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# Curative Acts and Limitations Acts Designed to Remedy Defects in Florida Land Titles—IV

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# CURATIVE ACTS AND LIMITATIONS ACTS DESIGNED TO REMEDY DEFECTS IN FLORIDA LAND TITLES — IV*

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## PART IV — CURATIVE ACTS WITH LIMITATIONS PROVISIONS

In order to remedy title defects in factual situations that are not reached by either pure curative acts or the limitations acts upon which the doctrine of acquisition of title to land by adverse possession is based, another type of remedial statute has been devised. For these statutes, this writer has coined the term "curative acts with a limitations provision" to differentiate them from other limitations acts that serve a different purpose. They actually are limitations acts and differ from other limitations acts only with reference to the function they are designed to perform. Consequently, they are subject to the same rules that are applicable to other limitations acts.

Curative acts with a limitations provision are distinguished from mere curative acts by the fact that they do not purport to validate defects immediately upon their enactment. They are statutes designed to rectify stated irregularities in transactions or proceedings either (1) by limiting the time for the assertion of the invalidity of a transaction or proceeding completed before their enactment to a stated period after the passage of the act in question or (2) by requiring an attack on a transaction or proceeding consummated after their enactment, to be made, if at all, within a stated time after some step in the transaction or proceeding itself.

These statutes can cure any defect that can be remedied by a curative act, since any result capable of achievement by an act that validates an irregularity immediately upon the act's becoming effective is of course not prevented by the fact that the statute provides a period subsequent to its effective date during which the defect can be attacked. They can in addition perfect the imperfect title of a claimant of land and divest the title of the true owner if the true

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owner fails to attack the imperfect title within the period stipulated, provided the period is of reasonable length and provided there is available to the true owner during the running of the period a cause of action for the recovery of possession of the land. In such instances, vested rights of the true owner are destroyed, a result that cannot be achieved by a pure curative act.[1] Curative acts with limitations provisions, however, like all other limitations acts, can bar any right, vested or otherwise, provided the application of the act to the facts at hand does not violate constitutional safeguards.[2] It is evident, for example, that, subject to the foregoing qualification, they can validate the defective acknowledgement of a married woman even in jurisdictions in which a defect of this kind is beyond the reach of a mere curative act.

These acts are not recent innovations, although they had their origin at a time less remote than that of pure curative acts. Although most of the Florida statutes of this type were enacted during and subsequent to the land boom of 1925, a few were passed long before that event. Section 20 of chapter 1887 of the Laws of 1872, for example, provided that a delinquent taxpayer could not bring suit after one year from the record of a deed made "in pursuance of any sale of lands for taxes" to set aside the tax deed or to recover the lands from the grantee named in the tax deed.[3] A statute almost identical with the one just mentioned was enacted in 1874.[4] Chapter 6925 of the

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[1]Horton v. Carter, 253 Ala. 325, 45 So.2d 10 (1950); Fugman v. Jiri Washington Bldg. & Loan Ass'n, 209 Ill. 176, 70 N.E. 644 (1904); Merchants Bank v. Ballou, 98 Va. 112, 32 S.E. 481 (1899); *accord,* Forster v. Forster, 129 Mass. 559 (1880); Merrill v. Sherburne, 1 N.H. 199 (1818); Cromwell v. MacLean, 123 N.Y. 474, 25 N.E. 932 (1890); Summer v. Mitchell, 29 Fla. 179, 203, 10 So. 562, 566 (1892) (dictum); Inhabitants of Otisfield v. Scribner, 129 Me. 311, 314, 151 Atl. 670, 671 (1930) (dictum); Addison v. Fleenor, 65 Wyo. 119, 126, 196 P.2d 991, 993 (1948) (dictum).

[2]*E.g.,* Dunkum v. Maceck Bldg. Corp., 256 N.Y. 275, 176 N.E. 392 (1931); Meigs v. Roberts, 162 N.Y. 371, 56 N.E. 838 (1900).

[3]The decision in Carncross v. Lykes, 22 Fla. 587 (1886), drastically curtailed the effectiveness of this statute. A tract of land had been indefinitely described on the assessment roll. It was held that the resulting tax deed therefore was not one made "in pursuance of any sale of lands for taxes" and was not within the scope of the statute. This case was followed in Grissom v. Furman, 22 Fla. 581 (1886), in which the township and range numbers of a tract had been reversed on the assessment roll and the land had been described both there and in the tax deed as a fractional part of a designated section without specifying which part was intended.

[4]Fla. Laws 1874, c. 1976, §63. It was held in Sloan v. Sloan, 25 Fla. 53, 5 So. 603 (1889), that a tax deed resulting from an assessment made by the county collector instead of by the assessor was not one made "in pursuance of any sale of

Laws of 1915 provided that conveyances theretofore made to a grantee with the word "trustee" appended to his name should, in the absence of a designation of the beneficiaries or purposes of the trust in the conveyance or in a declaration of trust recorded at the time of the recording of the conveyance or within seven years thereafter, have the effect of passing to the grantee a fee simple estate with power to convey the legal and beneficial interest, unless the validity of the conveyance should be attacked within six months of the effective date of the act.[5]

Curative acts with limitations provisions were at first most frequently passed in Florida and elsewhere with reference to defective tax deeds; but others dealing with other matters, as, for example, the Florida statute last mentioned, have since been enacted. Some of the more recent acts of this type have a very extensive scope.

A sudden increase in the number of real estate transactions and a rapid, though often temporary and illusory, increment in land values accompanied the boom of 1925.[6] This situation focused attention on the fact that in Florida, as in other jurisdictions, many land titles are defective. In an attempt to alleviate the resulting difficulties numerous remedial statutes were enacted. Limitations provisions were incorporated in some of the acts passed at that time[7] in order

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lands for taxes" within the terms of this statute. In Townsend v. Edwards, 25 Fla. 582, 6 So. 212 (1889), it was held to be error for the trial court to refuse to permit the introduction in evidence of the assessment roll for the purpose of showing that the land had not been assessed for the year for which the tax deed issued and that consequently it was not within the validating provision of this act. In Bird v. Benlisa, 142 U.S. 664 (1892), the four Florida cases cited in this footnote and the preceding one were followed in holding that when land is not assessed by an official or accurate description the resulting tax deed is not within the scope of this Florida statute.

[5]This statute as amended by Fla. Laws 1919, c. 7838, §10(11), now is found in FLA. STAT. §689.07 (1955). Among the changes effectuated by the amendment was the deletion of the limitations provision.

