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LIMITATIONS ON ACTIONS FOR REAL PROPERTY:
THE TEXAS FIVE-YEAR STATUTE

by

Lennart V. Larson*

I. INTRODUCTION

TEXAS has a number of statutes of limitation affecting actions to recover land. Among them is what may be referred to as the five-year statute. In its present form the statute reads as follows:

Every suit to recover real estate as against a person having peaceable and adverse possession thereof, cultivating, using or enjoying the same, and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be instituted within five years next after cause of action shall have accrued, and not afterward. This article shall not apply to one in possession of land, who deraigns title through a forged deed. And no one claiming under a forged deed, or deed executed under a forged power of attorney shall be allowed the benefits of this article.

When the Republic enacted legislation in 1841 limiting the times within which different types of actions to recover land might be brought, a five-year statute very similar to the present statute was included. In 1879 a statute substantially in the present form was enacted. The wording in the official revisions of the Texas Civil Statutes in 1879, 1895, 1911, and 1925 has remained the same with minor variations. Thus, it may be said that the decisions considering the five-year statute through the years have been concerned with language that presumably has been constant in meaning.

Practically all states have general statutes of limitation allowing ownership of land to pass by virtue of peaceable and adverse possession alone. The required period of possession is usually between seven and twenty years; the Texas ten-year statute falls into this category.

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2 Texas Acts 1841, An Act of Limitations, § 16, 2 Gammel, Laws of Texas 627 (1898) declared: "Be it further enacted, That he, she or they, who shall have had five years like peaceable possession of real state, cultivating, using or enjoying the same and paying tax thereon, if any, and claiming under a deed, or deeds, duly registered, shall be held to have full title, precluding all claims . . . ."
3 Texas Acts 1879, ch. CXXV, § Gammel, Laws of Texas 1432 (1898).
These statutes strike a balance between the interest of an adverse occupier to have his title and possession quieted and the interest of the "true" owner to have a fair opportunity to recover the land which belongs to him. In many cases—perhaps most—it is accurate to say that the statute rewards an occupier not for his ethical merit but because of the "true" owner's neglect to take effective action to protect his interests. Society demands that after a person has acted as owner and possessor of property for a substantial time, he should be recognized as such and thereafter should not be disturbed.

The Texas five year limitation statute, sometimes referred to as a "short limitation statute," is a more unusual piece of legislation; probably not more than eight to ten other states have legislation similar to it. It has been suggested that the length of time required by a statute of limitation should be inversely proportional to the weakness of the occupier's title. Consistent with this idea, short limitation statutes set out requirements in addition to peaceable and adverse possession. Meeting these additional requirements will improve the occupier's standing as a possessor and thus may increase the possibility of his becoming the "true" owner. Perhaps more important, compliance with these requirements gives to the world additional, precise notice of the occupier's claim.

The Texas five-year statute may be broken down into the following elements: (1) peaceable and adverse possession of land, (2) claim under a deed or deeds, (3) registration (recordation) of the deed or deeds, and (4) payment of taxes on the land. A suit to recover land clearly is barred by the statute only after these elements have coexisted continuously for a period of five years. The expression, "having peaceable and adverse possession thereof, cultivating, using or enjoying the same," is found in the ten and twenty-five year statutes as well as in the five-year statute. The three-year statute uses the simple expression, "in peaceable and adverse possession thereof."

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5 For discussions of the history and policy of limitation legislation, see 3 American Law of Property §§ 15.1, 15.2 (Casner ed. 1952); 4 Tiffany, Real Property §§ 1132-34 (3d ed. 1939).
Other statutes define "peaceable possession" and "adverse possession." Undoubtedly the concept of "peaceable and adverse possession" is the same in the various statutes. Hundreds of decisions have explored the concept and elaborated upon its meaning. Therefore, this Article will not deal with "peaceable and adverse possession." Rather, the topics for examination will be elements two through four, listed above. Consideration will be given to the elements which must exist in order for an occupier to establish ownership under the five-year statute, assuming that he has entered and possessed land in a manner which amounts to "peaceable and adverse possession, cultivating, using or enjoying the same."

II. Claim Under a Deed or Deeds

A. Does The Instrument Operate As A Deed?

The statute declares that the occupier must claim "under a deed or deeds." For purposes of the statute, a deed is an instrument which purports to convey land from a named grantor to a named grantee. A bond for title or contract for sale is not such an instrument.

In Massie v. Meeks a defendant who claimed title under an absolute deed to a prior party that was known by him to have been given as a mortgage could not set up the five-year statute as a defense. The statute contemplates a claim by an adverse possessor under a deed or deeds which purport to grant an interest that is immediate, beneficial, and possessory. It is immaterial under the statute that a deed in fact conveys nothing because the grantor owns nothing. The only requirements are that the instrument must be genuine and must pur-
port to convey an adequately described tract of land. A married woman, an administrator of an estate, or a sheriff may not have capacity, authority, or title to convey, respectively. Nevertheless, their deeds are sufficient under the five-year statute if they do not show nullity on their faces.

