Disabilities and Actions for the Recovery of Land in Texas

Lennart V. Larson

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by
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I. INTRODUCTION

THE basic purpose of statutes limiting the time within which actions may be brought for the recovery of land is to quiet the title of possessors who have acted as owners for a lengthy period. The ethical posture of a possessor may be sound or poor: he may have lost all evidence of his title or he may have entered the land as a trespasser. In either event he is protected after the passage of time from the claims of others who have failed to bestir themselves and to take effective action to vindicate their rights.

The condition and circumstances of some owners of land handicap them in asserting their rights and titles against adverse possessors. Hence all jurisdictions recognize disabilities which excuse prompt initiation of action and which prevent the periods of the statutes of limitation from running. Disability provisions cannot be said to operate with delicate regard for the great variety of disabling circumstances in which human beings find themselves. Rather, the provisions make allowances for easily described, commonly occurring, disabling conditions, and the hope is that a fair and reasonable accommodation is made for persons who are unable to enforce their rights or who are seriously handicapped in so doing.

Texas has provisions for disabilities which are, in essence, similar to those existing in other states. The legislative treatment in Texas consists of listing separately the disabilities in actions for the recovery of land and the disabilities in personal actions. This separation has resulted in at least one important difference in the operation of disabilities in the two types of actions. The present Article will confine itself largely to the disabilities which, in Texas, prevent the running of limitation periods in real property actions.

II. HISTORY OF ARTICLES 5518 AND 5544

A comprehensive "Act of Limitations" was first passed in the days of the Republic.[1] Section 11 of that act listed the disabilities of in-

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[1] See Texas Acts 1841, at 163, 2 G.L. 627.

fancy, coverture, imprisonment, and unsound mind and had application to personal actions. Sections 14 through 17 were the predecessors of the present three-, five-, and ten-year statutes of limitation affecting actions for the recovery of land.[2] Each of the latter sections listed infancy, coverture, and unsound mind as disabilities but omitted imprisonment. The ten-year statute (section 14) also included "forcible occupation of the premises, or county containing them by a public enemy" as a period of disability.

The Texas Revised Civil Statutes of 1879 put all disabilities affecting actions to recover land in one article.[3] The limitation periods did not run if the person having the right to sue was: "1. Under the age of twenty-one years; or, 2. A married woman; or, 3. Of unsound mind; or, 4. A person imprisoned. . . ."[4] Essentially the same language was used in the disability article affecting actions other than for the recovery of land.[5]

In 1895 came a change in the disabilities affecting real property actions. That year the Twenty-fourth Legislature omitted the disability of coverture and renumbered the remaining disabilities.[6] A proviso was added that "limitation shall not begin to run against married women until they arrive at the age of twenty-one years; and, further, that their disability shall continue one year from and after the passage of this act, and that they shall have thereafter the same time allowed others by the provisions hereof."[7] The article listing disabilities in personal actions was continued as before[8] and has remained substantially the same up to the present time.[9]

The 1911 revision of the Texas statutes retained for disabilities in real property actions the language of the 1895 revision.[10] In 1919 the statute[11] was amended to declare that the following persons were under disability: "(1) A person, including a married woman, under

[2] For the present statutes see Tex. Rev. Civ. Stat. Ann. arts. 5507-10 (1958).
[3] See Tex. Rev. Civ. Stat. art. 3201 (1879).
[4] *Ibid.*
[5] See Tex. Rev. Civ. Stat. art. 3222 (1879).
[6] Texas Acts 1895, ch. 30, 10 G.L. 765, amending art. 3201, Tex. Rev. Civ. Stat. (1879). Later, in the same legislative session, the provision became art. 3352, Tex. Rev. Civ. Stat. (1895).
[7] Texas Acts 1895, ch. 30, 10 G.L. 765. In the revision of 1895, Tex. Rev. Civ. Stat. art. 3352 (1895), the word "article" was substituted for "act." The proviso went on to say that the change should have no effect on pending suits.
[8] See Tex. Rev. Civ. Stat. art. 3373 (1895).
[9] See Tex. Rev. Civ. Stat. art. 5708 (1911); Tex. Rev. Civ. Stat. Ann. art. 5535 (1958).
[10] See Tex. Rev. Civ. Stat. art. 5684 (1911).
[11] Tex. Rev. Civ. Stat. art. 5684 (1919).

twenty-one years or [*sic*] 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. . . ."[12] A proviso was added that the period of limitation should not be extended so as to allow suit for the recovery of land more than twenty-five years after the cause of action accrued.[13]

The present article setting forth disabilities in real property actions was formulated in the 1925 revision of the Texas statutes.[14] Article 5518 reads:

> 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 first descend or the adverse possession commence:
>
> (1) A person, including a married woman, 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. . . .

Also bearing on the operation of disabilities is article 5544[15] of the current statutes. It reads: "The period of limitation shall not be extended by the connection of one disability with another; and, when the law of limitations shall begin to run, it shall continue to run, notwithstanding any supervening disability of the party entitled to sue or liable to be sued." This statute is not included in the subdivisions of statutes entitled "Limitations of Actions for Lands" or "Limitations of Personal Actions" but appears under "General Provisions." Hence it applies to both types of actions. The statute was first included in the 1879 revision of the Texas statutes[16] and has suffered no change in language.

III. Case Law: How the Disabilities Operate

It is generally held that for a disability to prevent a limitation peri-

[12] Texas Acts 1919, ch. 55, § 1, 19 G.L. 36th Leg. at 139.

[13] The proviso and its subsequent history are discussed in Larson, *Texas Limitations: The Twenty-Five Year Statutes*, 15 Sw. L.J. 177, 179 (1961).

[14] See Tex. Rev. Civ. Stat. Ann. art. 5518 (1958).

[15] Tex. Rev. Civ. Stat. Ann. art. 5544 (1958).

[16] See Tex. Rev. Civ. Stat. art. 3325 (1879).

od from running it must exist when the cause of action arises.[17] The first statute affecting personal actions (section 11) was enacted in 1841 and contained language indicating that the disabilities listed had no tolling effect if they did not exist when a cause of action arose.[18] This was not true of the statutes affecting real property actions, and, indeed, they could have been read to suspend the operation of limitations during any disability. However, with the 1879 and later revisions of the Texas statutes, the language has been clear that a disability must exist when a cause of action arises in order to toll limitations. Presently article 5518 declares that limitations do not run "if a person entitled to sue . . . be [under disability] at the time such title shall first descend or the adverse possession commence." Even more specific is present article 5544, which states that "when the law of limitation shall begin to run, it shall continue to run, notwithstanding any supervening disability."

