UPDATE ON OKLAHOMA TITLE RELATED CASES:
FOR 2010-2011

(Covering July 1, 2010 to June 30, 2011)

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"Oklahoma Bar Association Real Property Law Section Annual Meeting"

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PANEL PRESENTATION:

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Dale L. Astle is Senior Executive Vice President and General Counsel of Guaranty Abstract Company, Tulsa, Oklahoma. He received an Associate of Science degree from Northern Oklahoma College, a Bachelor of Science degree from Oklahoma State University and a Juris Doctor degree from University of Oklahoma College of Law.

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Dale was selected for inclusion in the 2007 and 2009 issues of "Oklahoma Super Lawyers". He has also served as a member of the Executive Committee of the Abstractors and Title Insurance Agents Section of the American Land Title Association and as chairman of the ALTA Public Relations Committee.

In addition, he has served as a member of the board of directors of the Tulsa Title and Probate Lawyers Association, the Oklahoma Land Title Association and the Real Property Law Section of the Oklahoma Bar Association and has served on numerous committees of the OLTA and OBA.

He is a frequent presenter in seminars and educational conferences, has taught Real Estate Transactions as an adjunct professor at the University of Tulsa College of Law and has written several articles covering various topics related to real estate law and Oklahoma land titles. He is the author of "Title Insurance", Vernon's Oklahoma Forms 2d, Real Estate (West, 2000), "Official Conveyances and Antecedent Records," Patton and Palomar on Land Titles, Third Edition (West, 2003) and "Transfer-on-Death Deeds in Oklahoma", 82 O.B.A.J. 651 (2011).

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Court-appointed Receiver for 5 Abstract Companies in Oklahoma
Oklahoma City University School of Law adjunct professor: "Oklahoma Land Titles" course (1982 - Present);
Vernons 2d: Oklahoma Real Estate Forms and Practice, (2000 - Present) General Editor and Contributing Author;
Basye on Clearing Land Titles, Author : Pocket Part Update (1998 – 2000); Contributing Author: Pocket Part Update (2001-Present)
Oklahoma Bar Review faculty: "Real Property" (1998 - 2003);
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SELECTED PUBLICATIONS:

"A Status Report: On-Line Images of Land Documents in Oklahoma County" & "Where Are We Going Next in Electronic Filing", 36 Briefcase (OCBA) 7 & 8 (July & August 2004)
"Real Estate Homesteads in Oklahoma: Conveying and Encumbering Such Interest", 75 The Oklahoma Bar Journal 1357 (May 15, 2004)
"*Have Judgment Lien Creditors Become 'Bona Fide Purchasers'?*", 68 Oklahoma Bar Journal 1071 (March 29, 1997)*; and

SPECIAL HONORS: *Okla. Bar Assn. 1997 Maurice Merrill *Golden Quill Award*;
Okla. Bar Assn. 1990 Earl Sneed *Continuing Legal Education Award*;
Okla. Bar Assn. 1990 Golden Gavel Award: *Title Exam. Standards Committee.;*
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SCOTT WILLIAM MCEACHIN

Scott McEachin is a sole practitioner in Jenks, Oklahoma. His practice is limited, almost exclusively, to oil and gas title examination. He received a Bachelor of Arts degree in History and Political Science from the University of California at Santa Barbara and a Juris Doctor degree from the University of Oklahoma College of Law.

Mr. McEachin has been an attorney with Apco Oil Corporation in Oklahoma City and with Hondo Oil and Gas Company in Roswell, New Mexico. He was also affiliated with other law firms before beginning his private practice in Jenks.

He is a member of the Real Property Section of the Oklahoma Bar Association, and he served as its Chair in 1989. He is a member of the Title Examination Standards Committee.

CASE LAW

LIST OF CASES

NO.	TOPIC	CASE	OKLAHOMA CITATION	DECIDED	MANDATE
1	Enforcement of a Restrictive Covenant Not Barred by 5 Year Statute of Limitation	Vranesevich v. Pearl Craft	2010 OK CIV APP 92	10/09/09	10/08/10
2	Tax Sale Notice and Adverse Possession	Davis v. Mayberry	2010 OK CIV APP 94	05/14/10	10/08/10
3	Ownership of River Water	Wagoner County Rural Water District No. 2 v. Grand River Dam Authority	2010 OK CIV APP 95	05/07/10	10/08/10
4	Eminent Domain Regarding Uneconomic Remnants	State of OK ex rel. Dept. of Transportation v. Evans	2010 OK CIV APP 107	03/25/10	10/14/10
5	Error in Mortgage Payoff Figure	Baer, Timberlake, Coulson & Cates, P.C. v. Warren	2010 OK CIV APP 112	08/13/10	10/22/10
6	Arbitration in Landlord Tenant Dispute	City College v. Moore Sorrento	2010 OK CIV APP 127	06/18/10	11/30/10
7	Statute of Limitation for Mortgage Release Penalty	Melson v. Wachovia Bank	2010 OK CIV APP 135	10/22/10	11/30/10
8	Interference with an Easement	Tidwell v. Bezner	2010 OK CIV APP 143	08/26/10	12/10/10
9	Eminent Domain for Power Lines	OG&E v. Beecher and Bd. of County Commissioners, Kingfisher County	2011 OK CIV APP 1	10/19/10	01/20/11
10	Distribution of Assets of a Corporation by Will	In the Matter of the Estate of Hodges	2011 OK CIV APP 2	12/28/10	01/28/11
11	Notice in Certificate Tax Sale	Benton v. Ted Parks	2011 OK CIV APP 7	12/02/10	01/24/11