Frequently an adverse possessor offers a tax deed as a basis for his claim, and this type of instrument has been accepted as fulfilling the requirement of the five-year statute. However, the statute does not begin to run until two years after the tax deed was executed because the land conveyed thereby is subject to redemption during that period by the taxpayer. *Davis v. Hurst* was the first decision on the point, and therein the Texas Supreme Court said:

"While the tax-deed to Franklin could not be used as a muniment of title or as a basis for possession under the five-year statute of limitations until the period for redemption had expired, still it would be such deed after the expiration of the time, and, if duly registered while in abeyance, the registration would be good after it ripened into an absolute deed by lapse of time. It would not be necessary to record it again after the time of redemption had expired to constitute it a deed duly registered."

In *Beatty v. O'Harrow* the court offered a brief explanation why the statute does not begin to run until two years have elapsed after the tax deed has been executed: "During this period the possession of the purchaser is much like that of a mortgagee in possession. It is

17 Fry v. Baker, 59 Tex. 404 (1883) (no joinder by husband, but deed did not disclose her coverture). In Harris v. Wells, 83 Tex. 312, 20 S.W. 68 (1892), a deed executed by a husband was held sufficient which did not show on its face that the land was the separate property of his wife. *Accord*, Dupuy v. Dicks, 218 S.W. 49 (Tex. Civ. App. 1919) *error ref.*; State Nat'l Bank v. Roberts, 103 S.W. 454 (Tex. Civ. App. 1907).


21 Davis v. Hurst, City of Houston v. Darland, Pounds v. Richardson, Lindley v. Mowell, Bledsoe v. Haney, Beatty v. O'Harrow, all cited note 20 supra. In the *Lindley* case this rule was held to operate in favor of a stranger to the tax suit in whom no right of redemption rested.

22 14 S.W. 610, 610-11 (Tex. 1890).
subject, rather than adverse, to the right of the owner to repossess himself at any time by a redemption.\footnote{25}

A deed executed in fraud of creditors qualifies as a sufficient deed under the five-year statute. The statute begins to run immediately against a creditor of the grantor who has reduced his lien to judgment and perhaps also against one who has a matured claim.\footnote{26} After the statute has run, the creditor can neither set aside the deed nor levy directly on the land.\footnote{27} Also, a suit by a creditor to cancel a deed executed in fraud of creditors may be barred by the four-year statute governing the bringing of personal actions; but this statute is not a real barrier because a creditor may proceed directly to fix a judgment lien upon the land.\footnote{28}

A deed procured by the fraud of a grantee undoubtedly qualifies as a sufficient deed under the five-year statute as against persons unconnected with the grantor. But as against the grantor special considerations either may postpone or may prevent the operation of the statute to an extent not fully known at present. \textit{Deaton v. Rush}\footnote{29} established that if a deed is procured by fraud, the grantor cannot sue to recover the land until after he has obtained a decree cancelling the deed. Consequently, the cause of action to recover the land does not accrue until after the deed is cancelled, and therefore the statutes of limitation pertaining to realty do not begin to run until the date of cancellation. Incidental relief for recovery of land may be sought in a suit for cancellation of a deed,\footnote{30} thereby preventing the statutes of limitation from beginning to run as of the date of cancellation. If judgment for only cancellation is had, at least the ten-year statute\footnote{31} will begin on run from that time, and the defendant

\textit{\textsuperscript{26}}Hartman v. Hartman, 135 Tex. 596, 138 S.W.2d 802 (1940); Eckert v. Wendel, 120 Tex. 618, 40 S.W.2d 796 (1931), noted in 10 Texas L. Rev. 371 (1932); White v. Pingenot, 49 Tex. Civ. App. 461, 90 S.W. 672 (1905) error ref.; Stern v. Marx, 23 Tex. Civ. App. 206, 56 S.W. 93 (1900) error ref.
\textit{\textsuperscript{27}}Cates v. Clark, 24 S.W.2d 410 (Tex. Civ. App. 1910) error ref.
\textit{\textsuperscript{28}}Tex. Rev. Civ. Stat. Ann. art. 5529 (1958). The four-year limitation barring suit for cancellation of a deed does not begin to run until the fraud is discovered or should have been discovered through the exercise of ordinary care. Cartwright v. Minton, 318 S.W.2d 449 (Tex. Civ. App. 1958) error ref. n.r.e.
\textit{\textsuperscript{29}}A direct levy upon the land by a creditor is allowed because a conveyance in fraud of creditors is null and void as to them, both legal and equitable title remaining in the debtor for the purpose of satisfying debts. Texas Sand Co. v. Shield, — Tex. —, 381 S.W.2d 48, 54-55 (1964); Eckert v. Wendel, 120 Tex. 618, 40 S.W.2d 796 (1931).
thereafter may acquire ownership by peaceable and adverse possession under this statute. There is some doubt whether the five year statute will run because the question of whether a deed cancelled by judicial process qualifies as a deed under the five-year statute presently is unanswered. Of course, the four-year statute barring suit for cancellation of a deed may run, in which event the deed is no longer subject to avoidance and no suit for recovery of the land ever can be brought.