[6]The existence of this boom, the numerous speculative transactions that characterized the period, the disastrous collapse in 1926, and the resulting deflation of real estate values are to such an extent matters of common knowledge that the Court takes judicial notice of them. Mahood v. Bessemer Properties, Inc., 154 Fla. 710, 18 So.2d 775 (1944); Harbeson v. Mering, 147 Fla. 174, 2 So.2d 886 (1941); Coral Gables v. State, 128 Fla. 874, 176 So. 40 (1937); Smith v. Massachusetts Mutual Life Ins. Co., 116 Fla. 390, 156 So. 498 (1934).

[7]*E.g.*, Fla. Laws 1925, c. 10168 (this act as amended by Fla. Laws 1941, c. 20954, §14, now exists as FLA. STAT. §95.22 (1955); Fla. Laws 1925, c. 10171, now FLA. STAT. §95.23 (1955).

to obtain the increased effectiveness that curative acts with limitations provisions have over pure curative acts. Many of the more recent remedial acts also are of this type.[8]

*Importance of Ascertaining Exact Scope of Act*

That curative acts with limitations provisions and pure curative acts operate only on factual situations that come within their terms may seem too obvious to deserve mention. These acts – particularly those of the former type – are often so worded, however, that a casual reading will lead one to believe them to be applicable to situations that actually are not within their scope.

In *Thompson v. Thompson*,[9] for example, the Florida Court held that a void gratuitous conveyance of homestead from a husband to his wife was validated as against the husband and the children of the couple by the lapse during the life of the husband of the limitations period of twenty years from the record of the deed, which is established by section 95.23 of Florida Statutes 1955. While it is the opinion of this writer, as is indicated in detail hereinafter, that the application of this statute to the facts at hand violated constitutional principles, the situation is within the language of the statute. Immediately after quoting the statute, however, the Court made these statements:

> "F.S. §95.2b, F.S.A. has reduced the limitation to ten years.
> "F.S. §694.08, F.S.A. validates instruments of record of more than seven years which are defective by reason of execution."

Although the reference to these statutes was probably made merely to call attention to the legislative policy concerning defective titles, it is couched in such terms as to suggest that they are applicable to the question before the Court. Any inference to that effect is unwarranted. Each statute merely purports to validate under stated circumstances instruments that are subject to such defects as im-

[8] *E.g.*, FLA. STAT. §§95.26-.35, 192.48, 196.09-.11, 692.03, 694.04, 694.08, 695.01, 695.03, 695.05, 695.20 (1955). No attempt is made herein to set forth all of the numerous Florida curative acts and curative acts with limitations provisions. A number of them will be described, however. At least most of the Florida statutes of this kind that were in effect in 1948 are discussed in an article by William H. Rogers in 22 FLA. L.J. 153 (1948) entitled "Florida Curative Statutes."

[9] 70 So.2d 555 (Fla. 1953).

perfections in acknowledgments and relinquishments of dower or omissions of seals and witnesses. The validation of a gratuitous conveyance of homestead by an owner who has children is not within their scope. Section 694.08, furthermore, by its own terms does not cure even the defects to which it is directed unless one or more conveyances of the land or of parts of it have been executed and recorded by the parties claiming under the defective instrument. There had been no such conveyance by the grantee wife in the *Thompson* case.[10]

Section 693.03 of Florida Statutes 1955 is a statute that can be misconstrued as applying to situations that actually are beyond its scope. It provides that the acknowledgement by a married woman of deeds, relinquishments of dower, and other instruments is necessary to entitle them to be recorded, but that no private examination of her separate from her husband is required for any purpose. After stipulating that the acknowledgment of an instrument by a married woman does not constitute any part of its execution, it sets forth a suggested form for acknowledgments and provides than an acknowledgment substantially in that form is sufficient for use by any individual. The limitations provision of the act reads:

> "All acknowledgments by a married woman in accordance with §693.03, as hereby amended, made before May 13, 1943, are hereby validated, unless the same shall be questioned in a court of competent jurisdiction within one year after May 13, 1943."

It is to be observed that while this statute, in the case of an instrument executed by a married woman on or after May 13, 1943, both eliminates her acknowledgment as a prerequisite to the validity of the instrument and renders unnecessary her separate acknowledgment for any purpose, the limitations provision with reference to acknowledgments made by a married woman before that date purports to validate only the omission of her separate acknowledgment. The total omission of an acknowledgment of an instrument executed by a married woman before May 13, 1943, is not within the terms of the provision.

A question exists, also, as to the scope of the validating provision

[10]The grantee wife in the *Thompson* case had devised the land to the defendant. This devise cannot be regarded as a subsequent recorded conveyance, particularly since her will had not even been probated when the litigation began.

of section 689.11 of Florida Statutes 1955.[11] This statute empowers one spouse to convey directly to the other, without the joinder of the grantee,[12] as effectually as if they were not married. It specifies, too, that a spouse holding a fee simple title can create an estate by the entirety by conveying to the other spouse by a deed in which the purpose to create that estate is stated. And it declares:

> "(2) All deeds heretofore made by a husband direct to his wife or by a wife direct to her husband are hereby validated and made as effectual to convey the title as they would have been were the parties not married;
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> ". . .
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> "(4) Provided further, that this section shall not apply to any conveyance heretofore made, the validity of which shall be contested by suit commenced within one year of the effective date of this law."

Section 689.11 of Florida Statutes 1941,[13] of which the present act is an amendment, is identical with the present act except that it contains no authorization for one spouse so to convey to the other as to make the grantee a tenant by the entirety with the grantor. It contains the same validating provision with reference to deeds previously executed that is found in the present act. The validating provision of the present act is not needed, therefore, with reference to the conveyances from one spouse to the other that were authorized by the act of 1941 or that had been cured by the expiration of the one-year limitations period of that act.[14] It can consequently be

[11]Enacted in its present form by Fla. Laws 1947, c. 23964.

[12]This statutory provision rendering unnecessary the joinder by a grantee spouse of course does not eliminate the necessity of joinder by a grantee spouse that is required by FLA. CONST. art. X, §4, when the grantor spouse conveys to her his homestead. Estep v. Herring, 154 Fla. 653, 18 So.2d 683 (1944); Jahn v. Purvis, 145 Fla. 354, 199 So. 340 (1940); *cf.* Church v. Lee, 102 Fla. 478, 136 So. 242 (1931).

[13]Enacted by Fla. Laws 1941, c. 20954, §6, effective July 1, 1941. This act was in turn an amendment of Fla. Laws 1903, c. 5147, §1, which authorized a conveyance by a husband directly to his wife. The act of 1903 contained a pure curative provision that with certain exceptions purported to validate at once conveyances made before its effective date by a husband to his wife. It did not, however, authorize even prospectively a conveyance by a wife directly to her husband.

