When Robert Frost's neighbor told him “good fences make good neighbors,” he probably meant a well-built fence on a true boundary line. Even small deviations between a fence and a true boundary line can engender vigorous disputes. These disputes commonly arise because a fence, hedge, or wall is erected on the wrong side of a recorded boundary line, and fences tend to confer exclusive possession to the neighbors on either side. Years pass, a sale or new construction is imminent, a survey is made, and then, the neighbor with record title sues to recover possession of the now-disputed land. Such boundary disputes among neighbors have increased in the Los Angeles area as property owners build ever larger structures on existing lots within the confines of required setbacks from the boundaries.

The outcome in these cases is difficult to predict. Both sides feel justified in their positions, one neighbor having grown accustomed to the use of the disputed property, and the other having record title. In the past, record title over a disputed area has often been defeated by possession, which, as the saying goes, is nine-tenths of the law. But a pair of recent decisions has now precipitously tilted the playing field in favor of the neighbor with record title.

After Silacci v. Adamson1 and Mehdizadeh v. Minzer,2 neighbors in possession must prove either that they have paid real property taxes on the disputed property or that there was uncertainty as to the location of the true boundary. As a practical matter, however, neighbors in possession of disputed property never pay the taxes on it, and a true boundary is rarely uncertain since it can be ascertained by a survey. As a result, the requirements of these cases would appear to be impossible to meet. Although these opinions thus seem to herald an end to boundary-dispute litigation, resourceful practitioners can still develop strategies that may provide relief for the neighbor in possession.

The typical boundary-dispute lawsuit, in which either neighbor may be the plaintiff, involves a fairly straightforward quiet title claim by the neighbor with record title, because the law presumes this person to be in possession of the land described in the deed. To achieve the goal of exclusive use of the disputed property, a neighbor in possession must prevail on the more problematic claims of adverse possession, prescriptive easement, or agreed boundary.

Not surprisingly, there are parallels among these three legal theories. The doctrines of adverse possession and prescriptive easement put the claimant to four daunting tests: The adverse claimant must have held possession 1) for five consecutive years, 2) in a manner that is "open and notorious," 3) under a claim of title, and 4) in a manner that is "hostile to the true owner."6

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Payment of property taxes has long been an additional touchstone in adverse possession claims. For more than a century, the legislature has required that claimants attempting to obtain title to land by adverse possession show that they “have paid all taxes.” In this context, “all taxes” means taxes for each of the five consecutive years of possession necessary to establish title by adverse possession. The typical adverse claimant in a boundary dispute—even if all of the elements regarding possession are established—cannot prove payment of taxes, because taxes are assessed and paid according to the record title.

Traditionally, the difficulty of establishing an adverse possession claim has done little to discourage litigation of boundary disputes. Neighbors in possession have been able to advance their goal of exclusive use of a neighbor's land through prescriptive easements. Since an easement refers to a right to use property of another, it is something of a stretch to use that claim to resolve a boundary dispute, in which both sides want title and exclusive use. The courts accordingly recognize that when the use to be established is exclusive—such as in a boundary dispute—a prescriptive easement amounts to title to the disputed property.

The advantage of seeking an exclusive prescriptive easement was that, until Silacci, the adverse claimant did not need to have paid property taxes. As a leading real property treatise states: “In some cases the use is sufficient to establish either a title or an easement, but the possessor can only acquire an easement because he did not pay the taxes required for adverse possession.”

In Silacci, however, the court ruled that an easement cannot be used to effectively obtain ownership. That ruling has made the prescriptive-easement doctrine inapplicable to boundary disputes among private landowners. The case involved a dispute between residents of the neighborhood. The Abramsons' back fence was on land included in Silacci's deed, and Silacci sued to recover the disputed land. Not only had the five-year prescriptive period apparently passed, but five owners prior to Silacci had failed to file a lawsuit challenging the trespass, although there had been complaints. With the requirements of hostile, continuous, and exclusive use for the statutory period met, the trial court awarded Abramson the exclusive use of Silacci's property for "a backyard garden area."

That, according to the conventional wisdom of the real property treatise, would normally have been the end of the matter: "A review of the decisions confirms that any case involving a prescriptive right is won or lost in the trial court, and that an appeal is generally of little value." Nonetheless, the court of appeal reversed.