The Texas decisions have been uniform in holding that a disability has no tolling effect unless it exists at the time a cause of action arises. If the adverse possession begins and the owner of the land later comes under disability, the limitation periods continue to run.[19] If the adverse possession begins and the owner of the land later conveys to a person under disability, the limitation periods are not interrupted.[20] The same is true if the person under disability received his title by devise or descent.[21] A different type of situation is presented

[17] See 3 American Law of Property § 15.12 (Casner ed. 1952); Burby, Real Property § 232 (2d ed. 1954); 4 Tiffany, Real Property § 1169 (3d ed. 1939).

[18] See Texas Acts 1841, at 163, 2 G.L. 627: ". . . [A]nd when the law of limitations did not commence to run prior to the existence of these disabilities, such persons shall have the same time allowed them after their removal, that is allowed to others by this and other laws of limitations now in force."

[19] Broom v. Pearson, 98 Tex. 469, 85 S.W. 790, *aff'd on rehearing*, 86 S.W. 733 (1905) (coverture); Murray v. Slater, 274 S.W.2d 921 (Tex. Civ. App. 1954—Austin) *no writ hist.* (insanity); Stubbs v. Lowrey's Heirs, 253 S.W.2d 312 (Tex. Civ. App. 1952—Eastland) *error ref. n.r.e* (moratorium statutes); Hoencke v. Lomax, 55 Tex. Civ. App. 189, 118 S.W. 817, *error ref.*, 102 Tex. 487, 119 S.W. 842 (1909); Kaack v. Stanton, 51 Tex. Civ. App. 495, 112 S.W. 702 (1908) *error ref.* (insanity); Halliday v. Lambright, 29 Tex. Civ. App. 226, 68 S.W. 712 (1902) *no writ hist.* (coverture).

[20] Johnson v. Schumacher, 72 Tex. 334, 12 S.W. 207 (1888) (coverture); Chandler v. Alamo Mfg. Co., 140 S.W.2d 918 (Tex. Civ. App. 1940—Austin) *no writ hist.* (coverture) (suit for rents); Houston Oil Co. v. Choate, 215 S.W. 118 (Tex. Civ. App. 1919—Beaumont), *aff'd*, 232 S.W. 285 (Tex. Comm. App. 1921) (coverture); Mexia v. Lewis, 3 Tex. Civ. App. 113, 21 S.W. 1016 (1893) (coverture).

[21] Howard v. Stubblefield, 79 Tex. 1, 14 S.W. 1044 (1890) (insanity); Moody's Heirs v. Moeller, 72 Tex. 635, 10 S.W. 727 (1889) (coverture, minority); Strickland v. Humble Oil & Ref. Co., 181 S.W.2d 901 (Tex. Civ. App. 1944—Eastland) *no writ hist.* (minority); Sandmeyer v. Dolijsi, 203 S.W. 113 (Tex. Civ. App. 1918—Galveston) *error*

where the owner of land is under disability both when adverse possession begins and when he later conveys to a person not under disability. Clearly, the limitation periods begin to run when the conveyance is complete.[22]

Cases involving the disability of unsound mind illustrate that a disability must be continuous to bar the operation of a limitation statute. If adverse possession is begun against a person *non compos mentis*, a later interval of lucidity will cause the limitation period to run without subsequent interruption.[23]

One may wonder why the legislature and the courts have been so careful to allow tolling of limitation statutes only where a disability is continuous and exists when the cause of action arises. Undoubtedly the answer is a strong feeling in favor of the purpose and policy of limitation statutes. If disabilities were permitted to have a tolling effect whenever they occur, limitation statutes would often have an intermittent and uncertain operation over a lengthy span of time.

A. *Minority*

Many cases have been decided in which the disability of minority has served to prevent the running of the statutes of limitation.[24] This disability is personal. For example, the minority of a tenant in com-

ref. (minority); Hays v. Hinkle, 193 S.W. 153 (Tex. Civ. App. 1917—Texarkana) *error ref.* (minority).

[22] Condra v. Grogan Mfg. Co., 149 Tex. 380, 233 S.W.2d 565 (1950) (purchase from incompetent).

[23] See Holt v. Hedberg, 316 S.W.2d 955 (Tex. Civ. App. 1958—Ft. Worth) *no writ hist.* (suit to cancel deed); Barber v. Federal Land Bank, 204 S.W.2d 74 (Tex. Civ. App. 1947—Texarkana) *error ref. n.r.e.;* Joy v. Joy, 156 S.W.2d 547 (Tex. Civ. App. 1941—Eastland) *error ref. w.o.m.* (suit to cancel deed); Kaack v. Stanton, 51 Tex. Civ. App. 495, 112 S.W. 702 (1908) *error ref.*

[24] Strong v. Garrett, 148 Tex. 265, 224 S.W.2d 471 (1949); Wiess v. Goodhue, 98 Tex. 274, 83 S.W. 178 (1904); Morton v. Morton, 286 S.W.2d 702 (Tex. Civ. App. 1955—Texarkana) *no writ hist.;* Pugh v. Clark, 238 S.W.2d 980 (Tex. Civ. App. 1951—Galveston) *error ref. n.r.e.;* Lotus Oil Co. v. Spires, 240 S.W.2d 357 (Tex. Civ. App. 1950—El Paso) *error ref. n.r.e.;* Kruse v. Sanders, 231 S.W.2d 747 (Tex. Civ. App. 1950—Austin) *no writ hist.;* Johnston v. Stinson, 215 S.W.2d 218 (Tex. Civ. App. 1948—Texarkana) *error ref. n.r.e.;* Lone Star Gas Co. v. Meyer, 296 S.W. 1110 (Tex. Civ. App. 1927—Ft. Worth) *error dism. w.o.j.;* Easterling v. Simmons, 293 S.W. 690 (Tex. Civ. App. 1927—Waco) *error ref.;* Hays v. Hinkle, 193 S.W. 153 (Tex. Civ. App. 1917—Texarkana) *error ref.;* Kidd v. Prince, 182 S.W. 725 (Tex. Civ. App. 1916—Dallas), *rev'd on other grounds,* 215 S.W. 844 (Tex. Comm. App. 1919); Vanderwolk v. Matthaei, 167 S.W. 304 (Tex. Civ. App. 1914—San Antonio) *error ref.;* Louisiana & Texas Lumber Co. v. Southern Pine Lumber Co., 147 S.W. 604 (Tex. Civ. App. 1912—Galveston) *no writ hist.;* Louisiana & Texas Lumber Co. v. Lovell, 147 S.W. 366 (Tex. Civ. App. 1912—Galveston) *no writ hist.;* Burnham v. Hardy Oil Co., 147 S.W. 330 (Tex. Civ. App. 1912—San Antonio), *aff'd,* 108 Tex. 555, 195 S.W. 1139 (1917); Meurin v. Kopplin, 100 S.W. 984 (Tex. Civ. App. 1907) *no writ hist.;* Surghenor v. Taliaferro, 98 S.W. 648 (Tex. Civ. App. 1906) *error dism.;* Halliday v. Lambright, 29 Tex. Civ. App. 226, 68 S.W. 712 (1902) *no writ hist.*