[14]When the title of one in possession of land has been perfected by the expiration of the period of a limitations act, a subsequent change in the act does not divest him of it. *E.g.*, Warren County v. Lamkin, 93 Miss. 123, 46 So. 497 (1908); Howell v. Rowe, 85 Misc. 560, 147 N.Y. Supp. 482 (Sup. Ct. 1914).

contended that the validating provision in question was designed to cure at the expiration of its limitations period prior conveyances in which one spouse had so conveyed to the other as to attempt to create a tenancy by the entirety,[15] since there is no other purpose that it can serve.[16]

On the other hand, it is to be observed that although the present act authorizes prospectively conveyances by one spouse to the other, both generally and when the conveyances are designed to make the spouses tenants by the entirety, its validating clause merely provides that "all deeds heretofore made by a husband direct to his wife or by a wife direct to her husband are hereby validated and made as effectual . . . as they would have been were the parties not married . . . ." It is arguable, therefore, that the validating clause is directed solely toward the common-law disability of one spouse to convey directly to the other.[17] If so, the statute cannot, in the case of an

[15]If reliance can be placed on the decision in Johnson v. Landefeld, 138 Fla. 511, 189 So. 666 (1939), the authorization of the present §689.11 for one spouse so to convey to the other as to create a tenancy by the entirety is superfluous; and so, too, is its validation of prior conveyances of this type in so far as concerns such conveyances made subsequent to the time when a spouse of the sex in question was empowered merely to convey generally to his spouse. The *Johnson* case, decided under a statute that merely authorized a husband to convey to his wife, upheld a conveyance from a husband to his wife for the purpose of making them tenants by the entirety; but its weight as an authority is weakened by the fact that the justices divided equally with reference to the question and thus automatically affirmed the decree of the trial court. The result of the *Johnson* case has been reached in a few other jurisdictions, *e.g.*, Cadgene v. Cadgene, 17 N.J. Misc. 332, 8 A.2d 858 (Sup. Ct. 1939), *aff'd*, 124 N.J.L. 566, 12 A.2d 635 (1940); Boehringer v. Schmid, 254 N.Y. 355, 173 N.E. 220 (1930); *cf.* Dutton v. Buckley, 116 Ore. 661, 242 Pac. 626 (1926). Some decisions have, however, adopted the contrary view, *e.g.*, Ames v. Chandler, 265 Mass. 428, 164 N.E. 616 (1929); Stone v. Culver, 286 Mich. 263, 282 N.W. 142 (1938); Dressler v. Mulhern, 77 Misc. 476, 136 N.Y. Supp. 1049 (Sup. Ct. 1912); *accord*, Union Guardian Trust Co. v. Vogt, 263 Mich. 330, 248 N.W. 639 (1933). See also 2 AMERICAN LAW OF PROPERTY §66 (Casner ed. 1952); 2 TIFFANY, REAL PROPERTY §432 (3d ed. 1939); Annot., 166 A.L.R. 1026 (1947), 137 A.L.R. 350 (1942), 132 A.L.R. 632 (1941), 62 A.L.R. 518 (1929).

[16]The force of this contention is weakened by the fact that FLA. STAT. §689.11 (1941), the predecessor of the present act, also validated at the expiration of its one-year limitations period prior conveyances generally from a husband directly to his wife, although such conveyances were already valid. Fla. Laws 1903, c. 5147, the predecessor of FLA. STAT. 1941, authorized the making of such conveyances subsequent to its effective date, and its curative provision purported to validate retroactively all conveyances of this kind made before its effective date.

[17]One spouse could not convey directly to the other at common law. 1 BL. COMM. *442; CO. LITT. *112a.

instrument executed by one spouse to the other before the effective date of the statute, supply the unities of time and title that at common law were prerequisite to the creation of a tenancy by the entirety[18] and that some jurisdictions regard as absent in a conveyance made by one spouse to the other.[19] Force is also given to the contention that such a conveyance is not within the validating provision of the statute by the fact that a conveyance from one spouse to the other to create a tenancy by the entirety is not a conveyance that would be valid if the parties were not married. A tenancy by the entirety can exist only when the co-owners are married.[20]

*Necessity of Allowing Reasonable Period for Bringing Action*

Defects in prior transactions that are beyond the remedial power of pure curative acts can be rectified by a curative act with a limitations provision only when the act continues, for a reasonable time after its passage, the enforceability of any previously existing chose in action based on the defect. This result is a corollary of the rule that any limitations act in order to bar existing choses in action must allow a reasonable period in which actions on them can be commenced.[21]

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[18]2 AMERICAN LAW OF PROPERTY §6.6 (Casner ed. 1952).

[19]*E.g.*, Stone v. Culver, 286 Mich. 263, 282 N.W. 142 (1938); Dressler v. Mulhern, 77 Misc. 476, 136 N.Y. Supp. 1049 (Sup. Ct. 1912). *Contra, e.g.*, Cadgene v. Cadgene, 17 N.J. Misc. 332, 8 A.2d 858 (Sup. Ct. 1939), *aff'd*, 124 N.J.L. 566, 12 A.2d 635 (1940).

[20]Morris v. McCarty, 158 Mass. 11, 32 N.E. 938 (1893); Simons v. Bollinger, 154 Ind. 83, 84, 56 N.E. 23, 24 (1900) (dictum); 2 TIFFANY, REAL PROPERTY §431 (3d ed. 1939).

[21]*E.g.*, Meyer v. Eufaula, 154 F.2d 943 (10th Cir. 1946); Mahood v. Bessemer Properties, Inc., 154 Fla. 710, 18 So.2d 775 (1944); Campbell v. Horne, 147 Fla. 523, 3 So. 2d 125 (1941); Western Holding Co. v. Northwestern Land and Loan Co., 113 Mont. 24, 120 P.2d 557 (1941); Toronto v. Sheffield, 222 P.2d 594 (Utah 1950); Steele v. Gann, 197 Ark. 480, 485, 123 S.W.2d 520, 523 (1939) (dictum); Hart v. Bostwick, 14 Fla. 162, 181 (1872) (dictum); Blevins v. Northwest Carolina Utilities, Inc., 209 N.C. 683, 686, 184 S.E. 517, 519 (1936) (dictum). Although the rule stated in the text is applicable to a chose in action belonging to a private person, it does not apply to a chose of the state itself. Thus a statute can without the allowance of a reasonable time extinguish immediately the right of the state or one of its political subdivisions to recover a delinquent excise tax. Lee v. Lang, 140 Fla. 782, 192 So. 490 (1939). And it can repeal as of its effective date a statute theretofore empowering a state to recover a penal sum in a civil action. Pensacola & A.R.R. v. State, 45 Fla. 86, 33 So. 985 (1903).

Periods of thirty days,[22] three months,[23] six months,[24] and one year,[25] respectively, for example, have been held to be sufficient for this purpose under most circumstances. By the generally prevailing view, this period can consist in part[26] or even exclusively[27] of

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[22]*Cf.* Mulvey v. Boston, 197 Mass. 178, 83 N.E. 402 (1908) (holding to be sufficient a period of 30 days in which actions could be brought by individuals to be precluded by a statute shortening a limitations period). *But cf.* Berry v. Ransdall, 61 Ky. (4 Met.) 292 (1863) (holding a period of 30 days to be unreasonably short for such a purpose).

