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ADVERSE POSSESSION: THE TWENTY-FIVE YEAR STATUTES OF LIMITATION AND DISABILITIES WHICH TOLL LIMITATIONS

The existence of statutes of limitation affecting real property is grounded on the public policy favoring the quiet and unassailed possession of land. “[S]ociety demands that after a person has acted as owner and possessor of property for a substantial time, he should be recognized as such and should not be subject to disturbance by a former owner.”²⁹⁴

25-YEAR STATUTES

There are three 25-year statutes of limitation in Texas, and they are intended as “catch-all” legislation.²⁹⁵ Two of the statutes, articles 5518 and 5519, bar any action by the apparent record owner of property if the requisites of the statute are met by the adverse claimant.²⁹⁶ Both these statutes require “peaceable and adverse possession” for 25

294. Larson, *Texas Limitations: The Twenty-Five Year Statutes*, 15 Sw. L.J. 177 (1961).

295. *Id.* at 178.

296. The proviso to TEX. REV. CIV. STAT. ANN. art. 5518 (Supp. 1975) (which also describes those disabilities in the record owner which toll statutes of limitation) provides:

[P]rovided, that notwithstanding a person may be or may have been laboring under any of the disabilities mentioned in this Article, one having the right of action for the recovery of any lands, tenements, or hereditaments against another having peaceable and adverse possession thereof, cultivating, using or enjoying same, shall institute his suit therefor within twenty-five years next after his cause of action shall have accrued and not thereafter.

TEX. REV. CIV. STAT. ANN. art. 5519 (Supp. 1975) provides:

No person who has a right of action for the recovery of real estate shall be permitted to maintain an action therefor against any person having peaceable and adverse possession of such real estate for a period of twenty-five years prior to the filing of such action, under claim of right, in good faith, under a deed or deeds, or any instrument or instruments, purporting to convey the same, which deed or deeds, or instrument or instruments purporting to convey the same have been recorded in the deed records of the county in which the real estate or a part thereof is situated; and one so holding and claiming such real estate under such claim of title and possession shall be held to have a good and marketable title thereto, and on proof of the above facts shall be held to have established title by limitation to such real estate regardless of minority, insanity or other disability in the adverse claimant, or any person under whom such adverse claimant claims, existing at the time of the accrual of the cause of action, or at any time thereafter. Such peaceable and adverse possession need not be continued in the same person, but when held by different persons successively there must be privity of estate between them. The adverse possession of any part of such real estate shall extend to and be held to include all of the property described in such deed or instrument conveying or purporting to convey, under which entry was made upon such land or any part thereof, and by instrument purporting to convey shall be meant any instrument in the form of a deed or which contains language showing an intention to convey even though such instrument, for want of proper execution or for other cause is void on its face or in fact.

years. "Peaceable" is defined as continuous and not interrupted by adverse suit,²⁹⁷ and "adverse possession" as an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to, the claims of any other.²⁹⁸ The third statute, article 5519a, is not a true statute of limitation in the sense that it does not bar an action by the apparent record owner, but rather delineates the elements constituting a prima facie case that title has passed to the adverse claimant.²⁹⁹ Although related, the statutes vary from one another in scope and effect, albeit the end result is the same.

Article 5518

The proviso to article 5518 states that regardless of any disabilities on the record owner, he must institute suit to recover his land from an adverse possessor within 25 years after his cause of action has accrued.³⁰⁰ There are three important differences between the proviso in article 5518 and requirements in article 5519. First, article 5518 does not require that the adverse possessor act in good faith, as article 5519 does. Second, no instrument which purports to convey is required by article 5518. Finally, the proviso refers to the time when the "cause of action shall have accrued," while article 5519 refers to "25 years prior to the filing of such an action."³⁰¹

Curiously, no cases have been reported which have utilized the pro-

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

298. TEX. REV. CIV. STAT. ANN. art. 5515 (1958); see Orn, *The Court's Charge in a Land Suit*, 13 SW. L.J. 44, 51 (1959).

299. TEX. REV. CIV. STAT. ANN. art. 5519A (1969) provides:

In all suits involving the title to land not claimed by the State, if it be shown that those holding the apparent record title thereto have not exercised dominion over such land or have not paid taxes thereon, one or more years during the period of twenty-five years next preceding the filing of such suit and during such period the opposing parties and those whose estate they own are shown to have openly exercised dominion over and asserted claim to same and have paid taxes thereon annually before becoming delinquent for as many as twenty-five years during such period, such facts shall constitute prima facie proof that the title thereto had passed to such persons so exercising dominion over, claiming and paying taxes thereon.

Sec. 2. This Act shall in no way affect any Statute of Limitation or the right to prove title by circumstantial evidence under the present Rule of Decision in the Courts of this State nor to suits between trustees and their beneficiaries nor to suits now pending.

300. TEX. REV. CIV. STAT. ANN. art. 5518 (Supp. 1975). Twenty-five years of adverse possession "is effective as well against those, as against those not, under disabilities." *Howth v. Farrar*, 94 F.2d 654, 660 (5th Cir.), cert. denied, 305 U.S. 599 (1938).

