by defrauding the lienholder. The judgment lienor, whose cause of action against the land would normally continue for 10 years,[257] may thereby be cut off by operation of the 5-year statute.[258] Adverse possession is, therefore, considered sufficient title to bar an action to recover the realty by a judgment creditor when the adverse claim is based on a conveyance which is void as to the judgment creditor.[259]

No deed in privity or recognition of the true owner's title will suffice under the 5-year statute. A warranty deed, a sheriff's deed of sale, and a tax deed are not within this category and are sufficient bases on which to assert a claim.[260] Even in a situation where a grantor's title has passed to his grantee by virtue of the doctrine of after-acquired title, the deed, although it does not vest any right to the property in the grantor, may still be utilized as a basis of claim under the 5-year statute.[261]

In addition to the requirements of a deed and of continuous adverse possession it is also necessary that all taxes assessed against the property during the 5-year period must be promptly paid.[262] The occupant must also appropriate the land to some purpose for which it is adaptable and which is sufficient to evidence his intent to appropriate.[263] The

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v. Wendel, 120 Tex. 618, 630, 40 S.W.2d 796, 801 (1931); Comment, *Peculiarities of the Five Year Statute*, 9 BAYLOR L. REV. 338, 340 (1957).

256. TEX. REV. CIV. STAT. ANN. art. 3996 (1966).

257. TEX. REV. CIV. STAT. ANN. art. 5449 (1958).

258. TEX. REV. CIV. STAT. ANN. art. 5513 (1958).

259. *See* TEX. REV. CIV. STAT. ANN. art. 5509 (1958); Eckert v. Wendel, 120 Tex. 618, 40 S.W.2d 796 (1931).

260. Schleicher v. Gatlin, 85 Tex. 270, 274, 20 S.W.2d 120, 122 (1892); Bowles v. Brice, 66 Tex. 724, 729-30, 2 S.W. 729, 732 (1886) (sheriff's sale); Bavousett v. Bradshaw, 332 S.W.2d 155, 157-58 (Tex. Civ. App.—Amarillo 1959, writ ref'd n.r.e.) (tax deed); Glasscock v. Dimmitt, 141 S.W. 822, 823 (Tex. Civ. App.—Austin 1911, writ ref'd) (warranty deed).

261. Daniels v. Jones, 450 S.W.2d 928, 932 (Tex. Civ. App.—Tyler 1970, writ ref'd n.r.e.).

262. Houston Oil Co. v. Jordan, 231 S.W. 320, 321 (Tex. Comm'n App. 1921, jdgmt adopted); Wichita Valley Ry. v. Somerville, 179 S.W. 671, 676 (Tex. Civ. App.—Amarillo 1915, no writ).

263. Killough v. Hinds, 161 Tex. 178, 183, 338 S.W.2d 707, 710 (1960); Wright v. Vernon Compress Co., 156 Tex. 474, 482, 296 S.W.2d 517, 522 (1957). Casual or incomplete possession or use will not satisfy the statute. The following are examples of casual or incomplete possession: (1) the storing of materials, (2) the erection and maintenance of an advertising sign on the property, (3) the digging up of trees and brush, (4) the filling in of property with dirt, (5) the use of an adjoining lot for ingress

effect of the requirement of cultivation or use under the 5 and 10-year statutes is to require some utilization of the land greater than mere actual or constructive possession.