[23]*Cf.* DeMoss v. Newton, 31 Ind. 219 (1869) (holding that a limitations period can thus be established retrospectively with respect to a right springing from legislative enactment but declining to pass unnecessarily on the question as to whether the rule is applicable in the case of a right arising from contract); Kozisek v. Brigham, 169 Minn. 57, 210 N.W. 622 (1926). *Contra,* Central Mo. Tel. Co. v. Conwell, 170 F.2d 641 (8th Cir. 1948).

[24]Kendall v. Keith Furnace Co., 162 F.2d 1002 (8th Cir. 1947); Tipton v. Smythe, 78 Ark. 392, 94 S.W. 678 (1906); Barnott v. Proctor, 128 Fla. 63, 174 So. 404 (1937); People v. Turner, 145 N.Y. 459, 40 N.E. 400 (1895), *aff'd,* 168 U.S. 90 (1897). *But cf.* Pearce's Heirs v. Patton, 46 Ky. (7 B. Mon.) 162 (1846); Sherman v. Nason, 25 Mont. 283, 64 Pac. 768 (1901); Blevins v. Northwest Carolina Utilities, Inc., 209 N.C. 683, 184 S.E. 517 (1936) (holding unreasonably short as to the existing controversy a 6-month period allowed before the taking effect retrospectively of a statute reducing an existing limitations period).

[25]Wolfe v. Phillips, 172 F.2d 481 (10th Cir. 1949); Campbell v. Horne, 147 Fla. 523, 3 So.2d 125 (1941); Krone v. Krone, 37 Mich. 307 (1877); Volz v. Steiner, 67 App. Div. 504, 73 N.Y. Supp. (1st Dep't 1902). *Contra,* Pereles v. Watertown, 19 Fed. Cas. 272, No. 10,980 (C.C.W.D. Wis. 1874) (involving an issue of municipal bonds largely owned in other states and abroad).

[26]*Cf.* Wooster v. Bateman, 126 Iowa 552, 102 N.W. 521 (1905); State v. Jones, 21 Md. 432 (1864); Merchants' Nat'l Bank v. Braithwaite, 7 N.D. 538, 75 N.W. 244 (1898); Reid v. Solar Corp., 69 F. Supp. 626, 637 (N.D. Iowa 1946) (dictum).

[27]Cummings v. Rosenberg, 12 Ariz. 327, 100 Pac. 810 (1909) (such period of 5 months and 10 days held sufficient); Mulvey v. Boston, 197 Mass. 178, 83 N.E. 402 (1908) (such period of 30 days held sufficient); Smith v. Morrison, 22 Pick. 430 (Mass. 1839) (such period of 5 months and 20 days held sufficient); Duncan v. Cobb, 32 Minn. 460, 21 N.W. 714 (1884); Eaton v. Manitowoc County, 40 Wis. 668 (1876); PATTON, TITLES §59 (1938); *cf.* Steele v. Gann, 197 Ark. 480, 123 S.W.2d 520 (1939) (such period of 90 days between the enactment and effective date of a statute shortening a limitations period held sufficient); Osborne v. Lindstrom, 9 N.D. 1, 81 N.W. 72 (1899) (such period of 9 months and 30 days held sufficient). *Contra,* Price v. Hopkin, 13 Mich. 318 (1865); Gilbert v. Ackerman, 159 N.Y. 118, 53 N.E. 753 (1899); Rochester Sav. Bank v. Stoeltzen & Tapper, Inc., 176 Misc. 140, 26 N.Y.S.2d 718 (Sup. Ct. 1941); Malossi v. McElligott, 166 Misc. 513, 2 N.Y.S.2d 712 (Sup. Ct. 1938); Hastings v. H. M. Byllesby & Co., 293 N.Y. 413, 420, 57 N.E.2d 737, 741 (1944) (dictum); Adams & Freese Co. v. Kenoyer, 17 N.D. 302, 307, 116 N.W. 98, 99 (1908) (dictum).

the time elapsing between the enactment of the statute and its effective date if the resulting interval is sufficient to constitute a reasonable time.

It is readily apparent that the upholding of very short periods in this connection may result in the extinguishment of choses in action of individuals who have had no real opportunity to learn of the change in the law. This writer investigated a point of Florida law at the request of a foreign attorney soon after the conclusion of the 1951 legislative session. The question seemed easy of solution, since it had long been settled by existing Florida decisions. No statute concerning it had been passed at previous sessions, and a careful search of such slip laws as were then available and of the usually adequate complete index summary of the laws of the 1951 session indicated that the matter was still unaffected by statute. He was embarrased by the necessity of telegraphing, several days after submitting his report, that an incidental reading of the *Lawyer's Weekly Report* of a national service had disclosed that the rule in point had after all been changed by a new statute that had become effective shortly before the happening of the event that gave rise to the inquiry. And, to add injury to insult — if an old phrase may be reversed in a not entirely appropriate context — the innovation curtailed greatly the interests of the correspondent's client.

To extinguish in a period of much less than a year existing choses in action that are for the first time brought within the scope of a statute of limitations is indeed to subject laymen unnecessarily and with a vengence to the consequences of their lack of knowledge of new law of which they can scarcely be expected to have information.[28] In many jurisdictions, however, this argument must be addressed to the legislature rather than to the court. And while a six-months period of this kind has been upheld in Florida,[29] it can be observed that in enacting new statutes containing limitations provisions the

[28]See Adams & Freese Co. v. Kennoyer, 17 N.D. 302, 116 N.W. 98 (1908). In Cranston v. New Process Fibre Co., 74 A.2d 818 (Del. Sup. 1950), however, the court, in sustaining as reasonable a 6-months grace period prior to the taking effect retrospectively of a shortened limitations period, stated that if the usual lapse of a year between the close of the session and the printing of the session laws is a proper matter for judicial notice, so also is the fact that information about the new laws is disseminated by daily press reports of the activities of the legislature and by calendars available upon request that give the title and status of pending and enacted bills.

[29]Barnott v. Proctor, 128 Fla. 63, 174 So. 404 (1937).

Florida Legislature has in most instances in recent years allowed a period of a year or longer.