301. See Note, 14 TEXAS L. REV. 269, 270 (1936). As Professor Larson indicates, it is difficult to envision a situation where a defendant could successfully plead article 5519, and not have made his case under article 5518. Larson, *Texas Limitations: The Twenty-Five Year Statutes*, 15 SW. L.J. 177, 183 (1961).

viso to article 5518 apart from article 5519, though undoubtedly the proviso is the more liberal of the two. In *Cauble v. Halbert*,³⁰² the court of civil appeals held that the defendant need not hold a deed in order for the statute to apply, but affirmed plaintiff's judgment on the basis that defendant had not held the land adversely for 25 years.³⁰³ In *Pinchback v. Hockless*³⁰⁴ plaintiff failed to establish his limitations claim because he pleaded only article 5519 and the necessary instrument was not evident.³⁰⁵ It is entirely possible that a plea of the article 5518 proviso would have induced a finding favorable to the adverse claimant. A court might conclude, however, that the proviso can be pleaded *only* against a record owner who was under a disability. This would hardly be a sensible view, as it would, in effect, make it *easier* to gain title from a person under a disability than from one not so encumbered. The more equitable position would make both articles 5518 and 5519 available to the prospective adverse claimant, who may then attempt to make his case under the more applicable of the two statutes. In any case, whenever a situation may arise in which article 5519 is applicable, the proviso to article 5518 should be pleaded as well, especially where the claimant's instrument may be inadequate under article 5519.³⁰⁶

Article 5519

"The paramount purpose of [article 5519] is to render infeasible the title of a limitation claimant whose claim satisfies the requirements of the statute"³⁰⁷ Article 5519 is the principal 25-year statute of limitation, and the elements which must be established by a defend-

302. 254 S.W. 407 (Tex. Civ. App.—Fort Worth 1923, writ *dism'd*).

303. *Id.* at 409.

304. 138 Tex. 306, 158 S.W.2d 997 (1942),

305. *Id.* at 314, 158 S.W.2d at 1001; *accord*, *Epps v. Finehout*, 189 S.W.2d 631, 632 (Tex. Civ. App.—San Antonio 1945, writ *ref'd w.o.m.*).

306. For example, in *Rio Bravo Oil Co. v. Hunt Petroleum Corp.*, 439 S.W.2d 853, 859 (Tex. Civ. App.—Eastland 1969), *rev'd on other grounds*, 455 S.W.2d 722 (Tex. 1970) it was held that a railroad deed which granted a right-of-way was insufficient to give the railroad's successor a fee simple by adverse possession under article 5519. The court went on to say, however, that the railroad's acts were not sufficient to show adversity of possession: therefore, pleading article 5518 would not have aided the defendant. Professor Larson suggests a situation, where an adverse claimant might gain title under the three, five or 10-year statute, and then plead article 5518 to cut off a disability in the record owner, 25 years after the cause of action accrued. He could not find a case of this sort. Larson, *Texas Limitations: The Twenty-Five Year Statutes*, 15 Sw. L.J. 177, 197 (1961).

307. *Free v. Owens*, 131 Tex. 281, 284-85, 113 S.W.2d 1221, 1224 (1938).

ant relying on it are: the land must be adversely possessed,³⁰⁸ for 25 years, under a claim of right, and in good faith.³⁰⁹ The adverse claimant must hold under a deed or deeds, or any instrument or instruments purporting to convey the land,³¹⁰ which deed or instrument is recorded in the county where the land is located.³¹¹

One of the problems which arose early in the history of the statute was to determine what types of actions were included in the phrase "an action for the recovery of real estate."³¹² An early case, *Deaton v. Rush*,³¹³ held that an action to reform or cancel a deed was not an action to recover real estate, and until such cancellation, there was no "mature right to recover the land."³¹⁴ The supreme court reasoned that the defendant's deed was only voidable, and until it was cancelled, the defendant had the right of possession and title.³¹⁵

In the landmark case of *Free v. Owen*,³¹⁶ the supreme court reversed itself, announcing that "an action of any character where the relief sought, if granted, would have the effect to dispossess the defendant of land or to invest the complainant with title to land, including the incidental right of possession" was an action for the recovery of real estate.³¹⁷ Thus, within the framework of article 5519 a suit to cancel a deed is a right of action to recover real estate.

A collateral aspect of the problem of who has a right of action to recover real estate is raised where adverse possession is taken against a life tenant. A problem is presented concerning whether remainder-

308. *Pinchback v. Hockless*, 138 Tex. 306, 309, 158 S.W.2d 997, 998 (1942); *Johnson v. Dickey*, 231 S.W.2d 952, 955 (Tex. Civ. App.—Austin 1950, no writ); *Allison v. California Petroleum Corp.*, 158 S.W.2d 597, 600-601 (Tex. Civ. App.—Texarkana 1941, writ ref'd w.o.m.).

309. *Wilhite v. Davis*, 298 S.W.2d 928, 934 (Tex. Civ. App.—Dallas 1957, no writ); *Unsell v. Federal Land Bank*, 138 S.W.2d 305, 309 (Tex. Civ. App.—Texarkana 1940, writ dism'd by agr.).

310. *West v. Hapgood*, 141 Tex. 576, 580, 174 S.W.2d 963, 966 (1943); *Pirtle v. Henry*, 486 S.W.2d 585, 590 (Tex. Civ. App.—Tyler 1972, writ ref'd n.r.e.); *Epps v. Finehout*, 189 S.W.2d 631, 632 (Tex. Civ. App.—San Antonio 1945, writ ref'd w.o.m.); *Peterson v. Holland*, 189 S.W.2d 94, 97 (Tex. Civ. App.—Texarkana 1945, writ ref'd).

311. *See West v. Hapgood*, 141 Tex. 576, 580, 174 S.W.2d 963, 966 (1943); *Free v. Owen*, 131 Tex. 281, 285, 113 S.W.2d 1221, 1224 (1938); *Allison v. California Petroleum Corp.*, 158 S.W.2d 597, 600 (Tex. Civ. App.—Texarkana 1941, writ ref'd w.o.m.).

312. TEX. REV. CIV. STAT. ANN. art. 5519 (Supp. 1975).

313. 113 Tex. 176, 252 S.W. 1025 (1923).

314. *Id.* at 194, 252 S.W. at 1031.

315. *Id.* at 192, 252 S.W. at 1030. The deed was procured by fraud. There was no mention of the 25-year statutes, since the suit was instituted before the statutes were enacted.

316. 131 Tex. 281, 113 S.W.2d 1221 (1938).