The Silacci court focused on the basic difference between adverse possession (which confers title to disputed property) and prescriptive easement (which confers "merely" a right of use). The court was bothered that an exclusive easement blurs the distinction, because it essentially gives away the title holders' "land completely, without reservation." On the other hand, the remedy of an exclusive easement has long been discussed in case law and treatises, and was granted in at least one reported case, Otay Water District v. Beckwith. The court limited Otay Water District "to its difficult and peculiar facts" involving the public interest and reversed the trial court: "An exclusive prescriptive easement is, nonetheless, a very unusual interest in land. The notion of an exclusive prescriptive easement, which as a practical matter completely prohibits the true owner from using his land, has no application to a simple back yard dispute like this one."

With that language, possession, even when no legal action is taken by numerous record owners over a period of years exceeding the statute of limitations, was subordinated to record title and the tax collector. As Silacci concludes, if the Abramsons had paid property taxes, then they would have an adverse possession claim—not an exclusive-prescriptive easement claim—and so the case was remanded to the trial court to determine whether those taxes had been paid.

Silacci reasoned that easements differ fundamentally from fee ownership. Holders of fee title have the entire bundle of sticks of property ownership, the benefits and the burdens. To acquire a fee interest by adverse possession, one must have assumed the burdens, including payment of taxes. In contrast, the owner of an easement, like a lessee, lacks some benefits and may be relieved of some burdens, including the payment of taxes. There was to the Silacci court something unseemly, however, when by a prescriptive easement the adverse claimant seeks all the sticks conferring benefits without having accepted those that bear the burdens.

Any doubt as to whether the Second District Court of Appeal would follow the Fourth District's lead in Silacci was removed with the Mehdi-zadeh decision. The scenario in this case was also a fence dispute between residential neighbors. The claimant had not paid taxes on the disputed property (and so could not establish adverse possession), but the trial court granted an exclusive prescriptive easement. On appeal, the record owners of the property argued that the trial court's granting of an exclusive prescriptive easement amounted to "adverse possession under the guise of a prescriptive easement." Citing

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**Bearing the Cost of Litigation**

At some point in a boundary dispute, particularly when it comes time to pay, the parties will probably remember their title policies. Although material encroachments are unde-

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1 See Armitage, 218 Cal. App. 3d at 887, 267 Cal. Rptr. at 399 (awarding damages for trespass and punitive damages after rejecting agreed boundary doctrine).
5 Brown Derby Hollywood Corp. 61 Cal. 2d at 860, 40 Cal. Rptr. 845.

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Sitacci, the court of appeal reversed the trial court and made adverse possession the sole basis for acquiring exclusive use of a neighbor’s property: “We hold that when a claimant cannot satisfy the requirements for adverse possession, the claimant may not receive a prescriptive easement which extends so far that it becomes the equivalent of a fee interest and dispossesses the record title owner[s] of part of their property.”

The Mehrizadeh court’s approach to the issue had more facets than the one taken in Sitacci. Rather than merely hold that exclusive easements do not apply to private boundary disputes, Mehrizadeh makes the requirements of exclusive easements and adverse possession identical. The opinion also cites the “general rule...which accords determinative legal effect to the description of land contained in a deed.” The opinion concludes with a rather bold pronouncement that an exclusive easement could only be created intentionally, i.e. never by prescription.

The “agreed boundary” doctrine, the third legal avenue available to neighbors in possession of disputed property but lacking record title, has the most relaxed requirements of all of these doctrines, in part because it is a creature of case law. As its name implies, the agreed boundary doctrine resolves boundary disputes with reference to adjacent landowners’ “agreements” as to the boundary. The three elements to establish a successful claim under this theory are: “uncertainty as to the true boundary line, an agreement between the adjacent owners establishing the line, and acceptance and acquiescence in that line [for five years].”

Because this doctrine permits a transfer of real property without a writing, uncertainty as to the true boundary is necessary so that the doctrine does not violate the Statue of Frauds. Where the boundary line was initially uncertain, such that no property is “intentionally” transferred by agreement to a boundary line, the courts have found no violation.