In the absence of a constitutional prohibition, a statute can shorten, even as to existing causes of action that have not been barred by the prior law, a previously established limitations period, provided it allows a reasonable time in which they can be enforced.[30] And it has occasionally been held that even when the period allowed by such a statute is unreasonably short, an individual is precluded from prosecuting a claim within its scope when he refrains from bringing his action for a time subsequent to the enactment of the statute that would have been reasonable if it had been the period provided by the statute.[31] In most decisions in which this principle would have been relevant, however, the courts have refrained from applying it to the facts before them.[32] In some of these cases so great a delay by

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[30]*E.g.*, Terry v. Anderson, 95 U.S. 628 (1877) (period of 9 months and 17 days held reasonable); Steele v. Gann, 197 Ark. 480, 123 S.W.2d 520 (1939) (period of 90 days held reasonable); Hart v. Bostwick, 14 Fla. 162 (1872) (decided before the inclusion in the state constitution of the provision of §33 of art. 3 of the present constitution that no statute shall be enacted that shortens "the time within which a civil action may be commenced on any cause of action existing at the time of its passage"); Collier v. Smaltz, 149 Iowa 230, 128 N.W. 396 (1910); Wooster v. Bateman, 126 Iowa 552, 102 N.W. 521 (1905); Mulven v. Boston, 197 Mass. 178, 83 N.E. 402 (1908) (period of 30 days held reasonable); Osborne v. Lindstrom, 9 N.D. 1, 81 N.W. 72 (1899) (period of 9 months and 30 days held reasonable); Cummings v. Rosenberg, 12 Ariz. 327, 329, 100 Pac. 810, 811 (1909) (dictum); Dee v. State Tax Comm'n, 257 App. Div. 531, 535, 13 N.Y.S.2d 719, 722 (3d Dep't 1939) (dictum); Blevins v. Northwest Carolina Utilities, Inc., 209 N.C. 683, 686, 184 S.E. 517, 519 (1936) (dictum).

[31]Sherman v. Nason, 25 Mont. 283, 64 Pac. 768 (1901) (holding that, although a shortened period of 6 months was unreasonable, the plaintiff was precluded from taking advantage of that fact by his failure to bring his action for a further period of one year, 11 months, and 29 days); Holcombe v. Tracy, 2 Minn. 241, 246 (1868) (dictum).

[32]Central Mo. Tel. Co. v. Conwell, 170 F.2d 641 (8th Cir. 1948) (holding unreasonable as to an existing cause of action a shortened limitations period of 90 days that became effective in 1945, even though the plaintiff made no attempt to enforce it until Jan. 2, 1947); Lamb v. Powder River Live Stock Co., 132 Fed. 434 (8th Cir. 1904); Adams & Freese Co. v. Kenoyer, 17 N.D. 302, 116 N.W. 98 (1908) (alternative holding that a shortened period of 3 months and 20 days was unreasonable as to an existing chose, although the plaintiff did not bring his action until 6 months and 20 days after the termination of that period); *accord*, Berry v. Ransdall, 61 Ky. (4 Met.) 292 (1863) (holding unconstitutional as to an existing chose not theretofore subject to any limitations statute the application of a new statute that allowed only 30 days in which an action on it could be brought, although the plaintiff had not begun his action until one year and 11 days after the statute

the plaintiff in bringing his action after the enactment of the new statute has been held not to deprive him of his right to object to the unreasonableness of the shortened period as to indicate that no delay, however long, would have that effect. In *Lamb v. Powder River Live Stock Co.*,[33] for example, a newly enacted statute reduced the time in which an action could be brought in Colorado on certain foreign judgments from six years to three months following the rendition of the judgment. The period of three months was held to be unreasonably short as to the holder of such a judgment that had been rendered in Nebraska one month and twenty-five days before the enactment of the new statute, although he did not bring his action on it in Colorado until five years, nine months, and sixteen days after the effective date of the act.

The Constitution of Florida forbids such reductions of limitations periods in so far as they apply to existing causes of action. Section 33 of article III of that instrument reads: "No statute shall be passed lessening the time within which a civil action may be commenced on any cause of action existing at the time of its passage."

The decision of *Baugher v. Boley*[34] illustrates the operation of this provision. In that case the defendant, who had no color of title to the plaintiff's land, began to construct a fence around it at a time when, under the statute[35] then in effect, the period of adverse possession without color of title that was sufficient to bar the true owner was twenty years. The fence was completed at about the effective date of a new statute[36] that reduced the period in question to seven years. In the plaintiff's action of ejectment the trial court instructed the jury that if the defendant's substantial enclosure was completed prior to the effective date of the new act, the twenty-year period that would then have become applicable could not subsequently be reduced. It instructed further that if the enclosure was not completed until after that date a possession of seven years thereafter would bar the right of the plaintiff to recover his land. These

became effective); Reid v. Solar Corp., 69 F. Supp. 626, 638 (N.D. Iowa 1946) (dictum) (stating that the plaintiff's delay in bringing action on a previously existing chose until one year and 13 days after the enactment of a statute reducing to 6 months the former limitations period and until 9 months and 7 days after its effective date was not so unreasonably long as to deprive him of his right to question the reasonableness of the 6-month period).

[33]132 Fed. 434 (8th Cir. 1904).

[34]63 Fla. 75, 58 So. 980 (1912).

[35]Fla. Laws 1895, c. 4412.

[36]Fla. Laws 1901, c. 4916.

instructions were upheld on appeal and the judgment for the defendant was affirmed.

The Florida Court has properly held that this constitutional provision does not forbid, even as to existing claims, the enactment of a new nonclaim statute that reduces the period in which a creditor can file his claim against the estate of a decedent. These nonclaim statutes are not statutes of limitations, since they differ from them in purpose and since they begin to run when notice to creditors is published and not at the time when the cause of action on the obligation arises.[37] In *Estate of Woods*[38] it was held permissible to reduce this period by a new nonclaim statute that was enacted after the debtor incurred the obligation in question and prior to his death. Since that holding is based in part upon the concept that the filing of a claim against the estate of a decedent is not "a civil action" within the terms of section 33 of article III of the Constitution,[39] it seems that a statute, even though enacted after the death of a decedent, can reduce the period in which such a claim can be filed provided a reasonable time remains in which the creditor can act.

An admittedly not entirely exhaustive search indicates that this prohibition of the reduction of a limitations period as to existing causes of action is not to be found in the constitution of any other jurisdiction. One phase of the operation of the prohibition is desirable. Since it forbids any reduction of a limitations period in the case of an existing cause of action, it of course prevents the cutting down of the time theretofore available for the bringing of such an action, to a period following the enactment of a new statute that is of sufficient duration to be upheld by the courts as reasonable although it is actually too brief to afford an adequate opportunity to the plaintiff to learn of the change in the law.

This advantage is otherwise more than counterbalanced, however. The prohibition renders newly established limitations provisions unconstitutional as to many factual situations. Suppose, for example, that a defendant is in possession of land under a defective title and that the existing statute with reference to adverse possession or some other limitations act gives the plaintiff, who is the owner of a vested interest in the land, seven years from the accrual of his cause of action in which to recover the land. If a statute is passed that purports to

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[37]Estate of Woods, 133 Fla. 730, 183 So. 10 (1938).