317. *Id.* at 285, 113 S.W.2d at 1224.

men have a cause of action within the scope of the liberal interpretation given article 5519 in the *Free* case. Texas courts have consistently held that a remainderman has no right of possession of the land until the death of the life tenant, so that article 5519 does not run against the remainderman, since he has no cause of action.³¹⁸ The test in such instances is whether the remainderman has a *present* possessory interest in the property: if so, limitations run against him as well as against the life tenant.³¹⁹ Ordinarily, however, the remainderman, by the very nature of his interest in the land, has no present possessory right.

Another problem under article 5519 is whether it is effective when pleaded to bar a suit to cancel a deed on grounds of fraud. What meager authority there is indicates article 5519 is effective in such circumstances.³²⁰ It is clear, however, that an action to set aside a deed on grounds of fraud or duress, in a case other than one involving article 5519, is not generally held to be a right to recover real estate.³²¹

It has been repeatedly held that the adverse claimant must hold under a deed or other instrument which purports to convey the property in order to invoke the aid of article 5519.³²² An adverse possessor

318. *Gibbs v. Barkley*, 242 S.W. 462, 466 (Tex. Comm'n App. 1922, judgment adopted); *Bryson v. Connecticut Gen. Life Ins. Co.*, 211 S.W.2d 304, 308 (Tex. Civ. App.—Austin 1948), *rev'd on other grounds*, 148 Tex. 86, 219 S.W.2d 799 (1949); *Pool v. Sneed*, 173 S.W.2d 768, 779-80 (Tex. Civ. App.—Amarillo 1943, writ ref'd w.o.m.); *Williams v. Pure Oil Co.*, 49 S.W.2d 846, 851 (Tex. Civ. App.—Dallas 1932), *aff'd*, 124 Tex. 341, 78 S.W.2d 929 (1935).

319. *Zambrano v. Olivas*, 490 S.W.2d 218, 220 (Tex. Civ. App.—El Paso 1973, writ ref'd n.r.e.); *Brown v. Wood*, 239 S.W.2d 195, 200 (Tex. Civ. App.—Dallas 1951, writ ref'd); *Evans v. Graves*, 166 S.W.2d 955, 959 (Tex. Civ. App.—Dallas 1942, writ ref'd w.o.m.); *Elcan v. Childress*, 89 S.W. 84 (Tex. Civ. App.—1905, writ ref'd); see *Master-son, Severance of the Mineral Estate by Grant of Land by the Sovereign and Adverse Possession*, 30 TEXAS L. REV. 323, 334-39 (1952); Comment, *The Adverseness of Possession to Fractional Interests*, 9 BAYLOR L. REV. 168, 189-194 (1957). In *Ferguson v. Johnston*, 320 S.W.2d 906, 913 (Tex. Civ. App.—Texarkana 1959, writ ref'd n.r.e.) the court distinguished *Elcan* and the cases it relied upon, on the basis that in that case, the remainderman had a present possessory interest, as well as a future interest in the land, and as such could have maintained an action.

320. See *Gonzales v. Yturia Land & Livestock Co.*, 72 F. Supp. 280, 282 (S.D. Tex. 1948); *Wilhite v. Davis*, 298 S.W.2d 928, 932 (Tex. Civ. App.—Dallas 1957, no writ). *Contra*, *Cartwright v. Minton*, 318 S.W.2d 449, 454 (Tex. Civ. App.—Eastland 1958, writ ref'd n.r.e.). Article 5518 also bars suit, but only after a cause of action accrues to the record owner, so it is of no aid to the adverse claimant in a life tenant-remainderman situation. For a discussion of the complexities involved see, Comment, *The Twenty-Five Year Statute of Limitations*, 10 BAYLOR L. REV. 196 (1958).

321. *Socony Mobil Oil Corp. v. Belveal*, 430 S.W.2d 529, 533 (Tex. Civ. App.—El Paso 1968, writ ref'd n.r.e.); *Glenney v. Crane*, 352 S.W.2d 773, 777 (Tex. Civ. App.—Houston 1961, writ ref'd n.r.e.). The interpretation of "right of action to recover real estate" is unique to article 5519.

322. *West v. Hapgood*, 141 Tex. 576, 581, 174 S.W.2d 963, 966 (1943); *Pirtle v.*

cannot succeed to land which is not described in the instrument.³²³ An interesting question is raised concerning rights to the minerals in the land, where there has been a severance of the mineral from the surface estate. The general rule is that if adverse possession is begun before the minerals are severed, possession is adverse as to both, but if the adverse possession is not begun until after severance of the minerals, no limitations run against the owner of the mineral interest unless actual possession of the minerals is taken by the adverse possessor.³²⁴ Article 5519 indicates that the instrument under which the adverse claimant takes possession must only *purport* to convey the property. There are cases which seem to imply that minerals which have been severed may be acquired if they are described in the adverse claimant's instrument, but there has been no clear ruling to that effect.³²⁵

The statute further requires that the deeds or instruments under which the adverse possessor claims must be recorded.³²⁶ Possession need not be maintained in one person; tacking of adverse possession is permissible. There must be privity of estate, however, among those subsequently in possession.³²⁷ Two questions are raised by this language: first, what meaning does "privity of estate" have in relation to article 5519, and secondly, must every deed or instrument in the adverse claimant's "chain of title" be recorded? *Free v. Owen*³²⁸ answers both of these questions. There the court held that "privity of estate" within the context of article 5519 means only privity of possession.³²⁹ In answering the second question, it was stated that the recor-

Henry, 486 S.W.2d 585, 590 (Tex. Civ. App.—Tyler 1972, no writ); Epps v. Finehout, 189 S.W.2d 631, 632 (Tex. Civ. App.—San Antonio 1945, writ ref'd w.o.m.); Peterson v. Holland, 189 S.W.2d 94, 97 (Tex. Civ. App.—Texarkana 1945, writ ref'd).

323. Pinchback v. Hockless, 138 Tex. 306, 310, 158 S.W.2d 997, 1000 (1942); Davenport v. Bass, 137 Tex. 248, 252, 153 S.W.2d 471, 473 (1941); Rio Bravo Oil Co. v. Hunt Petroleum Corp., 439 S.W.2d 853 (Tex. Civ. App.—Tyler 1969), *rev'd on other grounds*, 455 S.W.2d 722 (1970).