mon does not inure to the benefit of his adult cotenant.[25] Where a trust exists, minority of a beneficiary helps neither himself nor the trustee where an adverse possessor occupies trust property.[26] The trustee has full power and right to proceed against the adverse possessor, and if his title is barred by limitation statutes, the beneficial title is likewise barred.

The problems of when an infant reaches his majority, when a statute of limitations begins to run, and when is the last day for bringing suit are technical questions which are answered in *Ross v. Morrow*.[27] In that case one of the plaintiffs was born on April 17, 1860, and it was necessary to determine on what date the five-year statute of limitations had run against him. The Texas Supreme Court declared:

> The rule adopted in computing the age of a person is that the day of his birth is included; and, on the day before the twenty-first anniversary, he is held to be 21 years of age. Under the operation of this rule, Nathan Ross was 21 on the 16th day of April, 1881. . . . On that day, April 16, 1881, his disability of minority was removed, and he could have instituted his suit at any moment of that day. The statute of limitation, therefore, commenced to run against him on that day.
>
> It follows from this that the 16th day of April, 1881, the day on which he attained his majority, must be included in the computation of time against him, and, including it, the five years allowed him under . . . [the limitation statute] expired on the 15th day of April, 1886, one day before the institution of this suit. . . ."[28]

There is no question that the court followed common law principles in determining when the five-year limitation period expired.[29] Fractions of days are ignored where the birthday and the last day of the twenty-first year are concerned. Furthermore, it is to be observed that the last day for filing suit was held to be the *second* day prior to plaintiff's twenty-sixth birthday (anniversary of birth). Therefore, one should be wary of statements or easy assumptions that a minor has until his third, fifth, or tenth birthday after reaching twenty-one years of age to file suit against an adverse possessor.[30]

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[25] Johnson v. Schumacher, 72 Tex. 334, 12 S.W. 207 (1888); Stovall v. Carmichael, 52 Tex. 383 (1880).

[26] Wiess v. Goodhue, 98 Tex. 274, 83 S.W. 178 (1904); see 3 American Law of Property § 15.12 (Casner ed. 1952).

[27] 85 Tex. 172, 19 S.W. 1090 (1892).

[28] *Id.* at 175, 19 S.W. at 1091.

[29] The court cited Phelan v. Douglass, 11 How. Pr. 193 (N.Y. Sup. Ct. 1855), and 7 Wait, Actions and Defenses 129 (1879). See also 2 Kent, Commentaries 233 (7th ed. 1851).

[30] *E.g.*, see Morton v. Morton, 286 S.W.2d 702, 706 (Tex. Civ. App. 1955—Texarkana) *no writ hist.* (Plaintiff was born on June 8, 1921; "limitation could not begin to run against him prior to June 8, 1942.").

Of course, minority does not prevent a limitation period from running if the adverse possessor of land is under the disability and not the owner.[31] The only question here is whether the minor has entered and occupied for himself and no other. It has been said that the assent of a father to his minor son's acquisition of land "by occupying and cultivating it had the effect of emancipating . . . [the son] in so far as his right to acquire the land was concerned."[32]

B. *Coverture*

Many cases can be found in which the disability of a married woman was held to prevent the running of limitations with respect to her separate real property.[33] However, these holdings involved cases concerning coverture arising before the 1895 legislation was passed. Furthermore, the disability ended when a married woman became widowed, was divorced, or died.

In the years following 1895, decisions were handed down dealing with coverture which began before and continued after the new legislation was enacted. The courts were faithful to the language of the new statute,[34] holding that coverture existing when the cause of action arose continued as a disability for a year after the passage of the new legislation.[35] There was no retroactive destruction of the disability, and the limitation periods began to run only after a year's interval "after the passage" of the new statute. An authoritative decision[36] construed "one year from and after the passage of this act" to mean a year "after the act took effect, which was ninety days after the adjournment of the session of the Legislature at which said act was passed." It is safe to say that after July of 1896 coverture was no longer a disability.[37] In later years several cases had occasion

[31] Petty v. Griffin, 241 S.W. 252 (Tex. Civ. App. 1922—Beaumont) *error dism.*; Houston Oil Co. v. Griffin, 166 S.W. 902 (Tex. Civ. App. 1914—Galveston) *error ref.*; for earlier proceedings, see 149 S.W. 567 (Tex. Civ. App. 1912—Galveston) *no writ hist.*

[32] Houston Oil Co. v. Griffin, *supra* note 31. Similar language was used in the earlier proceedings. See 149 S.W. at 569.

[33] Broom v. Pearson, 98 Tex. 469, 85 S.W. 790, *aff'd on rehearing*, 98 Tex. 578, 86 S.W. 733 (1905); Johnson v. Schumacher, 72 Tex. 334, 12 S.W. 207 (1888); Hays v. Hinkle, 193 S.W. 153 (Tex. Civ. App. 1917—Texarkana) *error ref.*; Surghenor v. Taliaferro, 98 S.W. 648 (Tex. Civ. App. 1906) *error dism.*; Hymer v. Holyfield, 87 S.W. 722 (Tex. Civ. App. 1905) *error ref.*; Wren v. Howland, 33 Tex. Civ. App. 87, 75 S.W. 894 (1903) *error ref.*; Estes v. Turner, 30 Tex. Civ. App. 365, 70 S.W. 1007 (1902) *no writ hist.*; Williams v. Bradley, 67 S.W. 170 (Tex. Civ. App. 1902) *error ref.*; Fox v. Brady, 1 Tex. Civ. App. 590, 20 S.W. 1024 (1892) *no writ hist.*

[34] See note 6 *supra* and accompanying text.