Ordinarily, an occupier under the five-year statute is named as grantee in the last deed under which he claims. But a few cases have arisen in which an occupier has claimed under a deed taken in the name of a third party. In these cases the assertion of the five-year statute has been allowed. One may question, however, whether the policy of notice is served if an occupier is permitted to claim under a deed with which he apparently has no connection.

A Texas statute provides expressly for the tacking of peaceable and adverse possession. Privity of estate must exist between the successive occupiers; i.e., an intentional transfer of rights between these parties must occur. The language of the five-year statute ("claiming under deed or deeds") indicates that the legislature contemplated that successive periods of peaceable and adverse possession could be tacked, and Texas courts have so held without special comment in many cases. The language also indicates that if one occupier takes over what another occupier had, generally privity of estate must be achieved by deed. An exception arises if an adverse possessor claims as an heir or devisee of another. It is accepted that an occupier without a deed may claim under the five-year statute through an ancestor or testator who had a sufficient deed.

A deed void on its face does not satisfy the five-year statute. But

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80 However, see note 50 infra.
82 See note 26 supra.
84 Peaceable and adverse possession need not be continued in the same person, but when held by different persons successively there must be a privity of estate between them." Tex. Rev. Civ. Stat. Ann. art. 5516 (1958).
if a deed is void only because of facts and circumstances (other than forgery) extrinsic to its face, it will be an entirely adequate instrument. This conclusion is derived from a considerable number of cases in which an occupier has gained ownership of land under the statute through a deed that conveyed nothing. The most common ground for asserting that a deed is void on its face is insufficiency of or error in the description of the land conveyed thereby. This challenge has been sustained in a number of cases.\(^7\) In order to be valid in this respect, a deed must contain a sufficiently definite description from which the land conveyed can be located and the boundaries thereof fixed with certainty. The requirement of a claim “under a deed or deeds” is coupled immediately in the statute with the requirement of registration. Obviously, judicial insistence on a deed which sufficiently describes the land also is intended to complement the registration requirement, whose purpose is to afford precise and full notice to the world of exactly what the adverse possessor claims. Recordation of a deed containing an insufficient description of the land conveyed hardly perfects the requisite degree of notice contemplated in the statute. But frequently techniques of construction are utilized to make a description definite and certain,\(^8\) and parol evidence is admissible to give meaning to terms and expressions used in a deed.\(^9\) Mistakes are ignored or explained away if enough remains to constitute a definite and certain description.\(^10\)

Forgery nullifies a deed for the purposes of the statute. One cannot rely upon the statute if he “deraigns title through a forged deed” or through a deed “executed under a forged power of attorney.”\(^11\) But misrepresentation in a deed as to what a grantor owns or as to his relationship to a former owner does not constitute forgery.\(^12\) In *Olsen v. Grelle*\(^13\) defendants traced their title from a deed which had been executed under a forged power of attorney; but they had been in possession six or seven years under later genuine, recorded deeds. When the suit was brought, the exception in the statute con-


\(^13\) 228 S.W. 927 (Tex. Comm. App. 1921).
cerning forgery was worded as a proviso "that this article shall not apply to any one . . . who in the absence of this article would deraign title through a forged deed." It was held that defendants could not use the five-year statute of limitations as a defense. The court stated that the proviso made the five-year statute inapplicable "where invoked to perfect a title, regular on its face, but tainted with forgery." Adams v. Thompson was litigated after the most recent revision in 1925 of the Texas Civil Statutes, in which the clause, "who in the absence of this article," was omitted in the five-year statute.

The question before the court was the same as in the Olsen case. The court again rejected the argument that one who claims land under a deed in a chain of title which contains a forged deed may acquire ownership by holding the land for five years under a deed or deeds executed and recorded after the forgery: "The language of the proviso as it now reads is too plain and broad to warrant the construction limiting its application as contended by appellants."

It is clear that one holding under a recorded deed which is unconnected with the true claim of title can acquire ownership under the five-year statute. Therefore, it seems odd that such ownership cannot be acquired if the deed connects with the true claim through a forgery antedating the five years of peaceable and adverse possession. The notice given to the world is the same in both cases. Apparently the policy of the statute, as interpreted by the judiciary, is that forgery is a sufficiently serious wrong to vitiate any deed connected therewith in any way.

A deed is rendered a nullity under the statute if the grantee conveys his interest in the land or has his title thereto divested before he occupies the land under the deed. The same is true if an occupier tacks his possession to that of a predecessor who conveyed his interest in the land by an earlier deed. One cannot quarrel with the proposition that deeds should not qualify under the five-year statute if the grantees therein render them nugatory by their own acts.