324. Henley v. United States, 396 F.2d 956, 966-67 (Ct. Cl. 1968); King v. Hester, 200 F.2d 807, 815 (5th Cir. 1952); West v. Hapgood, 141 Tex. 576, 580, 174 S.W.2d 963, 966 (1943); Saunders v. Hornsby, 173 S.W.2d 795, 797 (Tex. Civ. App.—Amarillo 1943, writ ref'd w.o.m.). *But see* McLendon v. Comer, 200 S.W.2d 427, 430 (Tex. Civ. App.—Texarkana 1947, writ ref'd n.r.e.).

325. *Cf.* McClendon v. Comer, 200 S.W.2d 427, 430 (Tex. Civ. App.—Texarkana 1947, writ ref'd n.r.e.); *see* Masterson, *Severance of the Mineral Estate by Grant of Land by the Sovereign and Adverse Possession*, 30 TEXAS L. REV. 323, 334-39 (1952).

326. TEX. REV. CIV. STAT. ANN. art. 5519 (Supp. 1975); *see* West v. Hapgood, 141 Tex. 576, 581, 174 S.W.2d 963, 966 (1943); *Free v. Owen*, 131 Tex. 281, 285, 113 S.W.2d 1221, 1224 (1938); Allison v. California Petroleum Corp., 158 S.W.2d 597, 600 (Tex. Civ. App.—Texarkana 1941, writ ref'd w.o.m.).

327. TEX. REV. CIV. STAT. ANN. art. 5519 (Supp. 1975).

328. 131 Tex. 281, 113 S.W.2d 1221 (1938).

329. *Id.* at 286, 113 S.W.2d at 1224.

dation of the first deed by the original adverse possessor inures to the benefit of his successors, as long as the original claimant and his successors stand in privity of possession.³³⁰ Thus, the original adverse claimant's successors need not record their instruments in order to gain the benefit of article 5519.

The good faith requirement in article 5519 raises an issue as to its meaning within the context of the statute. There has been little more than a recitation of the requirement by the courts thus far.³³¹ It is improbable that the "good faith" requirement has much significance in an adverse possession situation, since an adverse claimant is necessarily hostile to all others in his claim of right to the land.

Finally, article 5519 provides that the successful adverse claimant has "a good and marketable title" to the land.³³² In spite of this language in the statute, it is clear that the grantor of land does not convey a good and marketable title to his grantee if the land was acquired under article 5519.³³³

Although article 5519 is basically unambiguous, some changes would remove any future doubts as to its catchall nature. A phrase should be added to the effect that fraud or duress, worked against a grantor, should be given no consideration, and the good faith requirement should be deleted as meaningless surplusage in a catchall adverse possession statute such as article 5519. Secondly, the broad interpretation given by the *Free* case should be written into the statute. By bringing within the purview of the statute *any* sort of action which ultimately may result in the recovery of the land by the record owner or a grantor, article 5519 would assume the complete catchall status which was intended.

330. *Id.* at 285-286, 113 S.W.2d at 1224.

331. In *Unsell v. Federal Land Bank*, 138 S.W.2d 305, 309 (Tex. Civ. App.—Texarkana 1940, writ *dism'd* by *agr.*) the court states that where the wife took deed from her deceased husband's papers and recorded it, she was not in good faith as required by article 5519. There was, however, no conveyance *per se* and that alone was sufficient to support the court's judgment. Examples of recitation of the requirement are in *Wilhite v. Davis*, 298 S.W.2d 928, 934 (Tex. Civ. App.—Dallas 1947, no writ); *Epps v. Finehout*, 189 S.W.2d 631, 632 (Tex. Civ. App.—San Antonio 1945, writ *ref'd w.o.m.*). Professor Larson is of the opinion that good faith here means "little more than seriousness in asserting a claim of right." Larson, *Texas Limitations: The Twenty-Five Year Statutes*, 15 Sw. L.J. 177, 193 (1961).

332. TEX. REV. CIV. STAT. ANN. art. 5519 (Supp. 1975).

333. *Alexander v. Glasscock*, 271 S.W.2d 333, 335 (Tex. Civ. App.—Texarkana 1954, no writ); *Owens v. Jackson*, 35 S.W.2d 186, 187-88 (Tex. Civ. App.—Austin 1931, writ *dism'd*).

Article 5519a

The adverse claimant must establish two facts under article 5519a in order to make a prima facie case that he has title to the disputed land. First, he must show that the apparent record holder of title has not exercised dominion over the land, or paid the taxes on it before they became delinquent, for one or more years in the 25 years preceding the filing of the suit.³³⁴ Secondly, he must show that he, and those under whom he holds possession, have openly exercised dominion over and asserted claim to the land and have paid the real estate taxes for 25 years preceding filing of the suit.³³⁵ One problem with this statute is how "dominion" differs from "peaceable and adverse possession," if at all. The decisions indicate merely that the exercise of dominion requires less than peaceable and adverse possession, but more than sporadic and widely separated ventures onto the land.³³⁶

Another problem raised by the language of the statute concerns the effect on the claimant in the event that the apparent record holder pays the taxes on the land for one or more years during the 25-year period. The cases show a conflict, with some stating that the claimant's payment of taxes before delinquency and assertion of dominion must be for 25 *consecutive* years,³³⁷ while one other case holds that a year is added to the statutory period for each year the claimant fails to pay his taxes before delinquency.³³⁸

If the claimant can establish the two elements included in the statute, the court extends a presumption that a deed exists in his favor, but such presumption is one of fact and not law, and open to rebuttal.³³⁹ Even if a claimant meets the requirements of article 5519a, and the record owner fails to rebut the presumption, the claimant does not have

334. *Love v. McGee*, 378 S.W.2d 96, 99 (Tex. Civ. App.—Texarkana 1964, writ ref'd n.r.e.); *Garret v. Downs*, 377 S.W.2d 117 (Tex. Civ. App.—Dallas 1964, no writ).