[35] Veeder v. Gilmer, 47 Tex. Civ. App. 464, 105 S.W. 331 (1907) *no writ hist.*; Anderson v. Wynne, 25 Tex. Civ. App. 440, 62 S.W. 119 (1901) *no writ hist.*; see Williams v. Bradley, 67 S.W. 170, 171 (Tex. Civ. App. 1902) *error ref.*

[36] Shook v. Laufer, 100 S.W. 1042, 1046 (Tex. Civ. App. 1907) *error ref.*

[37] The legislative session in question was adjourned on April 30, 1895. The ninety-day period prescribed by the Texas Constitution, art. 3, § 39, does not include the day of ad-

to say that coverture was not a disability tolling limitations on real property actions.[38]

The proviso to the 1895 statute made it clear that married women could claim the disability of minority. Moreover, the revision of the language in 1919, continued in the 1925 Revised Statutes, is unmistakable in preserving the disability of minority to married women under twenty-one years of age. Many decisions since 1895 have confirmed the principle that the disability of minority is not affected by marriage where limitations of actions for the recovery of land are concerned.[39]

Before its abolition as a disability, coverture was set up as a defense in several cases in an effort to defeat adverse possession of community property or the husband's separate property in which the wife claimed a homestead right. However, the efforts were unsuccessful. In *Smith v. Uzzell*[40] the land in question was the husband's separate property, and limitations had run against him. The court said:

> Nor do we see how the widow can invoke such a rule. The statutory bar is complete against those holding the fee in the land, and can it be possible that one who has no estate at all can have a higher right than the owner of the fee could have had he lived; that there is some vitality or magic influence in the fact that land was once the homestead, which gives to a claim of homestead, without an estate to support it, an exemption from the effect of the statute of limitation which the estate in fee does not enjoy, by which the mere claim of right to use as a homestead will be preserved, while adverse possession under the statute divests the only person from whom any estate or shadow of claim can be derived of the only estate upon which all others, or rights, must depend for an existence?[41]

The question answered itself, and the widow's homestead claim was denied.

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journment or the first day an act takes effect. Halbert v. San Saba Springs Land & Live-Stock Ass'n, 89 Tex. 231, 34 S.W. 639 (1896). Hence the legislative change in the Acts of 1895, ch. 30, was effective on July 30, 1895. But the disability of coverture continued a year after the change became effective. Because the change was in effect all of July 30, 1895, the year included that date. Thus, the precise date on which coverture ceased to be a disability was July 30, 1896.

[38] Lotus Oil Co. v. Spires, 240 S.W.2d 357 (Tex. Civ. App. 1950—El Paso) *error ref. n.r.e.*; Collins v. Griffith, 125 S.W.2d 419, 428 (Tex. Civ. App. 1938—Amarillo) *error ref.*; Barrett v. Crump, 15 S.W.2d 672 (Tex. Civ. App. 1929—Waco) *no writ hist.*; Ryman v. Petruka, 166 S.W. 711 (Tex. Civ. App. 1914—San Antonio) *no writ hist.*

[39] Collins v. Griffith, *supra* note 38; Holt v. Holt, 59 S.W.2d 324 (Tex. Civ. App. 1933—Texarkana) *error ref.*, noted, 12 Texas L. Rev. 105 (1933); Huling v. Moore, 194 S.W. 188 (Tex. Civ. App. 1917—San Antonio) *error ref.*; Kidd v. Prince, 182 S.W. 725 (Tex. Civ. App. 1916—Dallas), *rev'd on other grounds*, 215 S.W. 844 (Tex. Comm. App. 1919); Vanderwolk v. Matthaei, 167 S.W. 304 (Tex. Civ. App. 1914—San Antonio) *error ref.*; Gibson v. Oppenheimer, 154 S.W. 694 (Tex. Civ. App. 1913—San Antonio) *error ref.*

[40] 61 Tex. 220 (1884).

[41] *Id.* at 222.

In *Hussey v. Moser*[42] the land was community homestead, and defendants and their predecessors occupied it for more than ten years under a void deed from the husband. Citing the *Uzzell* case, the court there said:

> In the latter case the alleged homestead was the separate property of the husband; but no stress is laid upon this fact in the opinion, and we apprehend that there is no difference in principle whether the property be of the community estate, or of the separate estate of the husband. In either case, the wife's power to sue alone for the enforcement of her homestead rights, when her husband refuses to join her, is recognized by our courts (Kelly v. Whitmore, 41 Tex. 647 [1874]). . . . The effect, therefore, of the previous decisions upon this subject is to hold that this article [providing for disabilities] applies only to the wife's separate property, and not to that in which she holds merely the homestead interest conferred by our Constitution.[43]

In the *Uzzell* case adverse possession was had under a sheriff's deed, while in the *Hussey* case the husband's deed was voluntary. In the former case the husband might be expected to protect his wife's homestead right, but in the latter he would be presumed to be acting in hostility to her right. Nevertheless, there was no difference in the operation of the disability statute. The court stated:

> . . . [T]he legislature might well have provided that when the husband attempts the alienation of the homestead without the consent of the wife, the statute should not run against her as long as he lives. But in our opinion they have not done this. The court in Smith v. Uzell, supra, say, in effect, that an exception in favor of the wife who sets up claim to homestead merely as such cannot be engrafted on the statute by the courts. Neither are we at liberty to make a special exception in a similar case, because the husband has assumed to act in hostility to her claim.[44]

Other decisions are in accord with the *Hussey* and *Uzzell* cases.[45] Although coverture is no longer a disability, the principle of the cases probably has other applications. Suppose, for instance, that a married woman is in her minority when adverse possession starts against land which is community or separate property of the husband. Undoubtedly she cannot urge that limitations do not run against her claim of homestead right until she reaches her majority. The disabilities which may be claimed by a married woman can only

[42] 70 Tex. 42, 7 S.W. 606 (1888).
[43] *Id.* at 46, 7 S.W. at 608.
[44] *Ibid.*
[45] Simonton v. Mayblum, 59 Tex. 7 (1883) (community homestead); Sanders v. Word, 50 Tex. Civ. App. 294, 110 S.W. 205 (1908) *error ref.* (same); Cuellar v. Dewitt, 5 Tex. Civ. App. 568, 24 S.W. 671 (1893) *error ref.* (same).

be set up to toll limitations on her rights of action for her separate property.