12	Application of Fair Market Value After General Execution Sale	Little Bear Resources, LLC v. Nemaha Services, Inc.	2011 OK CIV APP 18	02/14/11	02/22/11
13	Proof as to Holder of Note	BAC Home Loans Servicing v. White	2011 OK CIV APP 35	12/03/10	03/16/11
14	Ambiguous Deed	MacDonald O/G v. Sledd, Trustee of Nedbalek Family Trust	2011 OK CIV APP 36	12/28/10	03/16/11
15	Section Line Roadway	Mayes v. Williams	2011 OK CIV APP 40	02/16/11	04/22/11
16	Future Advances Clause	RCB Bank v. Villas Development	2011 OK CIV APP 44	03/18/11	04/22/11
17	Lis Pendens Against Executory Purchaser	Bank of Commerce v. Breakers	2011 OK CIV APP 45	03/18/11	04/22/11
18	Attorney Fees to Prevailing Party	Twin Creek Estates v. Tipps	2011 OK CIV APP 53	03/30/11	05/05/11
19	Adverse Possession Distinguished by Title by Acquiescence	McDonald v. Martin	2011 OK CIV APP 55	04/01/11	05/05/11
20	Purchase Money Mortgage Priorities	American Bank of OK v. Wagoner	2011 OK CIV APP 76	11/05/10	06/29/11
21	Prepayment Penalties Enforceability	Massey v. Bayview Loan Servicing	2011 OK CIV APP 78	04/04/11	06/29/11
22	Award of Attorney Fees for Removal From Small Claims Court	Eagle Bluff, LLC v. Taylor	2010 OK 47	06/22/10	
23	Can Guarantor Wave Statutory Right to Set-Off F.M.V. Against Debt in a Mortgage Foreclosure	JPMorgan Chase Bank v. Specialty Restaurants, Inc.	2010 OK 65	09/21/10	
24	Qui Tam Intervention by	City of Broken Arrow, Oklahoma v. Bass Pro	2011 OK 1	01/18/11	

	Tax Payer	Outdoor World			
25	Access to Residential Property to Determine Assessed Value	Atkinson v. Gurich	2011 OK 12	02/22/11	
26	Establishing Status as a Pipeline Company with Eminent Domain Powers	D-Mil Production v. DKMT	2011 OK 55	06/21/11	

1. **<u>ENFORCEMENT OF A RESTRICTIVE COVENANT NOT BARRED BY 5 YEAR STATUTE OF LIMITATION</u>**

(Suit to <u>enjoin</u> a violation of a restrictive covenant (prohibiting placing manufactured home on residential lot) is not barred by passage of 5-year contract statute of limitations)

<u>VRANESEVICH v. PEARL CRAFT,</u> 2010 OK CIP APP 92 (decided 10/09/09; mandate issued 10/08/10)

A restriction prohibited the placement of a manufactured home on a lot. A manufactured home was placed on a site and it stayed there without complaint for over 5 years. A neighbor sued for injunction to cause the removal of the manufactured home under (1) violation of restrictive covenant and (2) nuisance.

Owner of manufactured home filed a Motion for Summary Judgment based on the passage of the 5-year statute of limitations (12 §95(1)) applicable to a written contract.

Trial court granted the summary judgment in favor the owner of the manufactured home relying on an earlier Court of Civil Appeals decision holding that a restrictive covenant is a written contract and is barred after 5 years. (<u>Russell v. Williams</u>, 1998 OK CIV APP 135 ,964 P.2d 231) The summary judgment failed to dispose of the plaintiff's nuisance claim.

The Court of Civil Appeals reversed (expressly disagreeing with <u>Russell</u>) and held (¶13): "Although a restrictive covenant affecting the use of real property is created by contract, the property interest created thereby 'runs with the land.' Consequently, Vranesevich's suit to enjoin an alleged breach of restrictive covenants is not barred by the five-year statute of limitations applicable to written contracts. Likewise, he may maintain an action to abate a private nuisance,

subject to any defenses Craft may assert. The judgment of the district court is reversed, and this case is remanded for further proceedings."

2. **TAX SALE NOTICE AND ADVERSE POSSESSION**

(Tax certificate sale of restricted Indian land requires special notice to the Bureau of Indian Affairs (BIA), and is void in its absence; a void tax deed based on 5-years adverse possession can overcome such lack of jurisdiction, but requires more than simply recording a deed and paying taxes.)

DAVIS v. MAYBERRY, 2010 OK CIV APP 94 (decided 05/14/10; mandate issued 10/08/10)

A person bought an 11/60 undivided interest in a 160-acre tract, in taxable Restricted Indian land. The tax deed holder filed the tax deed to himself and then filed a deed conveying the interest to himself and his wife, as joint tenants. The tax deed holder did not occupy the premises, but did pay the taxes on the new property for 5 years, and did not have its deed challenged in that time.