46 Olsen v. Grelle, 228 S.W. 927, 928.
49 See text accompanying and following note 33 supra.
One may speculate whether a deed which never has been delivered to the grantee satisfies the five-year statute, a question to which a Texas court has not addressed itself yet. However, it has been indicated that if delivery out of escrow has been made by reason of mistake or wrongdoing, the deed nevertheless will be sufficient under the statute. If the grantor assents to the delivery out of escrow, the situation will be similar to that in Deaton v. Rush, which established that a grantor must sue for cancellation of a deed procured by fraud before bringing an action to recover the land. Suit for recovery of the land apparently would have to be deferred until the deed were set aside, at which time at least the ten-year statute would begin to run—the operation of the five-year statute in this situation is uncertain because it is not known whether a deed cancelled by judicial process constitutes a "deed or deeds" within the meaning of the statute.

B. Extent Of Interest That Can Be Claimed

It is fundamental that an occupier under the five-year statute gains ownership of only the land described in the deed or deeds under which he claims. The tax deed cases discussed earlier exemplify this principle. Sometimes an occupier holds under a deed or deeds which convey only an undivided fractional interest in a tract of land, only the surface of the land, or only the minerals underneath. In these instances the occupier merely gains ownership under the five-year statute of the interest described in the deeds.

A related matter is the extent of the interest that can be claimed by an adverse possessor who occupies under a quitclaim deed. A quitclaim deed conveys "all rights, title and interest" which a grantor has in land, or the granting clause therein may "remise, release and forever quitclaim" a described tract of land. Regardless

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85 13 Tex. 176, 252 S.W. 1023 (1923); see note 27 supra and accompany text.
86 "Limitation under . . . [the] statute is available only when the party asserting it claims under a deed purporting to convey the property." Cass v. Green, 224 S.W. 938, 939 (Tex. Civ. App. 1920). See also Moore v. McDonald, 298 S.W. 662 (Tex. Civ. App. 1927) error dism.
87 See text accompanying notes 20-21 supra.
89 In order to comply with the requirement of payment of taxes under the five-year statute, it is sufficient that the occupier pays taxes proportionate to the extent of his claim. Club Land & Cattle Co. v. Wall, supra; Dowdell v. McCardell, supra. For a discussion of the requirement of payment of taxes under the five-year statute, see text accompanying notes 85-107 infra.
of the form of language used, the effect of a quitclaim deed is to transfer whatever interest the grantor has with no covenant or representation by him that any particular estate or title is conveyed. Can an occupier who holds under a quitclaim deed assert any greater title under the five-year statute than that which his grantor had? One might deduce a negative answer from the broad principle that no interest can be claimed in excess of that which the deed purports to grant, but the decisions have established a contrary rule. An occupier can assert a fee simple title under the statute even though his deed is a quitclaim and actually conveyed nothing. In *Parker v. Newberry* the Texas Supreme Court explained this result as follows:

Recurring to the first mentioned [question], we think that the rule that a purchaser, who takes only such interest as is conveyed by a quitclaim deed technically, cannot, under that character of conveyance, be protected as a purchaser in good faith, etc., has no application where such deed is made the basis of the five-years plea of limitation. Notice, good faith, and the payment of a valuable consideration are important elements, and may become vital, in a controversy where title is asserted under a quitclaim deed between parties deraigning their rights from a common vendor. They cannot be relied on to support limitation, and form none of the elements of that plea. The character of the instrument would be unimportant if it be valid . . . as a conveyance, and belongs to that class of written instruments. The essential requisites of a deed necessary as the foundation of the plea are that it shall by its own terms, or with such aids as the law authorizes, assume or purport to operate as a conveyance. . . . It is not necessary that it should emanate from one proving title, or that it shall convey the title. . . . The instrument in this case . . . has all of the constituent parts of a complete deed. In further explanation of the requirement of a deed, the court said the following in another decision:

The law of limitation of actions for land is founded upon notice. The title by limitation ripens, primarily, only because, in such manner and for such period of time as the different statutes require, notice is given of the hostile claim. Under the three years statute, it is afforded by possession under title or color of title. Under the ten years statute, simply by possession. And under the five years statute, it is given by possession, the payment of taxes, and the registration of a naked deed.

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69 83 Tex. 428, 430, 18 S.W. 815, 816 (1892).
It is not the character of the deed as a conveyance of title which, under the five years statute, helps to put limitation in motion. It assists the operation of limitation under that statute merely because of the notice given of the adverse claim by its registration as an instrument which purports to convey, not the title, but the land. (Emphasis added.)

One may approve wholeheartedly the decisions holding that a quitclaim deed is sufficient under the five-year statute to support a claim for full title. The deed effectuates the parties' intent in the common situation in which the parties desire that a full title should pass but are content to relieve the grantor of any obligation if it later becomes apparent that his title was defective. Persons inspecting a registered quitclaim deed understand its nature, and it is not unfair to hold them to notice that the grantee is asserting a full title.