335. *Love v. McGee*, 378 S.W.2d 96, 99 (Tex. Civ. App.—Texarkana 1964, writ ref'd n.r.e.); *Garret v. Downs*, 377 S.W.2d 117 (Tex. Civ. App.—Dallas 1964, no writ).

336. *King v. Hester*, 200 F.2d 807, 815 (5th Cir. 1952); *Gilbert v. Loblely*, 231 S.W.2d 969, 973 (Tex. Civ. App.—Fort Worth 1950), *aff'd*, 149 Tex. 493, 236 S.W.2d 121 (1951). *See also Purnell v. Gulihur*, 339 S.W.2d 86, 91 (Tex. Civ. App.—Tyler 1960, writ ref'd n.r.e.).

337. *Pagel v. Pumphrey*, 204 S.W.2d 58, 65 (Tex. Civ. App.—San Antonio 1947, writ ref'd n.r.e.); *Duke v. Houston Oil Co.*, 128 S.W.2d 480, 486 (Tex. Civ. App.—Beaumont 1939, writ dism'd jdgmt cor.).

338. *See Purnell v. Gulihur*, 339 S.W.2d 86, 90 (Tex. Civ. App.—Tyler 1960, writ ref'd n.r.e.).

339. *Duke v. Houston Oil Co.*, 128 S.W.2d 480, 485 (Tex. Civ. App.—Beaumont 1939, writ dism'd jdgmt cor.). The court stated that this presumption was the public policy of the state. *Id.* at 485.

absolute title to the property, but only prima facie proof that title is matured in him.³⁴⁰ While the 25-year statutes accomplish the purposes for which they were enacted, there is no apparent reason why all three statutes should not be consolidated into one in the interests of simplification.

DISABILITIES IN THE RECORD TITLE HOLDER OF LAND
WHICH TOLL STATUTES OF LIMITATION

The primary purpose in permitting statutory disabilities to toll the 3, 5 and 10-year statutes of limitation³⁴¹ is to alleviate certain common situations in which the record owner's ability to protect his property rights is impaired. Those disabilities which affect land actions are presently enumerated in article 5518,³⁴² which should be read in conjunction with article 5544.³⁴³ The tolling effect of the disabilities, however, is nullified if 25 years pass after a cause of action accrues to the record owner for recovery of real estate.³⁴⁴

There are certain general characteristics of these disabilities. For example, for any of the disabilities to have a tolling effect on one of the statutes of limitation the disability must have existed in the record owner when his cause of action accrued. Article 5518 specifies that limitations shall not run against the record owner if he is under one of the disabilities when he acquires title, or when an adverse claimant

340. *Carter & Bro. v. Rhoden*, 72 S.W.2d 620, 627 (Tex. Civ. App.—Beaumont 1934, writ dismissed), citing *Kellogg v. Southwestern Lumber Co.*, 44 S.W.2d 742 (Tex. Civ. App.—Beaumont 1931, writ refused).

341. TEX. REV. CIV. STAT. ANN. arts. 5507-5510 (1958).

342. TEX. REV. CIV. STAT. ANN. art. 5518 (Supp. 1975) reads in part:

If a person entitled to sue for the recovery of real property or make any defense founded on the title thereto, be at the time such title shall first descend or the adverse possession commence:

1. A person, including a married person, under twenty-one years of age, or
2. In time of war, a person in the military or naval service of the United States, or
3. A person of unsound mind, or
4. A person imprisoned, the time during which such disability or status shall continue shall not be deemed any portion of the time limited for the commencement of such suit, or the making of such defense; and such person shall have the same time after the removal of his disability that is allowed to others by the provisions of this title

343. TEX. REV. CIV. STAT. ANN. art. 5544 (1958) provides:

The period of limitation shall not be extended by the connection of one disability with another; and, when the law of limitation shall begin to run . . . notwithstanding any supervening disability of the party entitled to sue liable to be sued.

For a discussion of the history of articles 5518 and 5544, see Larson, *Disabilities and Actions for the Recovery of Land in Texas*, 16 Sw. L.J. 590, 590-92 (1962).

344. This nullifying effect is propounded in the proviso to TEX. REV. CIV. STAT. ANN. art. 5518 (Supp. 1975).

takes possession.³⁴⁵ Furthermore, article 5544 provides that "when the law of limitation shall begin to run, it shall continue to run, notwithstanding any supervening disability. . . ."³⁴⁶ Texas courts have long held that a later occurrence of a disability in the record holder of title is ineffective to toll the statutes of limitation in favor of an adverse possessor.³⁴⁷ Similarly, it makes no difference whether the person laboring under a disability receives the land by conveyance,³⁴⁸ or by devise or descent:³⁴⁹ limitations continue to run. If a person's disability was in existence when an adverse claimant took possession, the record owner's later conveyance of the property causes limitations to run against his grantee from the time of conveyance.³⁵⁰ While the operation of such a rigid requisite can conceivably create harsh results, it is founded on the public policy that statutes of limitation should ordinarily function without hindrance.³⁵¹

In connection with this policy the legislature has enacted a specific proscription against the "tacking" or joining of two or more disabilities for the purpose of lengthening the period for which limitations are tolled.³⁵² Most of the cases have involved an attempt to tack the now repealed disability of coverture³⁵³ to some other disability,³⁵⁴ but other

345. TEX. REV. CIV. STAT. ANN. art. 5518 (Supp. 1975).

346. TEX. REV. CIV. STAT. ANN. art. 5544 (1958).

347. *Broom v. Pearson*, 98 Tex. 469, 474, 85 S.W. 790, 792, *aff'd on rehearing*, 98 Tex. 578, 86 S.W. 733 (1905); *Carter v. Associated Transfer & Storage Co.*, 410 S.W.2d 830, 833 (Tex. Civ. App.—Waco 1966, no writ); *Stubbs v. Lowrey's Heirs*, 253 S.W.2d 312, 313 (Tex. Civ. App.—Eastland 1952, writ ref'd n.r.e.); *cf. Blum v. Elkins*, 369 S.W.2d 810, 812-13 (Tex. Civ. App.—Waco 1963, no writ); *Murray v. Slater*, 274 S.W.2d 921, 924 (Tex. Civ. App.—Austin 1954, no writ).