A pending quiet title suit added the tax deed owners asserting the tax deed sale was void due to the absence of the 90-day advance notice of the tax sale to the BIA. Tax deed holder asserted (1) the notice requirement was unconstitutional and (2) they had proved 5-years of actual possession.

The trial court granted the BIA's Motion for Partial Summary Judgment, because the tax deed was void due to the absence of the required notice to the BIA. The trial court set the adverse possession issue for trial.

At trial, on the adverse possession claim, the trial court ruled against the tax deed holder's proof of adverse possession.

On appeal, the Court of Civil Appeal affirmed the trial court, ruling against the tax deed holder's defense that "county treasurers and lawyers are generally ignorant of this [BIA advance notice] statute." (¶11) The appellate court refused to consider the constitutionality of the federal notice statute.

The appellate court also considered the 5-year adverse possession claim—asserted in support of the tax deed holder—and affirmed the trial court, holding that in spite of the partial undivided interest the tax deed holder must prove actual exclusive possession, and he failed.

3. **<u>OWNERSHIP OF RIVER WATER</u>**

(Water in Grand River Dam Authority's Multi-County area is owned by GRDA and is properly sold to the four Water Districts in that area)

<u>WAGONER COUNTY RURAL WATER DISTRICT NO. 2 v. GRAND RIVER DAM AUTHORITY,</u> 2010 OK CIV APP 95 (decided 05/07/10; mandate issued 10/08/10)

After the GRDA had been charging, and the area's four Water Districts had been paying, the GRDA for water from the Fort Gibson Reservoir and its tributaries for a long time, the Water Districts filed a lawsuit claiming the GRDA did not own such water and therefore could not charge for it. (¶'s 2, 5 & 19)

The GRDA filed a Motion to Dismiss for failure to state a claim. The trial court treated the Motion as a Summary Judgment Motion, and granted GRDA's Motion.

The four Water Districts appealed, but the Court of Civil Appeals affirmed, holding: navigable waters are subject to the control of Congress; & ownership and Control of non-navigable waters (such as the Grand River) is in the states. Oklahoma created the GRDA and gave it ownership and control of non-navigable waters in its multi-county jurisdiction. The GRDA was held to own and control the waters in the Fort Gibson reservoir and its tributaries.

4. **EMNENT DOMAIN REGARDING UNECONOMIC REMANTS**

(Landowner cannot force condemning authority (ODOT) to declare remaining lands as an economic remnant)

STATE OF OKLAHOMA ex rel. DEPARTMENT OF TRANSPORTATION v. EVANS, 2010 OK CIV APP 107 (decided 03/25/10; mandate issued 10/14/10)

ODOT filed a proceeding to acquire a part of a landowner's tract, and the landowner challenged the Commissioners' Report insisting ODOT must take all of her land rather than leaving her with a worthless unusable "uneconomic remnant." The taking went right up to her doorstep.

Title 27 O.S.2001 § 13 **Policies** states:

> Any person, acquiring agency or other entity acquiring real property for any public project or program described in Section 9 of this title shall comply with the following policies:
> 9. If the acquisition of only part of the property would leave its owner with an uneconomic remnant, an offer to acquire that remnant shall be made. For the purposes of this section, an uneconomic remnant is a parcel of real property in which the owner is left with an interest after the partial acquisition of the property of the owner which has little or no value or utility to the owner.

The trial court rejected the land owner's request.

The Court of Civil Appeals affirmed. It explained (¶4): "Section 15 of Title 27 is apposite to Section 13, and describes the circumscription of landowners: 'The provisions of Section 5 [Title 27, § 13] create no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation.' In *Western Farmers Electrical Co-Operative v. Willard*, 1986 OK CIV APP 5, 726 P.2d 361, this Court held that the trial court was correct in denying landowners' objections based on the condemning authority's failure to comply with § 13 because it is a statement of policy only."

5. **ERROR IN MORTGAGE PAYOFF FIGURE**

(If lender, or lender's attorney agent, provides payoff amount which is lower than the correct amount, the bank (or assignee of note) can pursue the shortfall (here about $10,000))

BAER, TIMBERLAKE, COULSON & CATES, P.C. v. WARREN, 2010 OK CIV APP 112 (decided 08/13/10; mandate issued 10/22/10)

Lender filed foreclosure action and Lender's foreclosure attorney provided three payoff amounts over a period of time, with the first two increasing in amount and the third one erroneously going down.

Owner secured a third party buyer and used the third payoff amount (the lower erroneous one) to cut and send a check to the lender's attorneys. Lender accepted and deposited such check and sent a letter to the debtor saying the mortgage was paid in full. Such payoff amount and debtor's check were about $10,000 short.

Lender's attorney paid the shortage to the lender and took an endorsement of the note. Such attorney sued the debtor for the difference.

Trial court awarded a judgment to the attorney.

It was affirmed on appeal.