It is to be noted that the disability of coverture still exists in personal actions[46] and that it will prevent limitation periods from running, even though it has no such effect in actions for the recovery of land.[47] No good reason appears for maintaining this difference in the two types of actions. In real property actions the legislature has adjudged that married women, after they reach twenty-one years of age, are under no substantial handicap in asserting their rights in court. The same judgment is warranted in personal actions.

C. *Unsound Mind*

The disability of unsound mind has operated to prevent the limitations from running in many real property actions reaching the appellate courts.[48] "Unsound mind" denotes either derangement (insanity) or weakness (or lack) of mental faculties. A person is of unsound mind if he "has not the ability to transact the ordinary affairs of life, to understand their nature and effect, and exercise his will in relation to them."[49] More specifically, he is of unsound mind if he does not have "sufficient mental capacity to understand the nature of bringing or defending a suit for land."[50]

In an action for the recovery of land the fact of unsound mind may be a defense even though there has been no previous action to establish insanity.[51] However, the adjudication of unsound mind in a proceeding for a guardianship or for commitment establishes the condition at that time, and a presumption of insanity continues thereafter.[52] On the other hand, an adjudication of restoration of

[46] Tex. Rev. Civ. Stat. Ann. art. 5535 (1958).

[47] Holt v. Holt, 59 S.W.2d 324 (Tex. Civ. App. 1933—Texarkana) *error ref.*, noted, 12 Texas L. Rev. 105 (1933); Barrett v. Crump, 15 S.W.2d 672 (Tex. Civ. App. 1929—Waco) *no writ hist.*

[48] Condra v. Grogan Mfg. Co., 149 Tex. 380, 233 S.W.2d 565 (1950); Moore v. City of Waco, 85 Tex. 206, 20 S.W. 61 (1892); Pugh v. Clark, 238 S.W.2d 980 (Tex. Civ. App. 1951—Galveston) *error ref. n.r.e.*; Kramer v. Sidlo, 233 S.W.2d 609 (Tex. Civ. App. 1950—El Paso) *no writ hist.*; Zachry v. Moody, 59 S.W.2d 846 (Tex. Civ. App. 1933—Beaumont) *error ref.*; Mitchell v. Stanton, 139 S.W. 1033 (Tex. Civ. App. 1911—San Antonio) *error ref.*; Kaack v. Stanton, 51 Tex. Civ. App. 495, 112 S.W. 702 (1908) *error ref.*

[49] Charge approved in Kaack v. Stanton, *supra* note 48.

[50] Pugh v. Clark, 238 S.W.2d 980, 986 (Tex. Civ. App. 1951—Galveston) *error ref. n.r.e.*

[51] Kaack v. Stanton, 51 Tex. Civ. App. 495, 498, 112 S.W. 702, 704 (1908) *error ref.*; see Joy v. Joy, 156 S.W.2d 547 (Tex. Civ. App. 1941—Eastland) *error ref. w.o.m.*

[52] Holt v. Hedberg, 316 S.W.2d 955, 956 (Tex. Civ. App. 1958—Eastland) *no writ hist.* (suit to cancel deed); Elliott v. Elliott, 208 S.W.2d 709 (Tex. Civ. App. 1948—Ft. Worth) *error ref. n.r.e.* (suit to cancel deed); Zachry v. Moody, 59 S.W.2d 846 (Tex. Civ. App. 1933—Beaumont) *error ref.*; Mitchell v. Stanton, 139 S.W. 1033 (Tex. Civ. App.

sanity establishes this fact at the time, and the presumption then is that the person concerned continues to be of sound mind.[53]

"Incompetency" is a term of broader meaning than "unsoundness of mind." In a land action tried in federal court,[54] the defendant set up that she had been adjudicated as an incompetent in Oklahoma. The court, however, rejected her claim that limitations did not run against her. "[T]he disability which prevents the Texas statutes from running is not an adjudication of incompetency, but the disability of an unsound mind. . . ."[55] The district court had found the defendant to be of sound mind, and the earlier judgment of incompetency was not considered as being an adjudication of unsound mind.

D. *Military Service, Imprisonment, Other Claimed Disabilities*

A person is under a disability "in a time of war" if he is "in the military or naval service of the United States."[56] This provision was added to the disability statute soon after the First World War, but Texas decisions have barely touched upon its operation.[57] Furthermore, federal legislation is broader and suspends the running of limitations regardless of whether a cause of action arises before or after the disability occurs.[58] The federal statute is a constitutional exercise of the power of Congress to declare and make war and supersedes any state legislation which is less favorable to a person in the armed forces.[59] It is to be noticed, however, that the disability statute affecting personal actions in Texas does not mention military or naval service.[60]

A person is under disability if he is "imprisoned," and this is true both in personal actions and actions for the recovery of land. This

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1911—San Antonio) *error ref.* In the *Elliott* case the court said:

> The implication of the holdings . . . is that an adjudication of insanity by the county court raises a continuous rebuttable presumption of insanity, and that only a judgment of restoration of sanity, entered in a proceeding brought for that purpose, will be sufficient to conclusively remove such rebuttable presumption. 208 S.W.2d at 715.

[53] Elliott v. Elliott, *supra* note 52.

[54] Thlocco v. Magnolia Petroleum Co., 141 F.2d 934 (5th Cir.), *cert. den.*, 323 U.S. 785 (1944).

[55] *Id.* at 937.

[56] Tex. Rev. Civ. Stat. Ann. art. 5518 (1958).