10-YEAR STATUTE

A comparison between the 5 and 10-year statutes shows that some requirements under the 5-year statute, such as payment of taxes, are supplanted under the 10-year statute by the longevity of the claim.[264] In fact, a claim under a duly registered deed is but one possible claim under the 10-year statute. The claimant may alternatively perfect limitation title under the 10-year statute by actual enclosure of the tract claimed or by entering the premises with or without permission, and staying the required 10 years.[265] A claim taken by this method, however, is limited in area to 160 acres. Thus, the claimant who establishes continuous cultivation, use, or enjoyment for 10 years has met virtually all the special requirements of the 10-year statute.[266]

A claimant under any of the possibilities in the 10-year statute may utilize the concept of constructive adverse possession. Under this concept adequate use, cultivation, or enjoyment of only a portion of the tract may support the adverse possessor's claim to the entire tract.[267] The courts have construed the 10-year statute as permitting a claim under a duly registered deed;[268] the rationale is that the claimant's actual possession, coupled with cultivation, use, or enjoyment of any part of the land described in the deed, should be sufficient to put the true owner on notice of an adverse claim. The owner may then, by examination of the deed records, discover the extent of the claim.[269] Under the 10-year statute the extent of the claim is limited to the property

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and egress from a business establishment, (6) the sale of shell from a shell bank, (7) occasional camping and fishing, (8) the cutting of weeds. Camping for the purpose of hunting does not constitute such use as to satisfy the limitations statute. Watson v. Campfield, 432 S.W.2d 184, 186 (Tex. Civ. App.—Waco 1968, no writ); Hejl v. Wirth, 334 S.W.2d 498 (Tex. Civ. App.—Austin 1960), *rev'd on other grounds*, 161 Tex. 609, 343 S.W.2d 226 (1961).

264. TEX. REV. CIV. STAT. ANN. art. 5510 (1958).

265. *Id.*

266. *Id.*

267. *See* Love v. McGee, 378 S.W.2d 96, 98 (Tex. Civ. App.—Texarkana 1964, writ ref'd n.r.e.).

268. As against the statutory phrase "*other than a deed.*" TEX. REV. CIV. STAT. ANN. art. 5510 (1958). If a larger tract than 160 acres is claimed, then a recorded deed is necessary. Harveys v. Humphreys, 178 S.W.2d 733, 737 (Tex. Civ. App.—Galveston 1944, writ ref'd w.o.m.).

269. McKee v. Stewart, 139 Tex. 260, 270, 162 S.W.2d 948, 953 (1942).

described in the muniment of title because the claimant's possession is presumed to be in conformity with the boundary descriptions in his deed.[270] For the claimant to acquire land outside the limits described in his deed, he must be in actual possession of all the land.[271]

"Actual enclosure" under the 10-year statute may also designate the extent of the adverse possessor's claim.[272] This method is most commonly used by a claimant who fences a tract and cultivates or otherwise uses it for 10 years, thus acquiring title to the entire fenced tract.[273] The fencing must be deliberate[274] and the fences properly maintained during the entire period. The fence must also be substantial enough to turn livestock in order to constitute actual enclosure.[275]

Although actual enclosure is only one of the means of defining the adverse possessor's claim, it is sometimes the only possible means. When the claimant's land completely surrounds the tract in dispute, he must fence off the disputed tracts in order to substantiate a claim against the true owner.[276] In addition, he must use at least one-tenth of the disputed tract for agricultural or manufacturing purposes.[277] Therefore, even though he encloses the interior tract and grazes animals on it, this does not establish a valid claim unless he also fulfills the requirement of use for agricultural or manufacturing purposes.[278]

If the claimant's enclosure does not embrace a substantial part of the disputed tract, the claimant is entitled only to that part of the land which he has actually enclosed.[279] If the encroachment amounts only

270. McCall v. Grogan-Cochran Lumber Co., 143 Tex. 490, 494, 186 S.W.2d 677, 678 (1945).

271. McCall v. Grogan-Cochran Lumber Co., 143 Tex. 490, 494, 186 S.W.2d 677, 678 (1945); Henderson v. Goodwin, 368 S.W.2d 800, 802 (Tex. Civ. App.—Beaumont 1963, no writ).

272. TEX. REV. CIV. STAT. ANN. art. 5510 (1958); Didier v. Woodward, 232 S.W. 563, 565 (Tex. Civ. App.—Amarillo 1921, no writ).