6. **ARBITRATION IN LANDLORD TENANT DISPUTE**

(Parties (landlord and tenant) can (and did) confer authority on an arbitration panel to decide both possessory and damages issues, arising originally in a forcible entry and detainer (FED) Action)

CITY COLLEGE v. MOORE SORRENTO, 2010 OK CIV APP 127 (decided 06/18/10; mandate issued 11/30/10)

Landlord sued in an FED action to evict a non-paying commercial tenant. Tenant cross-claimed for damages. Parties entered Agreed Order terminating lease and possession, and appointing an arbitration panel to resolve remaining damages issues.

Panel granted tenant substantial damages, attorneys fees, and directed landlord to pay for the arbitration.

Tenant submitted arbitration panel's award to the District Court, and over the landlord's objection, the Court confirmed the award.

Landlord appealed, and the Court of Civil Appeals affirmed.

The appellate Court denied the landlord's assertion that arbitration was not mandatory and that the panel exceeded their authority, since the lease allowed arbitration and the parties agreed to it.

The appellate court also rejected the landlord's claims of bias and impartiality by one of the arbitrators, because there was no evidence of any visible bias, and the relationship between the arbitrator and one of the parties' attorneys was known in advance and irrelevant.

7. **STATUTE OF LIMITATION FOR MORTGAGE RELEASE PENALTY**

(If a borrower waits more than 1- year after making a written demand for a release of mortgage, it is barred from seeking to recover either statutory penalty, or any other relief)

MELSON v. WACHOVIA BANK, 2010 OK CIV APP 135 (decided 10/22/10; mandate issued 11/30/10)

Borrower paid off their note and mortgage in 2001, and, when seeking to refinance their home in 2006, discovered the mortgage was not released. Borrower sent a written demand for release to the lender in 2006, which was not satisfied until February, 2009, when the lender filed

a Release of Mortgage. The borrower filed an action for a statutory penalty under 46 O.S. Section15 in 2008.

The trial court held that due to the one-year statute of limitation to seek to recover a penalty (12 O.S. §95(4)) and, because this penalty statute is the exclusive remedy, the borrowers were without any relief for a penalty or other damages.

The Court of Civil Appeals affirmed.

8. INTERFERENCE WITH AN EASEMENT

(Owner of lands subject to roadway easement cannot install a drive-through "bump gate")

TIDWELL v. BEZNER, 2010 OK CIV APP 143 (decided 08/26/10; mandate issued 12/10/10)

Owner of lands subject to roadway easement built a fence to keep in his cattle and wanted to install a gate on the roadway. Easement holder did not want a gate and, at his own expense, installed a cattle guard. Cattle owner installed a "bump guard" gate with electrically charged wires on it to discourage cattle from pushing through it. Easement holder sued to remove the gate.

Trial court ordered the gate to be removed, because it was "unduly burdensome." (¶20)

Court of Civil Appeals affirmed holding (¶17):

"In this regard, Tidwell [easement holder] admitted that the bump gate did not bar access to his property. However, he presented evidence that the electrical lines attached to the gate posed a danger to himself, his visitors and his grandchildren, that bumping the gate could possibly damage vehicles which passed through, and that the bump gate had devalued his property. He also presented evidence of a simple, alternative solution for keeping the cattle out of his yard----properly maintaining the cattle guard or ramping it. Although Bezner [land owner]

presented conflicting evidence, the trial court clearly resolved the factual conflicts in favor of Tidwell [easement holder] and balanced the equities before reaching its decision."

9. **EMINENT DOMAIN FOR POWER LINES**

(Exercise of eminent domain for construction of electric lines from wind farms is for a public purpose)

OG&E v. BEECHER AND BOARD OF COUNTY COMMISSIONERS, KINGFISHER COUNTY, 2011 OK CIV APP 1 (decided 10/19/10; mandate issued 01/20/11)

In an eminent domain action (six companion cases), OG&E sought to condemn lands for electric lines for wind farms. Land owners sought to prove (1) use of only 22% of electricity by Oklahoma customers meant it was for private and out of state purposes, and not public purposes, and (2) control of access to the lines by the Southwest Power Pool (SPP) meant it was not really an OG&E project for the use of the public in Oklahoma.

The trial court denied the land owner's objection to the Commissioner's Report, instead finding there was a public purpose.

The Court of Civil Appeals affirmed, finding (a) the landowners failed to prove the balance of the electricity (78%) would be used by out of state users and not by OG&E customers sometime in the future, and (b) the landowners failed to show SPP would deny OG&E customers access to any or all of the electricity.

10. **DISTRIBUTION OF ASSETS OF A CORPORATION BY WILL**

(The owner of all the stock of a corporation can pass the corporation's assets to a devisee/legatee)

IN THE MATTER OF THE ESTATE OF HODGES, 2011 OK CIV APP 2 (decided 12/28/10; mandate issued 01/28/11)

A holographic will gave into trust for a granddaughter, a ranch owned by a corporation whose stock was totally owned by the deceased, and the will expressly excluded a sister. It was necessary to sell the ranch to pay taxes and debts. A battle ensued between the granddaughter and sister as to the owner of the balance of the ranch sale proceeds ($950,000).