[57] Cases dealing with the disability have been decided under the federal law. See cases cited note 58 *infra.*

[58] See Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1178, 50 App. U.S.C. § 501, as amended, 50 App. U.S.C. § 520 (Supp. III, 1962); Johnston v. Stinson, 215 S.W.2d 218 (Tex. Civ. App. 1948—Texarkana) *error ref. n.r.e.;* Easterling v. Murphey, 11 S.W.2d 329 (Tex. Civ. App. 1928—Waco) *error ref.;* Comment, *Tolling and Suspension of the Land Limitation Statutes,* 9 Baylor L. Rev. 389, 391, 394 (1957).

[59] Bell v. Baker, 260 S.W. 158 (Tex. Comm. App. 1924) (personal action); Easterling v. Murphey, *supra* note 58.

[60] Tex. Rev. Civ. Stat. Ann. art. 5535 (1958).

disability has had slight treatment in the cases. In one case,[61] involving a personal action, the plaintiff showed that he was in jail from August 4, 1893, continuously (except when he was in court as an attached witness) until his confinement in the penitentiary on March 17, 1894, on a conviction for horse theft. He remained in durance vile until July 12, 1898. The issue presented to the court was whether the plaintiff was "in prison" when the cause of action arose on September 15, 1893. The court, answering in the affirmative, said, "It seems to us, therefore, that appellee was to all intents and purposes 'a person in prison,' when the cause of action arose, September 15, 1893, and that he so remained till within less than a year before the filing of this suit."[62]

In several cases the parties have asserted circumstances other than the disabilities listed in the statutes.[63] However, the courts uniformly hold that they cannot prevent limitations from running by adding to the disabilities provided in the statutes.

E. *Burden Of Proof*

A person who claims title to land by adverse possession has the burden of pleading and proving compliance with the statutes of limitation. Does this burden include the negativing of the existence of disabilities which prevent the limitations from running? Most decisions answer the question in the negative by stating that the disabilities are exceptions to the statutes of limitation and must be pleaded and proved by the person defending under them.[64]

In *Smith v. Lancaster*,[65] however, a distinction was made among

[61] Lasater v. Waites, 67 S.W. 518 (Tex. Civ. App.), *rev'd on other grounds*, 95 Tex. 553, 68 S.W. 500 (1902).

[62] *Id.* at 519.

[63] See Federal Crude Oil Co. v. Yount-Lee Oil Co., 73 S.W.2d 969 (Tex. Civ. App. 1934—Beaumont) *error dism., cert. den.*, 295 U.S. 741 (1935) (forfeiture of right to do business in state); Smith v. Lancaster, 248 S.W. 472, 475 (Tex. Civ. App. 1923—Texarkana) *error ref.* (delay in probate of will); Houston Oil Co. v. Griffin, 166 S.W. 902 (Tex. Civ. App. 1914) *error ref.*; for earlier proceedings see 149 S.W. 567 (Tex. Civ. App. 1912—Galveston) (corporation in receivership); Bowen v. Kirkland, 17 Tex. Civ. App. 346, 44 S.W. 189 (1897) *error ref.* (contest of appointment of administrator); see Hendron v. Yount-Lee Oil Co., 119 S.W.2d 171 (Tex. Civ. App. 1938—Texarkana) *error ref.*

[64] Martin v. Burr, 111 Tex. 57, 228 S.W. 543 (1921), *reversing* 171 S.W. 1044 (Tex. Civ. App. 1914) (prescriptive water right); Morton v. Morton, 286 S.W.2d 702 (Tex. Civ. App. 1955—Texarkana) *no writ hist.*; Dortch v. Sherman County, 212 S.W.2d 1018 (Tex. Civ. App. 1948—Amarillo) *no writ hist.* (prescriptive easement); Niemann v. Garcia, 144 S.W.2d 621 (Tex. Civ. App. 1940—San Antonio) *error dism., judgm. cor.*; Didier v. Woodward, 232 S.W. 563 (Tex. Civ. App. 1921—Amarillo) *no writ hist.*; Krause v. Hardin, 222 S.W. 310 (Tex. Civ. App. 1920—San Antonio) *error dism.*; Louisiana & Texas Lumber Co. v. Lovell, 147 S.W. 366 (Tex. Civ. App. 1912—Galveston) *no writ hist.*; Lamberida v. Barnum, 90 S.W. 698 (Tex. Civ. App. 1905) *error dism. w.o.j.*; Elcan v. Childress, 40 Tex. Civ. App. 193, 89 S.W. 84 (1905) *error ref.*

[65] 248 S.W. 472 (Tex. Civ. App. 1923—Texarkana) *error ref.*

the disabilities as to the burden of proof. In that case adverse possession or use of certain property was shown, thereby apparently establishing a railroad right of way. With respect to the burden of proof concerning the disabilities of minority, insanity, and imprisonment, the court stated:

> The "disability" that appellees were called on to affirmatively negative was, we think, that of minority only. The "disability" of insanity and of imprisonment was not required to be affirmatively shown to not exist. Insanity and imprisonment are, unlike minority, only exceptional occurrences in the lives and experience of mankind, and it is on this account that it is a presumption of law that all men are sane and that they obey the laws. This presumption would obtain in this record, there being no evidence to show to the contrary.[66]

The argument for making a distinction is not convincing. All of the disabilities constitute circumstances within the peculiar, private knowledge of the persons claiming them. A distinction is not warranted on the basis of difficulty of producing evidence. It seems unfair to compel an adverse possessor to come forward and prove a negative, *i.e.*, that none of his adversaries or their predecessors were minors (or under other of the listed disabilities) when the cause of action arose.

A different type of case is encountered where a plaintiff sues a defendant for injury to a property right gained through adverse possession or prescription against a third party. In *City of Austin v. Hall*[67] plaintiffs sued the city for interference with their right to use a public road which had become such through prescription against the true owners. The question for decision was whether "it [was] necessary [for plaintiffs] to show that during the prescriptive period the servient estates, the various tracts of land against which the prescriptive right is claimed, were owned by persons free from legal disability, and against whom limitation or prescriptive right could be acquired by adverse use."[68] The court answered in the affirmative stating:

> Where the right is claimed against one other than the defendant in the suit or some person under whom he claims, the plaintiff must prove his right and that no disability existed with the person from whom he claims to have derived the right. We do not intend to decide what would be the rule if a prescriptive right were claimed as against the defendant in the suit or some person whose title he asserts.[69]

[66] *Id.* at 474.
[67] 93 Tex. 591, 57 S.W. 563 (1900).
[68] *Id.* at 596, 57 S.W. 564.
[69] *Ibid.*

There is justification for the holding, since the defendant had no more facility for showing disabilities than did the plaintiffs. Thus, compelling the plaintiff to prove the non-existence of disabilities makes unlikely later assertions by owners of the land in question that they have some type of claim against the defendant. The unlikelihood is not a certainty, however, since the owners are not bound by a suit and judgment to which they were not parties.