To be distinguished from the quitclaim deed is a deed which is limited specifically to conveying only the interest which the grantor actually either owns or has acquired as an heir. In this situation an occupier has not been allowed to claim an interest greater than that which is described and limited expressly in the deed under which he claims. It is a matter of construction whether an instrument is a quitclaim deed intended to convey the grantor's entire interest in land or is a conveyance of a particular right or interest specifically contemplated by the parties.

The doctrine of constructive possession operates under the five-year statute in the usual way. The owner has constructive possession of all of his unoccupied lands until an adverse possessor enters. After entry, the adverse possessor acquires constructive possession of all unoccupied lands described in his deed, and the statute runs as to all of such lands. An owner of land may prevent an adverse occupier from acquiring constructive possession of unoccupied land by entering and occupying a portion of land described in the deed. After the owner of the land leaves, it will be necessary for the adverse claimant to enter and to occupy an additional portion of the land described in order to establish constructive possession to the limits of his deed. The entry and occupation of additional land gives notice of a claim made under a registered deed that may include unoccupied lands.

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59 Livingston v. McMullen Oil & Realty Co., 289 S.W.2d 791 (Tex. Civ. App. 1956) error dism. (“conveyance of minerals ‘which may actually be owned by... grantor at this time’”); Lawrence v. Barrow, 117 S.W.2d 116 (Tex. Civ. App. 1938) (“all my right, title and interest that I own as an heir of Amos Barrow, deceased”).
Constructive possession by an occupier does not extend to unoccupied lands owned by someone having no connection with the owner of the occupied portion. However, an adverse occupier can acquire ownership of two separately owned tracts under one deed, but to do so he must enter both lands and must maintain five years' peaceable and adverse possession of portions of both tracts.

III. Due Registration of Deeds

To qualify under the five-year statute, an occupier must claim under a deed or deeds “duly registered.” Due registration means recordation of a deed which fulfills the requirements therefor. The purpose of the requirement of recordation is to supply public notice of the occupier’s claim to the “true” owner and to the world. Recordation also gives rise to a presumption that the deed actually was executed and delivered. The five-year statute does not begin to run until due registration has been accomplished, even though peaceable and adverse possession has begun earlier. The statute will run against an owner only after notice has been given to him through both peaceable and adverse possession and proper recordation.

Successive grantees may possess land for a five-year period during which it is claimed a limitation title has matured. It is possible to argue that the statute requires only that the first deed must be registered and that the occupier must claim under it. This argument prevailed in a few cases, but the bulk of authority holds that all deeds executed during the five-year period must be recorded. This rule is supported by an analysis of the statutory language. The statute mentions claiming under a “deed or deeds duly registered,” and the use of the plural alternative therein suggests that the legislative mind was aware that two or more successive grantees might claim during a five-year period. It is easy to infer that in the statute the legislature intended to provide for continuity in recordation from grantee to grantee.

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62 Simonds v. Stanolind Oil & Gas Co., 134 Tex. 332, 114 S.W.2d 226 (1938).
66 See text accompanying notes 34-35 supra.
68 Cases cited note 69 infra.
The statute does not say how promptly successive deeds should be recorded. Immediate recording of the deeds is undoubtedly too much to expect, and the courts have declared that recording is sufficient if effected within a reasonable time after the grantee receives his deed and goes into possession. A few days or perhaps a month is reasonable, but a year clearly is unreasonable. Various circumstances bear on whether or not a lapse of time is reasonable. In Dunn v. Taylor the court said: "But there was proof explaining the dates of the deeds. The time shown by the dates of the registration by parties, their homes, and the surrounding circumstances all can be considered by the jury. . . . What is a reasonable time may under certain circumstances become a question of fact, and proper to be submitted to a jury for its finding." If an unreasonable delay in registration by a successive grantee has occurred, the statute will stop running, and later the limitation period will start anew after adverse possession again is coupled with a properly recorded deed.

Of course, recording should be perfected in the county in which the land lies. The recordation statute prescribes that all deeds and conveyances of land "shall be recorded in the county where such real estate, or a part thereof, is situated." In Slaughter v. Hight the question arose as to the county in which a deed conveying land in two counties should be recorded in order to satisfy the five-year statute. The court relied on the language of the recordation statute and declared that recording in either county would make the deed "duly registered." Logic and policy support the holding. Peaceable and adverse possession of part of a tract of land gives notice to the owner that the occupier may be claiming all the tract. If the tract extends into two counties, the owner will be on notice that the deed may be recorded in either county.

An ordinary grantee of land has a considerable responsibility for the proper recordation of his deed. If he is lax in this regard, he may lose his property to a subsequent bona fide purchaser without notice.

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71 Cases cited note 69 supra.


74 See generally 1 Tiffany, Real Property § 1273 (2d ed. 1939).
However, he is not prejudiced by his laxity if the subsequent party had notice or did not pay value. But unlike a grantee, an occupier under the five-year statute apparently has an absolute responsibility to record properly the deed or deeds under which he claims. No case suggests that the requirement of registration is dispensed with or eased if the owner is aware of the occupier's claim under a deed and knows of the deed's contents. Solely by virtue of the statute, an unworthy occupier may gain a full title, and the presumed legislative sentiment is that in order to do so he should satisfy fully the statutory requirements.