Trial court gave proceeds in trust to granddaughter to carry out intent of will.

Court of Civil Appeals affirmed allowing probate court, in equity, to treat corporate assets as property of deceased.

11. **NOTICE IN CERTIFICATE TAX SALE**

(Absence of proof of actual notice to the owner before a Certificate Sale voids both the Certificate Sale and the later Resale)

BENTON v. TED PARKS, 2011 OK CIV APP 7 (decided 12/02/10; mandate issued 01/24/11)

Sale at a Certificate Tax Sale requires actual notice to the owner. The notice of the Certificate Tax Sale was returned "unclaimed" after being sent to a lender (who was the prior owner) as the record owner. No attempt to send notice to the current owner, who received record title immediately before such sale, was attempted. The adequacy of the notice two years later in advance of the issuance of the Certificate Deed was challenged too.

The trial court sustained the prior owner's Motion for Summary Judgment in a quiet title suit.

The Court of Civil Appeals affirmed.

12. **APPLICATION OF FAIR MARKET VALUE AFTER GENERAL EXECUTION SALE**

(Where the general execution creditor buys the foreclosed real property at its own sale, the debtor receives credit for the fair market value rather than the lower sales price)

<u>LITTLE BEAR RESOURCES, LLC v. NEMAHA SERVICES, INC.,</u> 2011 OK CIV APP 18 (decided 02/14/11; mandate issued 02/22/11)

Sheriff's Sale on a general execution produced a sales price of $107,000 (2/3 of the appraised value) bid by the judgment creditor on real property valued at $160,000 by the pre-sale appraisers on a debt of over $175,000 (leaving a deficiency).

The trial court confirmed the sale and only applied the sales price of $107,000 against the debt, leaving a larger deficiency than if the appraised value had been used.

The debtor challenged the trial court's order confirming the sale. "The parties do not dispute that the sheriff's sale was conducted fairly and resulted in a statutorily proper bid. The sole issue on appeal is whether the trial court erred in applying the $107,000 against Little Bear's judgment instead of the full appraised value of $160,000." [¶4]

On appeal, the Court of Civil Appeals reversed the trial court and remanded the case to have the "full appraised value of the property ($160,000)…credited against Little Bear's judgment." [¶13] The appellate court said: "The Oklahoma Supreme Court considered in *Riverside Nat'l Bank v. Manolakis*, <u>1980 OK 72</u>, <u>613 P.2d 438</u>, whether the principal debtor's protections from deficiency judgments in <u>12 O.S. 1971 §686</u> should also extend to guarantors. *Riverside* held that §686 does not extend to guarantors and notes that the rights and obligations under guaranty agreements are governed by the provisions of 15 O.S. §§321-344. *Riverside* noted Oklahoma's anti-deficiency statute had adopted the same statutory wording as the New York anti-deficiency statute, and suggested Oklahoma courts would adopt a construction of §686 similar to New York courts, except as to guarantors which in Oklahoma, unlike New York, are subject to their own statutory scheme. New York courts have applied the New York anti-

deficiency statute, N.Y. Real Prop. Acts. Law §1371 (1962), in cases involving the foreclosure of judgment liens.

"In *Wandschneider v. Bekeny*, 75 Misc.2d 32, 346 N.Y.S.2d 925 (N.Y. Sup. Ct. 1973), the Supreme Court of New York, Westchester County discussed the origin of its anti-deficiency statute and concluded equity required the same rule (that the judgment debtor be allowed a credit against its debt for the sum representing the fair market value of the property sold) be applied to execution sales on judgment liens. Otherwise, the result is described as 'unjust and oppressive,' 'unconscionable' and an 'undeserved windfall' for the creditor. *Id.*, 75 Misc.2d at 34, 38, 346 N.Y.S.2d at 927, 931. While New York case law is certainly not controlling here, the reasoned construction of New York's similar statute is logical and equitable. Oklahoma courts should similarly apply the equitable principles of 12 O.S. 2001 §686 to execution on judgment liens to allow a debtor to receive full credit for the value actually received by the creditor - the fair market value of the property (or the sales price if it is higher). No good reason exists to treat judgment liens differently than if they were specifically included within the provisions of §686.

"Numerous other states have adopted anti-deficiency legislation requiring the application of fair market value to limit deficiency judgments. The Pennsylvania anti-deficiency statute has been applied to judgment debtors since its inception. Nevada has similarly applied the fair market value to actions involving any creditor/debtor relationship in which execution upon real property has occurred. Oklahoma courts sitting in equity should follow the reasoning of such other states to allow the same protection against a windfall for the judgment creditor as recognized in 12 O.S. 2001 §686. In situations where the judgment creditor purchases the judgment debtor's property at a sheriff's sale, the judgment debtor must be entitled to "set off the

fair and reasonable market value of the property less the amounts owing on prior liens and encumbrances."

[AUTHOR'S NOTE: I thought the general practice was to ignore the presale appraisal valuation at a deficiency hearing and to instead have both sides present a new appraisal.]