273. *See* Didier v. Woodward, 232 S.W. 563, 565 (Tex. Civ. App.—Amarillo 1921, no writ).

274. West Prod. Co. v. Kahanek, 132 Tex. 153, 158, 121 S.W.2d 328, 331 (1938).

275. Cox v. Olivard, 482 S.W.2d 682, 686 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.). Enclosure was incidental where the fencing was placed back from the deed boundaries to avoid washout areas and roughness of terrain. McDonnold v. Weinacht, 465 S.W.2d 136, 141 (Tex. 1971).

276. TEX. REV. CIV. STAT. ANN. art. 5511 (1958).

277. *Id.*

278. Vergara v. Kenyon, 261 S.W. 1009, 1010 (Tex. Comm'n App. 1924, jdgmt adopted); Vergara v. Myers, 239 S.W. 942, 943-44 (Tex. Comm'n App. 1922, jdgmt adopted).

279. *See* McCall v. Grogan-Cochran Lumber Co., 143 Tex. 490, 494, 186 S.W.2d 677, 678-79 (1945); Fielder v. Houston Oil Co., 210 S.W. 797, 798 (Tex. Comm'n App. 1919, jdgmt adopted); Southland Paper Mills, Inc. v. McGathon, 473 S.W.2d 294, 298

to a few feet, this is usually, as a matter of law, not sufficient notice to the true owner; however, if the encroachment includes a large portion of the tract, then the question of notice becomes a fact issue.[280]

Since a claim of right under the 10-year statute requires only an assertion of ownership, it has been held that a naked trespasser may acquire limitation title under the statute.[281] If there is no instrument of record describing the tract, and it is not enclosed by a fence, then the trespasser's claim is limited to 160 acres.[282] Where a trespasser cultivates, uses, or enjoys the land and actually possesses a substantial part of it, there is sufficient notice to the owner of a claim to the whole under the doctrine of constructive adverse possession. The 160 acres claimed must include that portion actually possessed and all claimed improvements.[283]

The showing of continuous cultivation, use, or enjoyment for 10 years is obviously the most difficult burden under article 5510,[284] even though proof of one is sufficient. Cultivation requires planting and harvesting of crops for each of the 10 years. The cutting of weeds or other naturally growing crops is not cultivation sufficient to qualify under the 10-year statute.[285] If the clamant has not cultivated the land, then he must prove continuous use of it for the statutory period. The use asserted must be sufficient to constitute actual and visible appropriaton of the land.[286]

(Tex. Civ. App.—Beaumont 1971, writ ref'd n.r.e.); Smith v. Temple Lumber Co., 323 S.W.2d 172, 174 (Tex. Civ. App.—Beaumont 1959, writ ref'd n.r.e.).

280. McCall v. Grogan-Cochran Lumber Co., 143 Tex. 490, 495, 186 S.W.2d 677, 679 (1945).

281. *See* Killough v. Hinds, 161 Tex. 178, 183, 338 S.W.2d 707, 711 (1960). The claimant can never gain title unless he claims the disputed land as his own, even though under the 10-year statute it is possible that he would enter and commence possession without color of title. TEX. REV. CIV. STAT. ANN. art. 5510 (1958). Color of title under the 10-year statute is construed to include a void deed or will, and is therefore different in meaning from color of title under the 3-year statute. McDow v. Rabb, 56 Tex. 154, 161 (1882).

282. Kirby Lumber Co. v. Conn, 114 Tex. 104, 110, 263 S.W. 902, 904 (1924).

283. Killough v. Hinds, 161 Tex. 178, 183, 338 S.W.2d 707, 711 (1960). In a legal controversy, the claimant should adequately describe the claimed tract in his pleadings. *See* Louisiana & Tex. Lumber Co. v. Kennedy, 103 Tex. 297, 298, 126 S.W. 1110, 1111 (1910). In the rather special circumstance that the claim is for 160 acres out of a larger tract, an alternative pleading for a designated and undesignated 160 acres is suggested. Kirby Lumber Co. v. Conn, 114 Tex. 104, 110, 263 S.W. 902, 904 (1924).