348. *Johnson v. Schumacher*, 72 Tex. 334, 338-39, 12 S.W. 207, 208 (1888); *Houston Oil Co. v. Choate*, 215 S.W. 118, 124 (Tex. Civ. App.—Beaumont 1919), *aff'd*, 232 S.W. 285 (Tex. Comm'n App. 1921, jdgmt adopted).

349. "[T]he running of the statute [of limitations] . . . is not suspended by reason of the fact that the heir is a minor or is of unsound mind." *Condra v. Grogan Mfg. Co.*, 149 Tex. 380, 386, 233 S.W.2d 565, 568 (1950); *see Howard v. Stubblefield*, 79 Tex. 1, 5, 14 S.W. 1044, 1045 (1890); *Moody's Heirs v. Moeller*, 72 Tex. 635, 637, 10 S.W. 727, 728 (1889); *Strickland v. Humble Oil & Ref. Co.*, 181 S.W.2d 901, 905 (Tex. Civ. App.—Eastland 1944, no writ); *Allison v. California Petroleum Corp.*, 158 S.W.2d 597, 598-600 (Tex. Civ. App.—Texarkana 1941, writ ref'd w.o.m.); *Sandmeyer v. Dolijsi*, 203 S.W. 113, 118 (Tex. Civ. App.—Galveston 1918, writ ref'd).

350. *Condra v. Grogan Mfg. Co.*, 149 Tex. 380, 385, 233 S.W.2d 565, 568 (1950).

351. Larson, *Disabilities and Actions for the Recovery of Land in Texas*, 16 Sw. L.J. 590, 594 (1962).

352. TEX. REV. CIV. STAT. ANN. art. 5544 (1958).

353. Coverture was abolished as a disability in 1895. TEX. REV. CIV. STAT. art. 3352 (1895) was the predecessor of TEX. REV. CIV. STAT. ANN. art. 5518 (Supp. 1975). It is well settled that coverture can no longer toll statutes of limitation to land actions. *See, e.g., Lotus Oil Co. v. Spires*, 240 S.W.2d 357, 360 (Tex. Civ. App.—El Paso 1950, writ ref'd n.r.e.); *Collins v. Griffith*, 125 S.W.2d 419, 428 (Tex. Civ. App.—Amarillo 1938, writ ref'd); *Barrett v. Crump*, 15 S.W.2d 672, 675 (Tex. Civ. App.—Waco 1929,

combinations have been tried.³⁵⁵ Any interruption of a record owner's disability begins the running of the limitation period, and a subsequent relapse or reimposition of the disability has no tolling effect.³⁵⁶ Tacking of successive disabilities in the record owner, or cumulative disabilities in two or more persons, such as grantee's disability onto grantor's, or of an heir's minority onto the ancestor's disability, have been rejected.³⁵⁷ On such occasions the supreme court has propounded a blanket disapproval of further permutations which the inventive practitioner might envision.³⁵⁸

Minority

The disability of minority is present in any landowner under 21 years of age,³⁵⁹ and has prevented the running of limitations in numerous cases.³⁶⁰ This is a disability personal to the minor, and does not, for example, aid his cotenant,³⁶¹ nor does it affect an adverse possessor's

no writ). Although a minor may marry, the disability of minority is not disturbed. *See* Collins v. Griffith, 125 S.W.2d 419, 428 (Tex. Civ. App.—Amarillo 1938, writ ref'd); Holt v. Holt, 59 S.W.2d 324, 327 (Tex. Civ. App.—Texarkana 1933, writ ref'd); for a detailed discussion of the abolishment of coverture as a disability, see Larson, *Disabilities and Actions for the Recovery of Land in Texas*, 16 Sw. L.J. 590, 596-99 (1962).

354. *See* Kruse v. Sanders, 231 S.W.2d 747, 749 (Tex. Civ. App.—Austin 1950, no writ); Louisiana & Tex. Lumber Co. v. Lovell, 147 S.W. 366, 367 (Tex. Civ. App.—Galveston 1912, no writ); Elcan v. Childress, 89 S.W. 84, 85 (Tex. Civ. App. 1905, writ ref'd); McConnico v. Thompson, 47 S.W. 537, 538 (Tex. Civ. App. 1898, writ ref'd).

355. *See, e.g.,* Zachry v. Moody, 59 S.W.2d 846, 848 (Tex. Civ. App.—Beaumont 1933, writ ref'd) (disability of an insane owner cannot be tacked to the disability of her surviving minor children).

356. Holt v. Hedberg, 316 S.W.2d 955, 957 (Tex. Civ. App.—Fort Worth 1958, no writ); *see* Blum v. Elkins, 369 S.W.2d 810, 812-13 (Tex. Civ. App.—Waco 1963, no writ); Kramer v. Sidlo, 233 S.W.2d 609, 610 (Tex. Civ. App.—El Paso 1950, no writ).

357. *See* Cities Serv. Oil Co. v. Green, 251 S.W.2d 906, 908 (Tex. Civ. App.—Texarkana 1952, writ ref'd n.r.e.); Zachry v. Moody, 59 S.W.2d 846, 848 (Tex. Civ. App.—Beaumont 1933, writ ref'd).

358. Jackson v. Houston, 84 Tex. 622, 626, 19 S.W. 799, 801 (1892). “[A]n opposite construction would have the effect of defeating the benign object of such laws [statutes of limitation]; and so, as it is said, ‘a right might travel through minorities for centuries.’” Hunton v. Nichols, 55 Tex. 217, 230 (1881).