13. **PROOF AS TO HOLDER OF NOTE**

(A lender cannot foreclose a mortgage absent proof it holds the related note)

BAC HOME LOANS SERVICING V. WHITE, 2011 OK CIV APP 35 (decided 12/03/10; mandate issued 03/16/11)

In a foreclosure of a mortgage, where American Home Mortgage took a note with MERS holding the mortgage, there was an alleged—but not proven—assignment of the note to BAC, who sought a Summary Judgment.

The trial court granted summary judgment to the lender (BAC), ordering a sale.

On appeal to the Court of Civil Appeals, the matter was reversed and remanded for a determination as to who holds the note. The appeals court found there was no evidence offered to prove BAC held the note being foreclosed. The appellate court also noted that the mortgage follows the note, even without an assignment of the mortgage.

14. **AMBIGUOUS DEED**

(A conveyance of all of one's right, title and interest in surface and minerals, but reserving ½ of the oil, gas and minerals, when grantors owned less than ½ was ambiguous)

MACDONALD OIL AND GAS v. SLEDD, TRUSTEE OF NEDBALEK FAMILY TRUST,

2011 CIV APP 36 (decided 12/28/10; mandate issued 03/16/11)

Action to quiet title to minerals turned on whether each of two deeds conveying all of the grantors' right, title and interest, with an exception of ½ of the oil, gas and other minerals, reserved <u>all</u> of the minerals they owned (since they owned <u>less than ½</u> of the minerals) or only reserved ½ of the portion they actually owned.

The trial court ruled the two deeds were unambiguous and reserved <u>all</u> the minerals.

On appeal, the Court of Civil Appeal held the deeds were ambiguous, and remanded for an evidentiary hearing on the parties' intentions.

15. **<u>SECTION LINE ROADWAY</u>**

(An abutting fee simple owner—by statute—is entitled to use a section line as a roadway (even if not opened by the County Commissioners), and such use cannot be blocked by another adjacent owner)

<u>MAYES v. WILLIAMS,</u> 2011 OK CIV APP 40 (decided 02/16/11; mandate issued 04/22/11)

A landowner needed to use a section line roadway to access the northern part of his land and did so for over 50 years. A new owner of the adjacent land installed a fence denying access to his neighbor. The user of the roadway sued to enjoin such obstacle.

The trial court granted the user's Motion for Summary Judgment enjoining the neighbor for maintaining a gate or otherwise obstructing such use.

On appeal, this decision was affirmed and the appellate court emphasized (1) such right of access was granted by statute (69 O.S. §1201), and (2) it is not necessary to prove such access is essential.

16. **<u>FUTURE ADVANCES CLAUSE</u>**

(Future advances (omnibus, dragnet) clauses in a mortgage survive payment of the initial note, and cover later notes and separate guarantees also)

RCB BANK V. VILLAS DEVELOPMENT, 2011 OK CIV APP 44 (decided 03/18/11; mandate issued 04/22/11)

A dispute arose (over priority) between two lenders holding competing mortgages upon default by the borrower. The holder of the later-recorded mortgage ("Lender 2") sought to defeat the earlier-recorded mortgage holder ("Lender 1") by claiming (1) Lender 1 held a note secured by the mortgage but it had to be released within 50 days of when it was fully paid off by statute (42 O.S. §15), the earlier ??? payoff, and (2) Lender 1's later guaranty and related note could not be secured by the mortgage because the later guaranty was not the type of obligation (i.e., not a note) expected to be secured by the mortgage.

The trial court granted Lender 1's motion for summary judgment giving the lender a valid first mortgage lien on all of its notes and the guaranty.

The losing lender appealed, but lost.

17. **LIS PENDENS AGAINST EXECUTORY PURCHASER**

(A buyer who signs a purchase contract before lis pendens is filed but takes title afterwards has no protectable interest and cannot intervene in the referenced action (a Mortgage foreclosure))

BANK OF COMMERCE v. BREAKERS, 2011 CIV APP 45 (decided 03/18/11; mandate issued 04/22/11)

A prospective buyer of real property, subject to two mortgages, who signed the purchase contract before a lis pendens foreclosure notice was filed. He then closed and took title after both

of the lenders begin foreclosure and after one of the lenders filed a lis pendens. He sought to intervene, asserting he held a protectable interest.

Trial court denied the buyer's motion to intervene.

On appeal, the Court of Civil Appeal affirmed, declaring such purchaser had paid nothing, and therefore, had no interest to protect, and waited too long to seek to intervene (12 months).

18. **ATTORNEY FEES TO PREVAILING PARTY**

(Developer was awarded attorney fees (under a statute) for successfully enforcing restrictive covenants)

TWIN CREEK ESTATES v. TIPPS, 2011 CIV APP 53 (decided 03/30/11; mandate issued 05/05/11)

When homeowners applied for a building permit without having developer's approval of plans, which approval was required under the recorded restrictions, the developer sued to require submittal of architectural plans, and, in addition, to force the home owner to use an "approved" builder.

Trial court issued an order requiring the home owner to submit the plans for the house to the developer, but refused to force the use of an approved builder. Separately, the trial court awarded the developer attorney fees as the prevailing party, under 60 O.S. §856.