Several types of technical defects in recording have prevented deeds from satisfying the recordation requirement of the five-year statute. In Carleton v. Lombardi a notary public took the acknowledgment of "T. W. Chandler" on a deed executed by "F. W. Chandler." There was evidence that the notary public made a mistake in writing "T" for "F" and that the recording clerk undertook to correct the recorded certificate. The court held that the defense of limitation failed because "the deed was neither acknowledged nor recorded properly." In Allison v. Baird Dev. Co., the claimants occupied land under a deed executed by "Mayer" but recorded as executed by "Mayes." Although the error seemed to be immaterial as far as public notice was concerned, the court on the authority of the Carleton case held that the deed was not duly registered and could not support limitation under the five-year statute. In Callen v. Collins the record of the certificate of acknowledgment of a deed was defective because it did not recite that the notary public knew the grantor as the person whose name was subscribed to the instrument. The court stated therein:

[T]he evidence fails to show title in Ivey under the 5 . . . year statute of limitation. . . . As it appears upon the record, this deed was not duly recorded, in that the certificate of acknowledgment, as shown by the record, was fatally defective, and we do not think that the fact that the deed was in truth properly acknowledged, and such acknowledgment properly certified by the officer, cures the defect in the record. The 5-year statute of limitation requires that the deed under which title may be acquired by 5 years' adverse possession shall be

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79 81 Tex. 355, 16 S.W. 1081 (1891).
80 The court stated, "The officer certified that T. W. Chandler was known to him, and that it was he who made the acknowledgment. The certificate that he knew the party must be held to include that he knew his name, and that he gave it correctly in the certificate. Presumptions cannot be indulged contrary to the facts stated in the certificate. An acknowledgment of a deed by a person named T. W. Chandler is not proof upon which one executed by F. W. Chandler may be lawfully recorded." Id. at 358, 16 S.W. at 1081-82.
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... means not only that the deed must be properly acknowledged and certified for record, but that the record itself must show this fact. 79

A miscellany of other defects have prevented proper recordation. Due registration of a deed is not effected if the certificate or acknowledgment lacks a notarial seal. 80 A certificate is inadequate if the agent of two persons who execute a deed appears before the notary to make the acknowledgment for them. 81 Until the enactment of recent legislation, 82 the omission of a material part of a privy acknowledgment by a married woman made her deed void and unacceptable for recordation if the deed showed on its face that her separate property was being conveyed. 83 If the list of pitfalls seems long, the adverse possessor should be cheered to know that the sufficiency of recordation is not affected if the records building burns down. 84

IV. Payment of Taxes

In order to qualify under the five-year statute an occupier of land must pay “taxes thereon, if any.” This requirement is stated in a simple phrase, and the courts have had numerous occasions to elaborate upon its meaning. The expression, “if any,” plainly indicates that if no taxes are imposed, the occupier will gain ownership by satisfying the other requirements of the statute. 85 The term “taxes” is not qualified, and presumably all taxes assessed against the land must be paid. State, county, city, and school district taxes certainly must be paid. 86 If the property already is on the tax rolls, “paying taxes” does not include rendering the land (i.e., reporting under oath to the tax-

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79 Id. at 625, 120 S.W. at 549.
84 Fitch v. Boyer, 51 Tex. 336 (1879).
85 Holbert v. City of Amarillo, 294 S.W.2d 243 (Tex. Civ. App. 1956) error ref. n.r.e.
86 Wichita Valley Ry. v. Somerville, 179 S.W. 671 (Tex. Civ. App. 1915). In Wixom v. Bowers, 152 S.W.2d 896 (Tex. Civ. App. 1941) error ref. w.o.m., it was assumed that drainage district taxes should be paid.
88 The court stated further, “If it is required for the purpose of additional notice, each tax roll, whether state, county, city, or independent school district, must each show the payment in order to give such notice; for each are [sic] required to be kept and the payment on each is notice of an adverse claim.” 179 S.W. at 675.
ing authorities that one owns certain property). But perhaps render-
ing is required if the taxing authorities are unaware of the tract in question. If a tax assessor erroneously fails to assess a particular tax on the land, it has been held that the claimant may satisfy the five-year statute by paying all other taxes levied on the land during the required period.

Taxes must be paid on the land described in the deeds under which the claim is made; tax payments on lands not described therein are ineffective to perfect a claim under the statute. The claimant has the responsibility for making his tax payments under a correct description of the land, and good intentions are no substitute therefor.

In *Dutton v. Thompson* the defendant claimed land in one section, but rendered land in another section for the purpose of tax assessment. The Texas Supreme Court stated:

Appellee's statement that he paid the taxes on the land for the years enumerated, in view of his rendition, amounts to no more than an expression of an intention to pay on the land, and this cannot override the conceded fact that his rendition did not cover the land in controversy, and the further fact that the tax roll was the collector's warrant for demanding and receiving taxes. That payment must be held to have been made under the assessment, in the absence of evidence other than such as appears in the record.