[38]*Ibid.*

[39]See also Bradford v. Shine, 13 Fla. 393 (1870).

validate the defendant's title unless it is attacked within a year of the effective date of the act, it cannot be applied to the plaintiff when its new limitations period is less than the portion of the seven-year period that remains available to him under the original act.[40] This situation renders the Florida curative acts with limitations provisions ineffectual in many factual settings that are within the express provisions of the acts, with the result that purchasers who rely upon them are likely to be misled.

In the proposed new state constitution drafted by the Constitution Committee of The Florida Bar, section 33 of article III of the present Constitution is replaced by the following provision:[41]

> "No statute shall be passed lessening the time within which a civil action may be commenced on any cause of action existing at the time of its passage without providing a period of at least one year within which action may be commenced thereon."

The suggested change is desirable.[42] It preserves the beneficial feature of the present provision and eliminates the disadvantages that accompany it.

A further qualification has been imposed on the present constitutional provision by the Florida Court that, although violative of the principles of statutory construction, reduces somewhat the frequency of its undesirable operation. The constitutional prohibition is held not to prevent the establishment of a limitations period, even as to existing causes of action, in instances when the action was not previously subject to any limitations period and could therefore, except for the new statute, be maintained at any time in the future.[43]

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[40]The existence of this principle has upon occasion been recognized and guarded against by the Legislature of Florida. Chapter 10168 of Fla. Laws 1925 provided that when one or more of the heirs or devisees of a decedent should purport to convey the entire interest of the decedent in land, no person should after 20 years from the recording of the deed claim any part of the land as heir, devisee, or otherwise under the decedent. FLA. STAT. §95.22 (1951) (effective July 1, 1941), in reducing this period subsequent to the recording of such a deed from 20 years to 7 years, expressly retained the former 20-year period in the case of deeds of the lands of decedents who had died before the effective date of the new act. See Rogers, *Chapter 20954, Acts of 1941,* 15 FLA. L.J. 276, 280 (1941).

[41]Proposed Constitution for Florida, art. III, §27.

[42]Day, *The Period During Which a Judgment Remains a Lien on Realty in Florida,* 2 U. FLA. L. REV. 315, 328 (1949).

[43]Campbell v. Horne, 147 Fla. 523, 3 So.2d 125 (1941) (alternative holding);

In this situation, as in all others, a reasonable time must of course be allowed after the effective date of the statute for the enforcement of existing actions.[44]

*Existence of a Cause of Action As a Prerequisite to Operation of a Limitations Act*

The period of a statute of limitations that bars the right of an owner to recover his land and divests him of his ownership of it does not begin to run until there accrues to him a cause of action to recover the land.[45] Curative acts with limitations provisions, when designed to rectify title defects that are beyond the remedial power of a pure curative act[46] and hence to extinguish vested interests, are statutes of limitations of this type. They are, consequently, by the great weight of authority and better view, subject to the foregoing rule,[47] particularly when the interest sought to be precluded is a possessory one and the owner of the interest is in possession of the land.[48]

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Lee v. Lang, 140 Fla. 782, 192 So. 490 (1939) (alternative holding); *accord,* H. K. L. Realty Corp. v. Kirtley, 74 So.2d 876 (Fla. 1954).

[44]*Cf.* Campbell v. Horne, 147 Fla. 523, 3 So.2d 125 (1941).

[45]1 AMERICAN LAW OF PROPERTY §4.113 (Casner ed. 1952); 3 *id.* §15.8; 4 TIFFANY, REAL PROPERTY §§1152, 1184 (3d ed. 1939); *accord,* Grayson v. Harris, 279 U.S. 300 (1929); Redfield v. Parks, 132 U.S. 239 (1889); Amory v. Amherst College, 229 Mass. 374, 118 N.E. 933 (1918); Stonum v. Davis, 348 Mo. 267, 152 S.W.2d 1067 (1941); Northern Pac. Ry. v. Smith, 62 Mont. 108, 203 Pac. 503 (1921); PATTON, TITLES §59 (1938); SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND 47 (1953).

[46]Curative acts with limitations provisions can cure any defect that can be remedied by a curative act. See p. 145 *supra.* Title defects that can be remedied by a curative act are discussed in Part III of this article, 8 U. FLA. L. REV. 365, 382-92 (1955).

[47]*E.g.,* Pearce's Heirs v. Patton, 46 Ky. (7 B. Mon.) 162 (1846). In this case it was held that the period of a limitations act does not run against a married woman's right to attack her invalid conveyance during the continuance of her husband's estate by the curtesy.

[48]*E.g.,* Smith v. Cox, 115 Ala. 503, 22 So. 78 (1897) (alternative holding); Phillips v. Jones, 79 Ark. 100, 95 S.W. 164 (1906); Charbonnet v. State Realty Co., 155 La. 1044, 99 So. 865 (1923); Case v. Dean, 16 Mich. 11 (1867); Hammon v. Hatfield, 192 Minn. 259, 256 N.W. 94 (1934); Baker v. Kelley, 11 Minn. *480 (1866); Grant v. Montgomery, 193 Miss. 175, 5 So.2d 491 (1942); Pinkham v. Pinkham, 60 Neb. 600, 83 N.W. 837 (1900); Baldwin v. Merriam, 16 Neb. 199, 20 N.W. 250 (1884); Jordan v. Simmons, 169 N.C. 140, 85 S.E. 214 (1915) (alternative holding); Buty v. Goldfinch, 74 Wash. 532, 133 Pac. 1057 (1913); Collier v. Goessling, 160 Fed. 604, 610 (6th Cir. 1908) (dictum); Wells v. Thomas, 78 So.2d 378, 382 (Fla. 1954) (dictum);

To permit a curative act with a limitations provision to extinguish such an interest is to deprive its owner of his property without due process of law.[49] In denying the power of the legislature to deprive an owner of his property arbitrarily, the New York Court of Appeals stated:[50]

> "To say . . . that . . . 'due process of law' may mean the very act of legislation which deprives the citizen of his rights . . . or property, leads to a simple absurdity. The Constitution would then mean, that no person shall be deprived of his property or rights, unless the Legislature shall pass a law to effectuate the wrong, and this would be throwing the restraint entirely away. The true interpretation of these constitutional phrases is, that . . . there is no power in any branch of the government to take them away . . . ."

This language has been quoted with approval by the Supreme Courts of Kansas[51] and Minnesota[52] in cases involving curative acts with limitations provisions.