IV. Case Law: Tacking

The prohibition on tacking disabilities follows logically from the rule that a disability does not prevent limitations from running unless it exists at the time the cause of action first accrues. If tacking were allowed, the limitations would not run after the first disability expired if, prior to its expiration, another disability happened to come into existence. Tacking is also not allowed when a period of time intrudes between the disabilities, since once a limitation begins to run, a later disability does not stop it. Finally, tacking is not involved if two (or more) disabilities exist at the time the cause of action accrues. The person under the disabilities may claim the benefit of the longer-lasting one.[70]

There have been repeated instances of attempts to tack one disability onto another when they affect the same person.[71] Most of the cases occurred before coverture was abolished as a disability. The situation developed when adverse possession had begun against a minor female and she later married while still a minor. However, it was uniformly held that the statutes of limitation began to run immediately after the marriage took place.[72] The Texas Supreme Court explained:

> By the terms of the statute then in force, the marriage of appellant, Alice Parish, terminated the guardianship. Pas. Dig., art. 6928. It also

[70] 3 American Law of Property § 15.12 (Casner ed. 1952); 4 Tiffany, Real Property § 1169 (3d ed. 1939).

[71] Jackson v. Houston, 84 Tex. 622, 19 S.W. 799 (1892); Ragsdale v. Barnes, 68 Tex. 504, 5 S.W. 68 (1887); Parish v. Alston, 65 Tex. 194 (1885); Hinnant v. Rodriguez, 255 S.W. 1000 (Tex. Civ. App. 1923—San Antonio), *aff'd*, 267 S.W. 471 (Tex. Comm. App. 1925); Louisiana & Texas Lumber Co. v. Southern Pine Lumber Co., 147 S.W. 604 (Tex. Civ. App. 1912—Galveston) *no writ hist.*; Louisiana & Texas Lumber Co. v. Lovell, 147 S.W. 366 (Tex. Civ. App. 1912—Galveston) *no writ hist.*; York v. Hutcheson, 37 Tex. Civ. App. 367, 83 S.W. 895 (1904) *no writ hist.*; Broom v. Pearson, 81 S.W. 753 (Tex. Civ. App. 1904), *rev'd on other grounds*, 98 Tex. 469, 85 S.W. 790 (1905); Grayson v. Lofland, 21 Tex. Civ. App. 503, 52 S.W. 121 (1899) *error ref.*; Taylor v. Brymer, 17 Tex. Civ. App. 517, 42 S.W. 999 (1897) *no writ hist.*; Smith v. Powell, 5 Tex. Civ. App. 373, 23 S.W. 1109 (1893) *no writ hist.*

[72] See cases cited note 71 *supra*.

> rendered her, in legal contemplation, of full age, although a minor. . . .
> . . . .
> The act which terminated . . . [the disability of minority] imposed another disability, viz., coverture, to which, if asserted as a protection against the statute, it might be replied that the cause of action accrued while she was a minor, and that one disability cannot be connected with another for the purpose of extending the period of limitation. R. S., art. 3225.[73]

Two years later the court again explained:

> Appellant's disability of minority, which existed when the cause of action first accrued, had been removed by her marriage. She can not set up her coverture, because, by the terms of the statute, that disability pertains only to such women as were covert at the time the adverse possession commenced. If the revisers of the statutes had had the question now before us distinctly in view when they framed the article quoted, and had desired to remove all doubt upon it, we do not think they could, by general terms, have expressed that intention more clearly.[74]

In *Gibson v. Oppenheimer*[75] a Texas court had the occasion to explain the change that occurred when coverture was discontinued as a disability under the 1895 legislation. In that case adverse possession was started against an owner of land who was a minor female and who had later married while still a minor. The court said:

> It is true that it is provided in article 4628, R.S. 1911, that every female under the age of 21 years who shall marry, in accordance with the laws of the state, shall, after such marriage, be deemed of full age, and shall have all the rights and privileges she would have, had she been 21 when she married, and that has been construed many times to mean that the statute of limitations begins to run against such minor from the moment of her marriage. Thompson v. Cragg, 24 Tex. 582; Parish v. Alston, 65 Tex. 194. But that rule has been

[73] Parish v. Alston, 65 Tex. 194, 197, 198 (1885). The same idea was expressed in Jackson v. Houston, 84 Tex. 622, 19 S.W. 799 (1892), where the court stated:

> That exceptions in the statute cannot be accumulated is a well settled and familiar rule. At the time the right of action accrued in this case—in 1849—Mrs. Fredonia Kirk was laboring under the disability of minority. That disability (or exception to the operation of the statute) was, as we have seen, removed by her marriage in 1861. Under well-settled and numerous authorities, no subsequent disability or exception can be added. 84 Tex. at 626, 19 S.W. at 801.

[74] Ragsdale v. Barnes, 68 Tex. 504, 506, 5 S.W. 68, 69 (1887). Grayson v. Lofland, 21 Tex. Civ. App. 503, 52 S.W. 121 (1899) *error ref.*, addressed itself to the contention that a married woman (before 1895) remained a minor until she reached 21 years of age. The court thought that the disability statute on its face (article 3201 of the 1879 Revised Statutes) showed that married women were not included in the category of minors. "But all doubt on the subject is taken away by article 2471, Rev. St. 1879, declaring that females under 21 years of age who have never married are minors." 21 Tex. Civ. App. at 505, 52 S.W. at 122.