It is not very clear why the legislature made the payment of taxes necessary in order to sustain the defense of limitation based on the five years' adverse possession under a recorded deed. It may have been . . . to require evidence of good faith on the part of the occupant, to secure to the state and its municipal subdivisions the payment of taxes due on the land, or to give further notice of the adverse claim and of the time it would mature into title, if possession be not interrupted, than afforded even by adverse possession under a recorded deed. If the latter be the reason, then there would be the strongest reasons for holding that the assessment—a public instrument—should show that claim to the particular land was thus made by the occupant or person for whom he may hold . . . .

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88 Ledyard v. Brown, 27 Tex. 393 (1864). "The position . . . that if there were no taxes assessed . . . , Ledyard was relieved from the necessity of proving the payment of the taxes upon it to make good his title . . . , cannot be sustained. It is the duty of a party claiming land, to render it to the officer whose duty it is to assess it." *Id.* at 405.
89 Wixom v. Bowers, 112 S.W.2d 896 (Tex. Civ. App. 1941) *error ref.* *w.o.m.*
92 85 Tex. 115, 19 S.W. 1026 (1892).
93 *Id.* at 119, 19 S.W. at 1028.
It has been stated that under the five-year statute taxes must be 
paid on all the land described in the claimant's deed. This statement 
is true if the issue is whether or not ownership of the entire tract 
described in the deed has passed by limitation. But it would seem 
possible for an adverse occupier to claim something less than the 
entire tract and to comply with the statutory requirement by paying 
taxes coextensive with this claim. Certainly if constructive possession 
is prevented by the true owner's occupation of part of the land de-
scribed in the deed, the adverse occupier should be able to acquire 
title to that part of the tract which he actually possesses by paying 
taxes thereon. If an occupier claims only an undivided interest in 
land, it has been held that payment of taxes proportionate to the 
extent of his claim is sufficient under the statute.

Occasionally, the actual extent of land described in and conveyed 
by a deed may exceed the number of acres specified in the deed. In 
such a case one can agree that "where a grantee in a deed pays on 
the number of acres called for in his conveyance, actually believing 
that he is paying for the full quantity in his possession, . . . he should 
[not] be deprived of the benefit of the statute, because it may sub-
sequently be ascertained that his tract is somewhat larger than he 
believed it to be." One may doubt, however, whether an occupant 
should have the benefit of the statute if he learns early in the five-
year period that his deed covers seventy-three acres instead of fifty-
two acres and thereafter continues to pay taxes only on the lesser 
acreage.

Nothing in the statute declares that the delinquent payment of 
taxes will not satisfy the statutory requirement, and several decisions 
so held early in this century. But it now is established that an occupi-
plier must pay the taxes accruing on the land during the five-year 
period before they become delinquent; failure to do so in any in-
stance stops the running of the five-year statute and nullifies all 
efforts made by the occupier to comply therewith, so that he must

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64 Kelly v. Medlin, 26 Tex. 48 (1861); Starr v. Dunbar, 69 S.W.2d 816 (Tex. Civ. 
Hoeneke v. Lomax, 102 Tex. 487, 119 S.W. 842 (1909), payment of taxes on an unde-
cined part of the land claimed was held insufficient.

65 See paragraph accompanying notes 60-62 supra.

66 Club Land & Cattle Co. v. Wall, 99 Tex. 591, 92 S.W. 984 (1906); Dowdell v. Mc-


1899) error ref. The cases were supported by Snowden v. Rush, 19 Tex. 197, 13 S.W. 189 
(1890).
start all over again to satisfy its requirements.100 In the leading case on the point, the supreme court said:

The Legislature's conclusion is . . . evident that the owner should not be deprived of his land by reason of his failure to sue for only half of ten years, unless he has been chargeable with notice of the adverse claim, not only through peaceable and adverse possession, but through a deed or deeds duly registered, and also through the payment of taxes.

By payment of taxes, as by registration of deed, does the possessor give notice, in a public office and in an unequivocal manner, of not only a claim of right but of the extent of that claim. There is nothing open to inspection in a public office to give an owner notice of the number of acres claimed by a naked possessor out of a tract of larger acreage than that in his actual possession. The number of acres is declared and shown in the office of the tax collector and in the office of the county clerk, when taxes are paid and when a deed, within the meaning of the five-year statute, is recorded. The fact that the deed records may furnish the more satisfactory notice does not prevent the tax payments from also furnishing notice. The statute requiring notice through both channels, notice through one, even though the better, cannot suffice.

Regular and unbroken tax payments, moreover, have a peculiar and distinct value in negativing an abandonment of the possessor's claim.