284. There is no presumption of a continuance of a claim, the claimant must prove continued possession for the entire period. There can be no shifting of the burden by showing possession part of the time. *See generally* Woods v. Hull, 90 Tex. 228, 229, 38 S.W. 165 (1896).

285. McDonnold v. Weinacht, 465 S.W.2d 136, 141 (Tex. 1971).

286. TEX. REV. CIV. STAT. ANN. art. 5515 (1958).

The grazing of livestock is commonly asserted as a claimant's use of the land. In order for grazing of livestock to constitute sufficient use, however, there must also be "designed" enclosure; that is, fencing for the purpose of grazing.[287] If the claimant cannot show that the fence was built for this purpose, then the fence is only casual or incidental enclosure, insufficient as notice under article 5515. The fact that the fence enclosing the tract claimed was built by one other than the claimant weighs heavily against his effort to prove "designed enclosure," even if the fence was thereafter maintained and repaired by the claimant.[288]

The use of land for outdoor sports is usually insufficient under article 5510 due to the great difficulty in showing the exclusiveness or continuity of the use.[289] A recent case illustrates this point. In *Bramlett v. Harris and Eliza Kempner Fund*,[290] it was held that, in spite of frequent use of the disputed land on weekends for hunting and fishing, and construction of a lean-to and duck blind, the claimant had not shown visible and notorious possession sufficient to raise a presumption of notice of the adverse claim.[291]

Once limitation is matured, it is good title, and cannot be forfeited through abandonment.[292] Limitation title is not marketable title, however, absent judicial determination that the claim is valid.[293] Of the three adverse possession statutes the 5 and 10-year statutes are invoked most frequently. The 5-year statute is viable only where one is willing

287. McDonnold v. Weinacht, 465 S.W.2d 136, 141 (Tex. 1971); Bridwell v. Long, 508 S.W.2d 466 (Tex. Civ. App.—Amarillo 1974, no writ); Georgetown Bldg., Inc. v. Heirs of Tanksley, 498 S.W.2d 222, 224 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.).

288. McDonnold v. Weinacht, 465 S.W.2d 136, 141 (Tex. 1971). The burden of proving designed enclosure was overcome in Pirtle v. Henry, 486 S.W.2d 585 (Tex. Civ. App.—Tyler 1972, writ ref'd n.r.e.), although the repairs in that case amounted to the construction of a new fence.

289. *See* McDonnold v. Weinacht, 465 S.W.2d 136, 141 (Tex. 1971); Crosby v. Davis, 421 S.W.2d 138, 143 (Tex. Civ. App.—Tyler 1967, writ ref'd n.r.e.). The same rule would apply to use for recreational purposes. Fannin v. Somervell County, 450 S.W.2d 933, 935 (Tex. Civ. App.—Waco 1970, no writ). The courts have not distinguished between use and enjoyment with regard to recreational use. Nona Mills Co. v. Wright, 101 Tex. 14, 23-24, 102 S.W. 1118, 1121 (1907).

290. 462 S.W.2d 105 (Tex. Civ. App.—Houston [1st Dist.] 1970, writ ref'd n.r.e.). The possession during the first few months of the period did not exhibit unmistakably an assertion of a claim of exclusive ownership.

291. *Id.* at 105.

292. Hurr v. Hildebrand, 388 S.W.2d 284, 291 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.).

293. *See* Finger v. Morris, 468 S.W.2d 572, 578-79 (Tex. Civ. App.—El Paso 1971, writ ref'd n.r.e.).

to assume the prescribed acts of ownership. The 10-year statute serves a less meritorious but more common situation, and for that reason, fulfills the valid function of quieting titles long and openly asserted.