A number of jurisdictions hold that, even when the land is un-

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Johnston v. Ellsworth Trust Co., 63 Fla. 443, 447, 58 So. 249, 250 (1912) (dictum); Toronto v. Sheffield, 118 Utah 460, 466, 222 P.2d 594, 597 (1950) (dictum); *cf.* Florida Sav. Bank v. Brittain, 20 Fla. 507 (1884); Turner v. New York, 168 U.S. 90, 95 (1897) (dictum); Meigs v. Roberts, 162 N.Y. 371, 379, 56 N.E. 838, 840 (1900) (dictum); Joslyn v. Rockwell, 128 N.Y. 334, 28 N.E. 604, 605 (1891) (dictum). *Contra,* Newland v. Marsh, 19 Ill. 376, 385 (1857) (dictum). See also Annot., 7 A.L.R.2d 1366 (1949); 46 L.R.A. (N.S.) 1065 (1913).

[49]*E.g.,* Murrison v. Fenstermacher, 166 Kan. 568, 203 P.2d 160 (1949); Charbonnet v. State Realty Co., 155 La. 1044, 99 So. 865 (1923); Case v. Dean, 16 Mich. 11 (1867); Groesbeck v. Seeley, 13 Mich. 329 (1865); Dingey v. Paxton, 60 Miss. 1038 (1883); Leavenworth v. Claughton, 197 Miss. 606, 621, 20 So.2d 821, 822 (1945) (dictum); *accord,* Baker v. Kelley, 11 Minn. *480 (1866); Buty v. Goldfinch, 74 Wash. 532, 133 Pac. 1057 (1913); Collier v. Goessling, 160 Fed. 604, 610 (6th Cir. 1908) (dictum).

U.S. CONST. amend. V, effective since the latter part of 1791, forbids the federal government to deprive one of his property without due process of law. *Id.* amend. XIV, which was promulgated as being in effect on July 28, 1868, provides that no state shall deprive any person of property without due process of law. Similarly, the constitutions of most of the states prohibit the taking of property without due process, *e.g.,* FLA. CONST. Decl. of Rights §12.

[50]Wynehamer v. The People, 13 N.Y. (3 Kern.) 378, 392 (1856).

[51]Murrison v. Fenstermacher, 166 Kan. 568, 574, 203 P.2d 160, 164 (1949).

[52]Baker v. Kelley, 11 Minn. *480, 488 (1866).

occupied by anyone, the period of a curative act with a limitations provision does not extinguish an interest that is beyond the reach of a mere curative act.[53] In such a situation, the constructive possession is in the true owner. The Supreme Court of Kansas, for example, took this position in *Murrison v. Fenstermacher*.[54] The case involved a statute which provided that when one other than the owner of land platted it as a town and the plat had been of record for more than twenty-five years, a deed to any part of the land executed by that person should be conclusively presumed to be valid after it had been recorded for more than twenty-five years unless the owner should contest its validity within one year of the effective date of the act.[55] It was held that to apply this statute to a situation in which the holder of the invalid deed had not been in possession of the land during the running of the limitations period would be to deprive the true owner of his property without due process of law even if he also had not been in possession during that period.

The instances in which curative acts with limitations provisions have been held unconstitutional as violating the principles under consideration have most frequently involved statutes that were designed to validate void tax deeds.[56] Similar statutes directed toward other defective instruments or transactions are, however, equally subject to these principles. The treatment accorded the statute involved in the *Murrison* case is illustrative of this fact. A limitations act has similarly been held not to run against a grantee's right to have his deed reformed for mistake as long as he remains in possession of the

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[53]*E.g.*, Murrison v. Fenstermacher, 166 Kan. 568, 203 P.2d 160 (1949); Groesbeck v. Seeley, 13 Mich. 329 (1865); Leavenworth v. Claughton, 197 Miss. 618, 20 So.2d 821 (1945); Leavenworth v. Claughton, 197 Miss. 606, 19 So.2d 815 (1944); Grant v. Montgomery, 193 Miss. 175, 5 So.2d 491 (1942); Dingey v. Paxton, 60 Miss. 1038 (1883); Waln v. Sherman, 8 S. & R. 357 (Pa. 1822); Gardner v. Reedy, 62 S.C. 503, 40 S.E. 947 (1902); *accord*, Baldwin v. Merriam, 16 Neb. 199, 20 N.W. 250 (1884); Smith v. Cox, 115 Ala. 503, 510, 22 So. 78, 80 (1897) (dictum). *Contra*, Turner v. New York, 168 U.S. 90 (1897).

[54]See note 53 *supra*.

[55]KAN. GEN. STAT. §67-612 (Corrick 1949).

[56]*E.g.*, Smith v. Cox, 115 Ala. 503, 22 So. 78 (1897); Charbonnet v. State Realty Co., 155 La. 1044, 99 So. 865 (1923); Case v. Dean, 16 Mich. 11 (1867); Groesbeck v. Seeley, 13 Mich. 329 (1865); Baker v. Kelley, 11 Minn. 480 (1866); Leavenworth v. Claughton, 197 Miss. 606, 19 So.2d 815 (1944); Grant v. Montgomery, 193 Miss. 175, 5 So.2d 491 (1942); Dingey v. Paxton, 60 Miss. 1038 (1883); Baldwin v. Merriam, 16 Neb. 199, 20 N.W. 250 (1884); Jordan v. Simmons, 169 N.C. 140, 85 S.W. 214 (1915); Buty v. Goldfinch, 74 Wash. 532, 133 Pac. 1057 (1913).

land.[57] And a limitations act has been held to be inapplicable to the right of a grantor of a deed absolute in terms to show that it was intended as a mortgage when the grantee has never taken possession of the land.[58]

In cases involving tax deeds, the Supreme Court of Wisconsin speciously circumvents the rule that when land is unoccupied by anyone the period of a curative act with a limitations provision does not extinguish an interest that is beyond the reach of a mere curative act. Under statutes providing respectively that the action of an owner to recover his land sold for taxes is barred three years from the recording of the tax deed[59] and that when lands are unoccupied the owner can maintain ejectment against a person claiming title to them at the commencement of the action,[60] the Wisconsin court holds

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[57]Pinkham v. Pinkham, 60 Neb. 600, 83 N.W. 837 (1900).

[58]Mott v. Fiske, 155 Ind. 597, 58 N.E. 1053 (1900). Grable v. Nunez, 64 So.2d 154 (Fla. 1953), is not at variance with the *Mott* case. In the latter decision the instrument in question, if actually an absolute deed, gave to the grantee the right to possess the land. This was not true of the instrument involved in *Grable v. Nunez*. That instrument purported by its terms to be an absolute transfer of a beneficiary's interest in a trust. The right to possession — and the actual possession — of the trust assets remained throughout in a third person, the trustee, regardless of whether the instrument was an absolute transfer or a mere mortgage. The holding that the expiration of the 20-year limitations period of FLA. STAT. §95.23 (1955) precluded the grantor from showing that the instrument was intended as a mortgage therefore was not a deviation from the principle that the period of a statute of limitations that bars the right of an owner to recover his land does not begin to run until there accrues to him a cause of action to recover the land.