The attorney fees issue was appealed and the Court of Civil Appeals affirmed, mentioning "the substantial focus of the parties' dispute centered on the design of the Tipp's home…". (¶fn 1)

19. **ADVERSE POSSESSION DISTINGUISHED FROM TITLE BY ACQUIESCENCE**

(While a quit claim directed to "record owners" conveys away any title acquired by an in choate (unlitigated) adverse possession, it does not resolve the issue of title by acquiescence created by a long standing fence)

<u>MCDONALD v. MARTIN,</u> 2011 OK CIV APP 55 (decided 4/01/11; mandate issued 05/05/11)

An owner put up a replacement fence following the property line based on a deed to a parcel containing two parts, a large part based on record title and a smaller strip by in choate adverse possession. Thereafter, the grantees filed a deed of record directed to "record owners" covering the adverse possession strip for the purpose (stated on the deed) of "deed being filed to move cloud on title created by mortgage filed in book 5731, page 979." After this deed to "record owners" was recorded, the adjacent owner acquired title by deed to lands, apparently including the dispute strip. The new adjacent owner then tore down the fence and trees on the disputed strip. The owners by adverse possession sued to quiet title by adverse possession, slander of title, injunction, damages for trespass, damages to property, and diminution of value. The new adjacent owner sued to quiet title.

Trial court granted the owner's adverse possession claim and damages to trees, and denied slander of title.

Court of Civil Appeals reversed saying the adverse possession claim was given up by the quit claim deed, but that the trial court must consider the (unraised) issue of title by acquiescence, due to the long standing fence (over 40 years).

[NOTE This issue was <u>not</u> raised by any of the parties, or the trial court, and, therefore, seems waived.]

20. **<u>PURCHASE MONEY MORTGAGE PRIORITIES</u>**

(Where a vendor's purchase money mortgage is recorded after a third party's purchase money mortgage, but the third party knew of the vendor's mortgage, the vendor's mortgage has priority in a foreclosure)

AMERICAN BANK OF OK v. WAGONER, 2011 OK CIV APP 76 (decided 11/05/10; mandate issued 06/29/11)

A seller took a note and mortgage and recorded it after the third-party's simultaneous mortgage was recorded. On foreclosure, the two lenders fought over priority.

The trial court granted priority to the third party lender's mortgage because it was recorded first.

On appeal, the Court of Civil Appeals reversed, finding that because the third party lender knew of the simultaneous vendor's mortgage when taking its own mortgage, the third party lender could not rely on the order of recording to establish priority. Absent such recording rule's benefit, the buyer took title already encumbered by the vendor's mortgage, and consequently the third party lender's mortgage was second.

21. PREPAYMENT PENALTIES ENFORCEABILITY

(Note and mortgage provisions providing both a "Lockout Fee" and a "Prepayment Consideration" are penalties and, therefore, are unenforceable as impermissible liquidated damages, although there can be damages sought based on a determination of the "present value" of the lost interest)

MASSEY v. BAYVIEW LOAN SERVICING, 2011 OK CIV APP 78 (decided 04/04/11; mandate issued 06/29/11)

A couple took out a note and mortgage on a home, and then in less than 5 years, sold it. In preparation for the closing, they sought a payoff figure from the lender. The payoff figure that the borrower received included large amounts in addition to the unpaid principal, covering all anticipated unpaid interest ($117,613) [“Lockout Fee”: if mortgage paid off sooner than 5 years], plus a substantial penalty for early payoff ($11,370, plus $3,428 for document fees, plus $7,390 in default interest, plus $11,114 in accrued interest) [“Prepayment Consideration”]. The borrower paid the full amount expressly “under protest,” and, after the closing, sued to recover such excess amounts.

The trial court granted the lender’s Motion for Summary Judgment saying the fees were agreed to.

The Court of Civil Appeals reversed holding both amounts were void as being punitive, and duplicative, but remanded to determine the present value of the lost anticipated interest, which would have been paid up until the end of the 5-year Lockout Period. This computed amount would reduce (offset) the amount to be repaid to the borrower.

22. AWARD OF ATTORNEY FEES FOR REMOVAL FROM SMALL CLAIMS COURT

(If small claims court matter is mandatorily transferred to the civil docket, no attorney fees are available if plaintiff defeats counterclaims)

EAGLE BLUFF, LLC v. TAYLOR, 2010 OK 47 (decided 06/22/10)

“Real estate developer brought a small claims action against property owners, seeking $900 for a pro rata share of subdivision maintenance expenses. Property owners counterclaimed

for breach of contract, fraud in the inducement, fraud, and deceit. These counterclaims related to the parties' real estate purchase contract, and owners sought damages in excess of $10,000.

“Property owners moved to transfer the case to the civil docket citing 12 O.S.2001 § 1757, which gives the trial court discretion to transfer cases.

“The trial court transferred the case to the civil docket, but did so with the observation that the transfer was mandatory under 12 O.S. 2001 § 1759. After transfer, developer recovered on its claim for maintenance expenses and prevailed on the counterclaims. The court awarded an attorney's fee to developer for services related to *both* its claim and the counterclaims. In doing so, the court relied on the fee sanctions provision of 12 O.S.2001 § 1757(C), believing it was applicable to all transferred cases.