[75] 154 S.W. 694 (Tex. Civ. App. 1913—San Antonio) *error ref.*

> changed by an act of 1895, wherein it is provided "that limitation shall not begin to run against married women until they arrive at the age of 21 years," in suits for the recovery of real property. By the amendment of 1895 . . . the disability of infancy of a woman as to claims for real estate is not removed by marriage, but remains until she becomes 21 years of age, at which time it begins to run; and their claims to land will be barred in the same time that those of others are barred. It is true that the amendment of 1895 has no reference to any suits except those for land; but as this is a suit for land, and not to set aside a judgment, it applies. If this were a proceeding to set aside the judgment, the statute of four years would apply, and Mrs. Eardley would be barred, because, as to a proceeding of that kind, the statute began to run when she married.[76]

In summary, tacking of coverture to minority has been no problem since 1895 in real property actions because coverture is not a disability. Furthermore, minority continues to be a disability despite the minor's marriage. By way of contrast, in personal actions the law seems preserved that coverture removes the disability of minority and is not tacked, with the result that the limitations will begin to run at the date of marriage.[77] This is the import of the last sentence in the quotation from the *Oppenheimer* decision.

It is clear that if a cause of action for the recovery of land accrues in the owner and he is under disability, one who succeeds to his title cannot set up the same or different disability in himself. A common type of case appearing in the older reports is that in which adverse possession started during coverture of the owner (before 1895) and the title descended to minor heirs. The disability of the minor heirs could not be tacked to the disability of the deceased mother.[78] The court in *Hunton v. Nichols*[79] explained the rationale behind the rule:

> Unquestionably, if adverse possession of the property was taken previous to Mrs. Kerfoot's death, the defense of minority or coverture against the bar of the statute will not avail the plaintiffs. Their minority cannot be tacked to her coverture. The saving of the statute is only to those to whom the right first accrues. Successive or cumulative disabilities are of no avail. This is the settled construction of statutes of limitation; otherwise, statutes intended for the repose and peace of society by these saving clauses of coverture and minority, by

[76] *Id.* at 697; *cf.* Comment, *Tolling and Suspension of Land Limitation Statutes,* 9 Baylor L. Rev. 389, 392 (1957).

[77] See Kruse v. Sanders, 231 S.W.2d 747 (Tex. Civ. App. 1950—Austin) *no writ hist.;* D. Sullivan & Co. v. Ramsey, 155 S.W. 580 (Tex. Civ. App. 1913—San Antonio) *no writ hist.*

[78] Harris v. Wells, 85 Tex. 312, 20 S.W. 68 (1892); Hunton v. Nichols, 55 Tex. 217 (1881); Laird v. Murray, 111 S.W. 782 (Tex. Civ. App. 908) *error ref.;* Lamberida v. Barnum, 90 S.W. 698 (Tex. Civ. App. 1905) *error dism. w.o.j.;* Elcan v. Childress, 40 Tex. Civ. App. 193, 89 S.W. 84 (1905) *error ref.*

[79] 55 Tex. 217, 230 (1881).

> an opposite construction would have the effect of defeating the benign object of such laws; and so, as it is said, "a right might travel through minorities for centuries."

Other variations of tacking have also been rejected by the courts. Thus, the minority of heirs will not be tacked to the disability of insanity of their ancestor.[80] Nor will it be tacked to the ancestor's minority.[81] Similarly, the insanity of a grantee of land will not be tacked to a disability of the grantor.[82] Where adverse possession begins against a fully competent ancestor and the title descends to heirs who are under disability, tacking is not involved; limitations continue to run because no disability existed when the cause of action accrued.[83]

V. Suggestions and Conclusion

The disability statute affecting suits to recover land has operated simply and fairly in favor of those persons who are for various reasons prevented from enforcing their causes of action. There is no apparent reason for extending the effect of existing disabilities by permitting them to be tacked or to stop limitations which have already begun to run. With respect to the burden of proof, the case law seems to be pursuing a proper path in requiring that disabilities be pleaded and proved by the person asserting them.

The difference between the disability statutes in real property and personal actions is something of a trap for the unwary. Coverture does not operate as a disability in actions to recover land, and the same should be true of personal actions. A married woman has equal rights to bring both types of action. Presumably her husband has the same interest and inclination to join both types of suits for her separate property, and if he refuses, she can proceed alone.[84] The rule in personal actions that coverture ends the disability of minority but will not be tacked is technical, although it has the merit of elimi-

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[80] Zachry v. Moody, 59 S.W.2d 846 (Tex. Civ. App. 1933—Beaumont) *error ref.*

[81] Easterling v. Simmons, 293 S.W. 690 (Tex. Civ. App. 1927—Waco) *error ref.*; Best v. Nix, 6 Tex. Civ. App. 349, 25 S.W. 130 (1894) *no writ hist.*

In a personal action coverture of the heirs will not be tacked to the disability of coverture of their ancestor (mother). Leatherwood v. Stephens, 13 S.W.2d 726 (Tex. Civ. App. 1929—Waco), *aff'd*, 24 S.W.2d 819 (Tex. Comm. App. 1930).

[82] Cities Serv. Oil Co. v. Green, 251 S.W.2d 906 (Tex. Civ. App. 1952—Texarkana) *error ref. n.r.e.*

[83] Huling v. Moore, 194 S.W. 188 (Tex. Civ. App. 1917—San Antonio) *error ref.*; Sanders v. Word, 50 Tex. Civ. App. 294, 110 S.W. 205 (1908) *error ref.*; Best v. Nix, 6 Tex. Civ. App. 349, 25 S.W. 130 (1894) *no writ hist.*; cases cited notes 20, 21 *supra.*

Similarly, where limitations began to run against a female who reached twenty-one years of age, her later marriage (in 1883) did not toll the statutes. Hinnant v. Rodriguez, 255 S.W. 1000 (Tex. Civ. App. 1923—San Antonio), *aff'd*, 267 S.W. 471 (Tex. Comm. App. 1925).

[84] Tex. Rev. Civ. Stat. Ann. art. 1983 (1958).

nating coverture as a disability in that particular case. It would be preferable that this rule be supplanted by one which simply declares nonage a disability regardless of coverture.

The suggested change can be accomplished by altering article 5535 of the present statutes to contain an enumeration of disabilities like that in article 5518.[85] Such a modification would add a disability (military or naval service in a time of war), but no harm is seen in this. It is not suggested that the proviso to article 5518 be added, although consideration could well be given to a limitation period in personal actions which runs regardless of disabilities. Conformity of the two statutes would be an improvement in the area of limitations law, bringing simplicity of rules and similarity of treatment to litigants.

[85] Tex. Prob. Code Ann. § 93 (1956) does not list coverture as a disability in an action to contest the probate of a will. See 12 Baylor L. Rev. 136 (1960).