359. TEX. REV. CIV. STAT. ANN. art. 5518(1) (Supp. 1975). There is no apparent reason why the age of majority within the framework of this statute is 21, instead of 18. The legislators have seemingly carried forward the language of the earlier statute without considering this point.

360. *E.g.,* Strong v. Garrett, 148 Tex. 265, 273, 224 S.W.2d 471, 475 (1949); Morton v. Morton, 286 S.W.2d 702, 706 (Tex. Civ. App.—Texarkana 1955, no writ); Lotus Oil Co. v. Spires, 240 S.W.2d 357, 360 (Tex. Civ. App.—El Paso 1950, writ ref'd n.r.e.). For an exhaustive compilation of such cases, see Larson, *Disabilities and Actions for the Recovery of Land in Texas*, 16 Sw. L.J. 590, 594 n.24 (1962).

361. Johnson v. Schumacher, 72 Tex. 334, 338, 12 S.W. 207, 208 (1888); Stoval v. Carmichael, 52 Tex. 383, 386 (1880).

claim to the minor's property held in trust.³⁶²

The principal uncertainty involved in this disability concerns the time at which the statutes of limitation begin to run. Relying on common law principles, the supreme court has held that since birthdays are included in the computation of age, the statutes of limitation begin to run on the day before the 21st anniversary of birth.³⁶³ The court stated further that a record owner had until the *second* day before the anniversary of birth, plus the period of whichever statute of limitation was at issue, to file his suit.³⁶⁴ The reason for this is that the day of the 21st anniversary is included in computing the period that limitations must run.³⁶⁵ Minority will not, however, impede the adverse possessor as it does the record owner of the land,³⁶⁶ the only prerequisite is that the minor claimant claim adversely for himself.³⁶⁷

Unsound Mind

The disability of unsound mind, like that of minority, has been frequently examined by the courts.³⁶⁸ This disability is not dependent on an adjudication of insanity,³⁶⁹ but if there has been such an adjudication, there is a presumption of continuing insanity until such time as the record owner's sanity is judicially reinstated.³⁷⁰ The statutes of limitation run from the time of restoration of sanity—not from the time

362. *Weiss v. Goodhue*, 98 Tex. 274, 278-80, 83 S.W. 178, 179 (1904).

363. *Ross v. Morrow*, 85 Tex. 172, 175, 19 S.W. 1090, 1091 (1892).

364. *Id.* at 175, 19 S.W. at 1091. To illustrate, plaintiff born January 1, 1900, would reach majority under article 5518 on December 31, 1920 and if the 3-year statute was plead in bar by defendant, plaintiff would have through December 30, 1920, to file his suit. Professor Larson points out in his article that at least one court has incorrectly figured these computations. Larson, *Disabilities and Actions for the Recovery of Land in Texas*, 16 Sw. L.J. 590, 595 (1962).

365. *Ross v. Morrow*, 85 Tex. 172, 175, 19 S.W. 1090, 1091 (1892)..

366. *Petty v. Griffin*, 241 S.W. 252, 254 (Tex. Civ. App.—Beaumont 1922, writ *dism'd*).

367. *Houston Oil Co. v. Griffin*, 166 S.W. 902 (Tex. Civ. App.—Galveston 1914, writ *ref'd*). Where the minor claims and occupies the land for his own, with the parents' consent and without the parents asserting claim to it, the consent emancipates the minor, as far as right to acquire land. *Id.* at 904.

368. *E.g.*, *Condra v. Grogan Mfg. Co.*, 149 Tex. 380, 386, 233 S.W.2d 565, 568 (1950); *Holt v. Hedberg*, 316 S.W.2d 955, 957 (Tex. Civ. App.—Fort Worth 1958, no writ); *Kramer v. Sidlo*, 233 S.W.2d 609, 611 (Tex. Civ. App.—El Paso 1950, no writ); *Zachry v. Moody*, 59 S.W.2d 846, 848 (Tex. Civ. App.—Beaumont 1933, writ *ref'd*); *Kaack v. Stanton*, 112 S.W. 702, 704 (Tex. Civ. App. 1908, writ *ref'd*).

369. *Joy v. Joy*, 156 S.W.2d 547, 553 (Tex. Civ. App.—Eastland 1941, writ *ref'd w.o.m.*); *Kaack v. Stanton*, 112 S.W. 702, 704 (Tex. Civ. App. 1908, writ *ref'd*).

370. *Holt v. Hedberg*, 316 S.W.2d 955, 956 (Tex. Civ. App.—Fort Worth 1958, no writ); *Kramer v. Sidlo*, 233 S.W.2d 609, 611 (Tex. Civ. App.—El Paso 1950, no writ); *Elliot v. Elliot*, 208 S.W.2d 709, 715 (Tex. Civ. App.—Fort Worth 1948, writ *ref'd n.r.e.*).

of possession by the adverse claimant.³⁷¹ A clear statement of what mental condition constitutes unsound mind was made in *Pugh v. Clark*,³⁷² where the court stated that the record owner was of unsound mind if he "did not have [sufficient] capacity to understand the nature of bringing or defending a suit for land"³⁷³ Thus, the term "unsound mind" has a broader meaning than "insanity," but it is apparently not so expansive as the term "incompetency." This was demonstrated when the Court of Appeals for the Fifth Circuit determined that an adjudication of incompetency in Oklahoma was not sufficient to toll the statute of limitation.³⁷⁴

Imprisonment, Military Service, and Other Claimed Disabilities

A record owner who is imprisoned at the time an adverse claimant takes possession of the land is protected by his disability.³⁷⁵ There have been, however, very few cases in which this disability has been asserted. In *Lasater v. Waits*³⁷⁶ it was held that continuous confinement in a penal institution was "imprisonment" within the meaning of the disability.³⁷⁷ It is clear, however, that imprisonment of the record owner after adverse possession commences has no tolling effect.³⁷⁸

While article 5518 provides that limitations will not run against a person "in time of war . . . in the military or naval service of the United States,"³⁷⁹ its effect is superseded by a more expansive federal statute.³⁸⁰ The federal statute tolls limitations even if the disability arises subsequent to the commencement of adverse possession, and Texas courts have given the federal law precedence over article 5518.³⁸¹

371. *Holt v. Hedberg*, 316 S.W.2d 955, 957 (Tex. Civ. App.—Fort Worth 1958, no writ).