“On appeal, property owners contended the trial court erred by including services related to the defense of the counterclaims in the attorney's fee award. The Court of Civil Appeals agreed and reversed.

“This Court previously granted certiorari to provide precedential guidance for the award of an attorney's fee in cases transferred from the small claims docket. We hold (1) the transfer of the case from the small claims docket was a mandatory transfer pursuant to § 1759(A) and not a discretionary transfer governed by § 1757; (2) the attorney's fee provision of § 1757(C) is not applicable in cases of mandatory transfers pursuant to § 1759; and (3) no independent basis existed for awarding an attorney's fee for services related to developer's defense of the counterclaims that triggered the mandatory transfer of the case.” (¶0)

23. **CAN GUARANTOR WAVE STATUTORY RIGHT TO SET-OFF F.M.V. AGAINST DEBT IN A MORTGAGE FORECLOSURE**

(Guarantors can and did herein expressly waive any right to set off the fair market value of the real property being sold)

JPMORGAN CHASE BANK v. SPECIALTY RESTAURANTS, INC., 2010 OK 65 (decided 09/21/10)

Lender foreclosed on a real estate mortgage and sought to enforce two third-party guarantees for the deficiency. The debt was $1.7 million, the "fair and reasonable market value as determined in a hearing" was $1.5 million and the sale price was $750,000 (purchased by the creditor). [¶0]

The trial court confirmed the sale and credited the fair market value of $1.5 million against the debt during determination of a deficiency on the $1.7 million debt. Such credit was given to both the debtor and the two guarantors.

The lender appealed the credit given to the guarantors above the $750,000 sales price.

The Court of Civil Appeals affirmed.

The Supreme Court reversed holding that the express language of the two guarantees waived any right to a set off for anything other than the "actual payment."

24. **QUI TAM INTERVENTION BY TAX PAYER**

(City will adequately represent the tax payers in a Qui Tam action and, therefore, the taxpayers cannot intervene)

CITY OF BROKEN ARROW, OKLAHOMA v. BASS PRO OUTDOOR WORLD, 2011 OK 1 (decided 01/18/11)

Taxpayer filed a Qui Tam action to create a challenge to a city project involving spending city money to promote an economic development project in Broken Arrow for a Bass Pro Shop. City reacted to the Qui Tam demand by filing a declaratory judgment action. Taxpayer sought to

intervene and city objected and also filed a Motion for Summary Judgment on the primary matter.

Trial court denied tax payer's Motion to Intervene and granted City's Motion for Summary Judgment.

Taxpayer appealed and Court of Civil Appeals affirmed. Taxpayer again appealed, seeking Certiori.

Oklahoma Supreme Court accepted the case and affirmed the trial Court (and vacated the Court of Civil Appeals) decision, finding the City adequately presented all relevant facts and law to the trial court concerning whether the deal with Bass Pro was proper and legally entered into.

25. **ACCESS TO RESIDENTIAL PROPERTY TO DETERMINE ASSESSED VALUE**

(Where residential property owner challenges county's valuation of real property for ad valorem tax purposes, but does not challenge personal property valuation, no access to the home is allowed, even in a related District Court action)

ATKINSON v. GURICH, 2011 OK 12 (decided 02/22/11)

Residential property owner challenged real property valuation first before the Board of Equalization and then to the District Court. When the County Assessor sought access to the interior of the home through a normal discovery request in the court action, the landowner sought a protective order denying such entry.

Trial court denied the protective order.

Landowner asked the Oklahoma Supreme Court to assume original jurisdiction, and it agreed.

The appellate court first held the assessment statutes only permit access to the home if (a) there is a dispute over the value of personal property and (b) the homeowner requests a re-valuation. It then concluded (1) Oklahoma County has no personal property tax, and (2) the discovery code does not overcome the U.S. and Oklahoma Constitution's protection against unreasonable searches.

26. ESTABLISHING STATUS AS A PIPELINE COMPANY WITH EMINENT DOMAIN POWERS

(A foreign (Texas) corporation, which is not authorized to act as a "pipeline company" in its state of origin, cannot, by simply becoming domesticated in Oklahoma, become entitled to use the right of eminent domain to take easements for a pipeline in Oklahoma)

D-MIL PRODUCTION v. DKMT , 2011 OK 55 (decided 06/21/11)

A Texas corporation, with unspecified business purposes in its Texas Charter, became domesticated in Oklahoma. Its Articles of Domestication in Oklahoma stated its purpose for doing business in Oklahoma was for "mineral leasing," and, yet in those same Articles, expressly disclaimed any interest in laying pipelines in Oklahoma or elsewhere. This corporation filed an eminent domain proceeding in Oklahoma District Court to take land for an easement for a pipeline. The landowner challenged the status of the company as a pipeline company which would entitle the company to condemn lands.

The trial court granted the company's Motion for Summary Judgment.

On appeal, the Oklahoma Supreme Court reversed and remanded with instructions to grand landowner Summary Judgment. This Court held the evidence showed the company was not a pipeline company in Texas and, therefore, could not be one in Oklahoma.