Many older cases permit uncertainty to be shown by the long-term maintenance of a fence that does not coincide with the legal boundary. As for the second element, the cases do not strictly require an agreement, but will imply an agreement from the conduct of the parties. Thus, a fence to which no objection has been made can be sufficient to establish an agreement to establish a boundary. In fact, one could find a case to support almost any position under this doctrine, which might simply be called a form of estoppel. In short, the agreed-boundary doctrine provided—until quite recently—a formidable argument by which the neighbor in possession could obtain a favorable settlement, if not an outright victory in court.

That changed in 1994, however, with the California Supreme Court’s decision in Bryant v. Blevins. In that case, the court held that courts cannot imply “uncertainty” as to a property line where the true boundary can be determined through available legal records, such as tract maps and deeds. Although courts of appeal had made similar statements previously, other courts had disagreed. The California Supreme Court directly confronted the issue whether record title should prevail against estoppel by possession, and chose record title. Elevating surveying to a quasi-religious experience, the court deferred to “the sanctity of true and accurate legal descriptions.” The court stated that it would not permit the agreed boundary doctrine “to trump the boundary established by the legal records.”

According to the Mehrizadeh court, the agreed boundary doctrine’s purpose is to “secure repose and prevent litigation.” But, after Bryant, the burden of proof imposed on the neighbor in possession was significantly heightened in cases in which legal records furnish a reasonable basis for fixing the true boundary. In those cases, the neighbor in possession must establish that there was subjective uncertainty and that the parties therefore made an agreement to fix the boundary at a particular place. However, in cases in which the legal records are inadequate to settle a boundary dispute, the courts can still imply an agreement to fix a boundary at a fence line. Apparently, the courts intend that by making the burden of proof more difficult, litigants will be discouraged from making agreed boundary claims entirely. The ruling in Bryant effectively forced many neighbors in possession to rely on the doctrine of exclusive easements, which is why the holdings in Sitacci and Mehrizadeh, ostensibly making exclusive easements inapplicable, are so significant.

Within this new legal framework, where adverse possession and exclusive-preservation easements must be supported by evidence of payment of taxes, and where agreed boundary claims require direct proof of uncertainty, strategies are still available to protect the neighbor who is on the wrong side of the fence. While record title holders enjoyed significant victories in Sitacci and Mehrizadeh, neighbors in possession have no cause to give up their land unconditionally.

In particular, attorneys for adverse claimants seeking exclusive prescriptive easements or adverse possession should not be hasty to stipulate that their client did not pay the taxes on the disputed property. For instance, some attorneys have advanced a “visual assessment” theory, under which the adverse claimant argues that the fence makes it appear that the disputed property is part of the adverse claimant’s parcel. The (Continued on page 50)
adverse claimant would then ask the court to conclude that the tax payment requirement has been satisfied—that is, even though the adverse claimant did not pay the tax bill issued for the disputed property, the claimant actually did pay taxes on the disputed property because the claimant's own tax bill included the value of the disputed property, which everyone believed was part of his or her lot.

The visual assessment theory requires evidence of the actual method of assessment. The adverse claimant would need to prove that neither the landowners themselves nor the assessor relied on a survey; instead, they relied on a visual assessment of the real property and its visual boundaries, i.e., on fences. Some claimants may be able to bolster the argument that the assessor did not rely on record title by invoking the constitutional requirement (since the passage of Proposition 13) that the assessment of real property be based on acquisition cost. This cost, in turn, may have been based on a visual assessment of property boundaries. If the encroaching landowner can establish that the acquisition price—and thereby the assessment—were based on the value of the disputed property and improvements, then the requirement of the payment of taxes has arguably been satisfied.

This acquisition-cost approach to providing evidence of the payment of taxes would be especially forceful in scenarios where the disputed property significantly affects the value of the adverse claimant's property, either because the disputed portion is intrinsically valuable or because its loss would diminish the value of the remainder. This might be the case, for example, when the loss of a side yard would cause structures to be in violation of setback restrictions.