372. 238 S.W.2d 980 (Tex. Civ. App.—Galveston 1951, writ ref'd n.r.e.).

373. *Id.* at 986. Similar language is found in *Joy v. Joy*, 156 S.W.2d 547, 553 (Tex. Civ. App.—Eastland 1941, writ ref'd w.o.m.).

374. *Thlocco v. Magnolia Petroleum Co.*, 141 F.2d 934, 937-38 (5th Cir.), cert. denied, 323 U.S. 785 (1944). The Oklahoma statute specifically provided that "unsound mind" was equivalent to insanity. *Id.* at 937-38.

375. TEX. REV. CIV. STAT. ANN. art. 5518(4) (Supp. 1975).

376. 67 S.W. 518 (Tex. Civ. App. 1902), rev'd on other grounds, 95 Tex. 553, 68 S.W. 500 (1902).

377. *Id.* at 519.

378. *Blum v. Elkins*, 369 S.W.2d 810 (Tex. Civ. App.—Waco 1963, no writ). No disability has a tolling effect unless present in the record owner at the time adverse possession commences. See cases cited note 54 *supra*.

379. TEX. REV. CIV. STAT. ANN. art. 5518(2) (Supp. 1975).

380. Soldiers' & Sailors' Civil Relief Act of 1940, 50 U.S.C. § 525 (App. 1970). See generally *Bell v. Baker*, 260 S.W. 158 (Tex. Comm'n App. 1924, jdgmt adopted).

381. *Scruggs v. Troncalli*, 307 S.W.2d 300, 304 (Tex. Civ. App.—Waco 1957, writ

Burden of Proof

As a general rule, the burden of proving the existence of a disability in the record owner of land is on the person asserting it, and the adverse claimant need not prove the absence of disability at the time the claimant took possession.³⁸² It has been held, however, that although the disability of minority must be negated by the adverse possessor, he need not affirmatively show an absence of insanity or imprisonment.³⁸³ Professor Larson considers this distinction to be unwarranted since the party most able to prove minority is the record owner, who desires the benefit of the statute.³⁸⁴ One further exception is provided: when the plaintiff brings a suit for injury to property acquired, by prescription or adverse possession, from a third party,³⁸⁵ the burden rests on the plaintiff to prove there was no disability on the record owner of the land.³⁸⁶ The reason for this is that the defendant is in no better position to prove disability in the record owner than is the plaintiff, since the original record owner is not a party to the suit.³⁸⁷

While article 5518 clearly does not list all the situations which occasion an actual "disability" in the landowner, it does provide for the more common ones. Ample justification for the disabilities can be found in the public policy which seeks to protect those persons who are ordinarily incapable or unlikely to have the ability to protect their property rights.

The 25-year statutes of limitation run against the record owner

ref'd n.r.e.); *Johnston v. Stinson*, 215 S.W.2d 218, 224 (Tex. Civ. App.—Texarkana 1948, writ ref'd n.r.e.); *Easterling v. Murphey*, 11 S.W.2d 329, 332 (Tex. Civ. App.—Waco 1928, writ ref'd).

Other disabilities have been alleged, but the courts have been unwilling to expand the statutory list. See *Federal Crude Oil Co. v. Yount-Lee Oil Co.*, 73 S.W.2d 969, 974 (Tex. Civ. App.—Beaumont 1934, writ dismissed) (forfeiture of right to do business in Texas); *Houston Oil Co. v. Griffin*, 166 S.W. 902, 904 (Tex. Civ. App.—Galveston 1914, writ ref'd) (corporation in receivership). For other examples see, Larson, *Disabilities and Actions for the Recovery of Land in Texas*, 16 Sw. L.J. 590, 601 n.63 (1962).

382. E.g., *Morton v. Morton*, 286 S.W.2d 702, 707 (Tex. Civ. App.—Texarkana 1955, no writ); *Elcan v. Childress*, 89 S.W. 84, 85 (Tex. Civ. App. 1905, writ ref'd); accord, *Martin v. Burr*, 111 Tex. 57, 66, 228 S.W. 543, 546 (1921); see *Niemann v. Garcia*, 144 S.W.2d 621, 625 (Tex. Civ. App.—San Antonio 1940, writ dismissed judgment corrected).

383. *Smith v. Lancaster*, 248 S.W. 472, 474 (Tex. Civ. App.—Texarkana 1923, writ ref'd).

384. Larson, *Disabilities and Actions for the Recovery of Land in Texas*, 16 Sw. L.J. 590, 602 (1962).

385. *City of Austin v. Hall*, 93 Tex. 591, 57 S.W. 563 (1900).

386. *Id.* at 596, 57 S.W. at 564.

387. See Larson, *Disabilities and Actions for the Recovery of Land in Texas*, 16 Sw. L.J. 590, 603 (1962).

despite any disability.³⁸⁸ The rule is also grounded in public policy, in that a certain period of adverse possession ought to be sufficient to mature title in the claimant, regardless of the record owner's disabling circumstances. In spite of this overriding effect of the 25-year statutes of limitation, there is one disability, that of military service, which apparently will toll even the 25-year statutes. The federal statute³⁸⁹ supersedes any contravening state legislation, but as yet there has been no case where a record owner has invoked the federal statute against a claimant under one of the 25-year statutes.

388. TEX. REV. CIV. STAT. ANN. arts. 5518, 5519 (Supp. 1975), and art. 5519a (1958).

389. Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. § 525 (App. 1970).