As certainly as the payment of taxes implies the assertion of a claim of right, in an open and public way, which may reach the owner, so the discontinuance of tax payments signifies the abandonment of such claim.101

The cases demonstrate that the statute begins to run when the conditions of proper registration of a deed and adverse possession coexist102 and does not cease to run thereafter if taxes are paid before they become delinquent. In other words, the running of the statute is postponed if and when the third condition of timely payment of taxes fails to coexist with the other two conditions. Of course, the taxes must be paid before becoming delinquent during five successive years.103 The fact that taxes were delinquent before or after the five-year period does not prejudice the occupier under the statute.104

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102 See text accompanying note 65 supra.

103 Cases cited note 100 supra; Murphey v. Welder, 38 Tex. 235 (1883); Gramm v. Coffield, 116 S.W.2d 1089 (Tex. Civ. App. 1938) error dism.

The burden of proof concerning payment of taxes (and the other elements of the five-year statute) is on the occupier. Proof of payment of taxes before they became delinquent can be made by receipts, by official records, and by direct and circumstantial evidence. But a tax collector's certificate that no taxes are due is not of itself sufficient proof of payment before the taxes became delinquent.

The reasons stated by the Texas Supreme Court for requiring that taxes be paid before delinquent are entirely convincing. An occupier hardly could be allowed to wait to see whether his claim were challenged during a five-year period before paying the accumulated taxes for that entire period. A requirement in terms of delinquency of taxes is more practical than, for example, one establishing annual periods within which the taxes must be paid. Notice of an adverse claim is given when taxes are paid, and the occupier should not be permitted to postpone this notice for an indefinite time.

V. CONCLUSION

The five-year statute under discussion has a period one-half that of the general statute of limitation in Texas. The ten-year general statute allows acquisition of ownership through peaceable and adverse possession, and no other requirement is imposed. The five-year statute under discussion operates over a relatively short period and, in addition to the requirement of peaceable and adverse possession, requires a claim under a deed or deeds duly registered and the payment of taxes. It is undoubtedly in accordance with legislative intent that the courts have insisted upon full satisfaction of these additional requirements.

The decisions concerning defects in recording seem highly technical. If a deed or deeds are accepted for registration and the grantee or grantees enter thereunder, the notice to the "true" owner and to the world seems unaffected if the grantor's name was transcribed incorrectly, a notarial seal was left off, or phrases in the certificate were omitted. Nevertheless, the statute calls for "duly registered" deeds, and the courts have been on firm ground in adhering to the legislative language. Among the technical defects that

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107 Acklin v. Paschal, 48 Tex. 147 (1877).
109 See notes 75-84 supra and accompanying text.
prevent due registration, it is not easy to distinguish between those which are material and those which are immaterial in the operation of the five-year statute. One can understand the judicial tendency to resolve the question by requiring an occupier attempting to gain title in five-years to accomplish everything that is meant by "due registration."

The course of decisions concerning payment of taxes has been wholly satisfactory. The requirement that taxes must be paid before becoming delinquent\(^\text{10}\) accords with common sense and insures that notice from the payments will come at regular intervals while the five-year period is running. The payment of taxes has a special virtue because it defines the occupier's claim and informs the world thereof. The requirement should not be weakened, and the decisions show no tendency in this direction.

The tests imposed for determining whether an instrument serves as a deed under the five-year statute have been drawn from general rules governing conveyancing. The distinction between deeds valid or void on their face\(^\text{11}\) is a workable one. In some cases one may question whether, from the standpoint of notice, the insistence on a sufficient description is necessary in view of the occupation of the land by the claimant.\(^\text{12}\) Frequently, however, the claimant does not occupy all the land which he believes his deed describes. The statute requires a registered deed, which means that notice of what is claimed should be given to the world. The burden properly is placed on the occupier to ensure that his deed or deeds are sufficiently certain to indicate the bounds of the land claimed.

The cases dealing with forged instruments\(^\text{13}\) have taken a turn which needs correcting. As the decisions now stand, occupier A who claims land under a single deed executed by a stranger to the title can acquire ownership after five years, but occupier B who claims under a similar deed which is in a chain of title leading to a forged deed (or to a deed executed under a forged power of attorney) of twenty-five years ago cannot acquire ownership under the five-year statute. This amounts to unequal treatment between occupiers A and B. No good reason exists for visiting such a drastic consequence on an occupier who otherwise fully satisfies the requirements of the statute with a genuine deed or deeds during five years of peaceable and adverse possession. It is hoped that the decisions which make this

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\(^{10}\) See text accompanying notes 99-104 supra.

\(^{11}\) See text accompanying and following note 36 supra.

\(^{12}\) See text accompanying notes 37-40 supra.

\(^{13}\) See text accompanying notes 41-47 supra.
distinction will be overruled. In the alternative it is suggested that the statute be amended to substitute for the last two sentences the following:

The benefits of this article shall not extend to one who deraigns title through a forged deed (or deed executed under a forged power of attorney) executed during the five years of peaceable and adverse possession relied upon to establish limitation title.

The five-year statute of limitation has been a worthy and desirable part of the system of limitations of actions for the recovery of land in Texas. On the whole its operation is clear and is satisfactorily understood. It is expected that the statute will continue to have an important role in the adjudication of titles in the future.