At the same time, the claimant may directly challenge the requirement that taxes must have been paid. In *Gilardi v. Hallam* the supreme court declined to address the applicability of the tax payment requirement to exclusive prescriptive easements.\(^{35}\) It is something of a mystery—perhaps a nineteenth-century ploy by wealthy railroads to derail squatters’ claims—why it should matter between private landowners who paid the local county.\(^{36}\) California is in the minority of states to make payment of taxes a prerequisite for adverse possession.\(^{37}\) But it remains doubtful that, after 100 years, the adverse possession requirements of Code of Civil Procedure Section 325 will be amended.\(^{38}\)

As an alternative to satisfying the tax payment requirement under the visual-assessment or acquisition-cost theories, or attacking the requirement itself, the adverse claimant may seek to be excused from the requirement by presenting evidence on the as-yet-untested theory that it is impossible to have paid the taxes on the disputed property. *Silacci* and *Mehdizadeh* both assume that such tax payment is possible. However, as a practical matter it may not be. The Los Angeles County Assessor, like all assessors, imposes taxes only on property interests disclosed in public records, and not on portions of lots that are the subject of adverse claims.\(^{39}\) In 1992, the legislature amended Revenue and Taxation Code Section 610 to provide:

> Any person may have his or her name added to the assessment roll for a particular parcel of property if he or she provides the assessor with ...(3) a declaration under penalty of perjury that he or she is currently in possession of the property and intends to be assessed in order to perfect a claim by adverse possession.

This statute only allows a person to pay taxes on another person’s “particular parcel”; it does not purport to allow the creation of a new parcel by such a declaration. Thus, while it may be possible for an adverse claimant to pay taxes on his or her neighbor’s entire property, it appears to be impossible to pay taxes on the portion of the assessor’s parcel number containing the easement. In view of these barriers, adverse claimants may argue that they can obtain title without paying taxes because to pay taxes would be impossible, and as the maxim of jurisprudence states, “The law never requires impossibilities.”\(^{40}\)

This “impossibility” approach can be made to seem less novel by invoking the well-accepted proposition that, for adverse possession and prescriptive easements, payment of taxes is not required when the property is tax exempt. That exception is arguably an example of the impossibility exception. If the courts follow *Mehdizadeh*’s position that the requirements for adverse possession and prescriptive easement are identical, then this argument (that payment of taxes should be excused because one cannot pay taxes on a part of a parcel) will enable the adverse claimant to prevail under both theories.

Rather than attempting to satisfy, attack, or excuse the tax payment requirement, the adverse claimant may instead consider seeking a nonexclusive easement. Nonexclusive uses are beyond the holding of *Silacci* and would not require the payment of taxes. Whether the easement is characterized as exclusive or nonexclusive depends on the use of the land during the prescriptive period.\(^{41}\) For example, if the fence has a gate without a lock, or with a lock to which both neighbors have keys, or which has fallen down in places, then these facts tend to show that the fence did not create an exclusive use of the disputed property by the adverse claimant.

However, a nonexclusive easement may not be a desirable remedy; most neighbors, especially litigious ones, do not want to share their property. *Silacci* arguably foreclosed nonexclusive yard easements by quoting the trial court’s statement that “the privately enclosed area of a home does not lend itself to shared use.”\(^{42}\) Thus, pursuing a nonexclusive easement may be primarily useful as a means of encouraging the record owner to settle, since neither neighbor will want the court to split the backyard.

In contrast to prescriptive easements and adverse possession, which depend on the payment of taxes, the agreed boundary doctrine depends on uncertainty over the true boundary. As a result, the first issue in litigating an agreed boundary claim is whether legal records provide a reasonable basis for fixing the true boundary. If they do not, then the neighbor in possession will have the advantage under the doctrine, since an agreement may still be implied when there is direct evidence of uncertainty.

At least one of the neighbors must obtain a survey to confirm the location of the boundary. Finding the true boundary generally requires available monuments. These monuments may be described in recorded deeds or in tract maps referred to in the deeds. Next, one must determine whether the monuments can be located or are lost. Contemporary monuments, such as brass markers in sidewalks,\(^{43}\) are more likely to be available than ancient monuments, such as trees. If the monuments are lost (or there have been material topographic changes), locating the true boundary line will require considerable research. In such cases, the legal records alone may not provide a “reasonable” basis for fixing the boundary, and that satisfies the requirement of objective uncertainty.\(^{44}\)

Using the existing recorded documents and monuments, a survey can be performed by a registered civil engineer or licensed land surveyor.\(^{45}\) Both neighbors should cooperate. It is not, however, generally necessary that the surveyor be allowed access to a nonconsenting neighbor’s land.\(^{46}\) It may be tempting, but it is illegal, to remove the stakes while a survey is being performed.\(^{47}\) (Correspondingly, the neighbor with record title should not resort to tearing down the encroaching fence; possession can only be restored by the courts.\(^{48}\))

The survey can establish uncertainty when the description of the boundary in legal records does not coincide with the monu-
ments, because the monuments control. This inconsistency is more common in older tracts. Public records may yield some evidence of this inconsistency, because surveyors record a "record of survey" when there is a material discrepancy between recorded information and field data.49

Inconsistencies among surveys can also establish uncertainty. The adverse claimant should commission multiple surveys if there are doubts as to a first survey's precision. The adverse claimant should also seek prior surveys, which may have been performed to obtain a title policy or as a condition for construction of improvements (such as to establish that there was no encroachment into side yard setbacks). For instance, in *Kunza v. Gaskell*, the proponent of record title commissioned three surveys with inconsistent results, and the court confirmed the fence as the agreed boundary.

Even if the true boundary line can reasonably be located from legal records, the adverse claimant still has the opportunity to present direct evidence that there was subjective uncertainty among the co-terminous owners when the fence was built, and that they intended the fence to resolve that uncertainty. This burden may not be as onerous as it first appears. In *Bryant*, the California Supreme Court reaffirmed its holding in *Ernie v. Trinity Lutheran Church*42 that the evidence was met by evidence that the neighbor performed a survey directly before building an encroaching fence, sidewalk, and structure. Conducting a survey "presumably" established uncertainty, and building the fence showed an agreement to resolve it. The legislature has also eased the burden by making admissible hearsay evidence from unavailable witnesses regarding boundary lines.42

As a practical matter, in this type of dispute, which is often without significant economic benefit to either neighbor, other considerations can create an atmosphere for voluntary resolution. The cost of litigation, except to the extent that it is defrayed by insurance (see "Bearing the Cost of Litigation," page 32); the anxiety caused by suing neighbors; and the inability to sell property while litigation is pending (particularly if a lis pendens has been recorded) may all lead to settlement.

If the parties agree to abide by the true boundary, then the adverse claimant might surrender possession in exchange for the record owner bearing the cost of relocating the fence and perhaps making other concessions relating to the design of the fence. Alternatively, the parties may agree that the adverse claimant holds only a revocable license for a limited use, thereby allowing
Planning program highlighting:
- including consolidated return issues; leveraged recaps; financial accounting planning involving financial products;
- tailoring; and compensation issues in closely-held corporations

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- the administrative trust; designating accounts; generation skipping transfer x traps in boilerplate provisions; and

pursue in greater depth some of the ramifications, as well as charitable remainder liens and their families; planning and the Internet in a tax practice; employee nd planning to avoid a "hobby loss"

his activity has been approved for redit by the State Bar of California in

1 R. Frost, "Mending Wall" (1914).
5 Different principles apply to a structure built entirely on another's land. The rules governing such "good faith improvements" are the subject of a peculiar blend of statute and case law and were not affected by Silacci, 45 Cal. App. 4th 558, 53 Cal. Rptr. 2d 37 (1996).
11 Payment of taxes is required only in the rare case in which the easement has been separately assessed. Gilaridi, 30 Cal. 3d 702, 178 Cal. Rptr. 624 (1981).
13 Id. §15.31 a.10, at 476.
14 Silacci, 45 Cal. App. 4th at 564.
15 Otay Water Dist. v. Beckwith, 1 Cal. App. 4th 1941, 3 Cal. Rptr. 2d 223 (1991) (grant of exclusive easement for a reservoir not comparable to a title because of use restriction).
16 Silacci, 45 Cal. App. 4th at 564.
17 Mehdi-zadeh, 46 Cal. App. 4th 1304-05. Id. at 1308.
18 Id.
19 Id. (citing Pasadena v. California-Michigan Land & Water Co., 17 Cal. 2d 576, 578-79, 110 P.2d 983, 985 (1941)).