The holding in the *Grable* case is somewhat analogous to that in Fitger v. Alger Smith & Co., 130 Minn. 520, 153 N.W. 997 (1915). In the *Fitger* case the defendant entered into adverse possession of land that had previously been mortgaged by its owner. Soon thereafter the mortgagee attempted to foreclose but failed to comply with a statutory requirement that notice be served on the defendant as the person in possession. A statute provided that a foreclosure could be attacked because of such a defect only within 5 years. It was held that at the expiration of that period the defect was cured both as against the owner and the adverse possessor. A limitations act can run in favor of a claimant and against an owner who, due to the fact that the land is adversely possessed by a third person, has neither actual nor constructive possession of it.

[59]WIS. REV. STAT. c. 15, §123 (1849). This statute is no longer in effect.

[60]WIS. STAT. §275.03 (1953). A similar attempt was made in an early Florida tax statute to evade the rule that when land is unoccupied by anyone the period of a curative act with a limitations provision does not extinguish an interest that is beyond the reach of a mere curative act. Fla. Laws 1874, c. 1976, §63, after forbidding a delinquent taxpayer to bring suit subsequent to one year from the

that the tax deed, though invalid, is rendered immune from attack three years after its recordation if during that time the land is not in the possession of the delinquent taxpayer or some third person.[61] The position is taken that under such circumstances the recorded tax deed vests the constructive possession of the land in the holder of the tax deed.[62]

The Supreme Court of the United States applied this Wisconsin rule in *Leffingwell v. Warren*[63] to facts controlled by the law of that state. It is to be observed, however, that this decision was prior to the adoption of the fourteenth amendment, which, for the first time, incorporated in the Constitution of the United States a provision forbidding the states to deprive one of his property without due process of law.

The Wisconsin doctrine is erroneous. Such a purported giving to a landowner, by either express or implied statutory provision or otherwise, of a cause of action to recover his land that has not been invaded is an attempt to evade by subterfuge the rule that a limita-

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recording of a deed made "in pursuance of any sale for taxes" to set aside the deed or to recover the lands from the grantee therein named, provided that "the recording of such deed shall be deemed such assertion of title or such entry into possession by the grantee . . . as to authorize such suit or proceedings against him . . . as for an actual entry." It was held in Sloan v. Sloan, 25 Fla. 53, 5 So. 603 (1889), that a tax deed resulting from an assessment made by the county collector instead of by the assessor was not a deed made "in pursuance of any sales for taxes" and that therefore the defect was not cured by the expiration of the limitations period of the statute. The same position was taken in Townsend v. Edwards, 25 Fla. 582, 6 So. 212 (1889), with reference to a tax deed based on taxes for a year in which the land had not been assessed on the roll. The United States Supreme Court in Bird v. Benlisa, 142 U.S. 664 (1892), applied this theory concerning the Florida statute to a tax deed of land that had been improperly described on the assessment roll.

The result attained in the three cases could have been reached on the ground that the attempt of the statute to create an action for "an actual entry" when there had been no entry, which is the case when the lands are either unoccupied or in the possession of the delinquent taxpayer, was without effect; and that consequently the statute in such instances violated the rule that it unsuccessfully sought to evade. Such a holding would have permitted the limitations provision of the statute to operate when the holder of even a seriously defective tax deed was in possession of the land. The effect of the statute in a situation of the type mentioned is abrogated by the theory actually adopted in the three decisions.

[61]Parish v. Eager, 15 Wis. *532 (1862); Knox v. Cleveland, 13 Wis. *245 (1860); Hill v. Kricke, 11 Wis. *442 (1860).

[62]Parish v. Eager, 15 Wis. *532 (1862).

[63]67 U.S. (2 Black) 599 (1862).

tions act does not run against the owner of land until he has a cause of action to recover it. The Supreme Court of Mississippi has cogently summarized this situation as follows:[64]

> " '[T]here is a wide distinction between that legislation which requires one having a mere right to sue, to pursue the right speedily, and that which creates the necessity for suit by converting an estate in possession into a mere right of action, and then limits the time in which the suit may be brought.' In other words, the legislature has no power to create and bring into existence a right of action which does not exist in fact. It cannot by legislative fiat set up, Don Quixote like, an imaginary windmill and command the property owner to charge and demolish it by legal proceedings within a stated time."

Closely related to the principle that a curative act with a limitations provision cannot validate a seriously defective tax deed when neither the actual possession nor the constructive possession of the delinquent taxpayer is invaded is the rule that the expiration of the limitations period of such an act cannot as to jurisdictional matters raise a conclusive presumption of the regularity of the proceedings leading to the issuance of the deed.[65] Effect can be given, however, to a provision of a statute of this kind that the expiration of its limitations provision raises a rebuttable presumption of the regularity of the proceedings on which a tax deed is based.[66]

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[64]Leavenworth v. Claughton, 197 Miss. 606, 621, 20 So.2d 821, 822 (1945). This Mississippi decision involved a statute which provided that a delinquent taxpayer could attack an invalid tax deed only within a period of two years from the date of its issuance. It was held to be a denial of due process to permit this period to begin to run prior to the time that the possession of the taxpayer was invaded by the holder of the tax deed, regardless of whether the possession of the taxpayer was actual or merely constructive.

[65]*E.g.,* Marx v. Hanthorn, 148 U.S. 172 (1893) (alternative holding); Collier v. Goessling, 160 Fed. 604 (6th Cir. 1908); Groesbeck v. Seeley, 13 Mich. 329 (1865); *accord,* Baker v. Kelley, 11 Minn. 480 (1866); *cf.* Wells v. Thomas, 78 So.2d 378 (Fla. 1955); Quinlon v. Rogers, 12 Mich. 168 (1863); Ensign v. Barse, 107 N.Y. 329, 338, 14 N.E. 400, 402 (1887) (dictum). *Contra,* Florida Sav. Bank v. Brittain, 20 Fla. 507, 514 (1884) (dictum); *cf.* Turner v. New York, 168 U.S. 90 (1897); De Treville v. Smalls, 98 U.S. 517 (1878).

[66]*E.g.,* Wells v. Thomas, 78 So.2d 378 (Fla. 1955); Ensign v. Barse, 107 N.Y. 329, 14 N.E. 400 (1887); Marx v. Hanthorn, 148 U.S. 172, 182 (1892) (dictum); Collier v. Goessling, 160 Fed. 604, 608 (6th Cir. 1908) (dictum); Groesbeck v. Seeley, 13 Mich. 329, 340 (1865) (dictum).

Attention is directed to certain Florida decisions concerning the application to tax deeds of curative acts with limitations provisions. In *Baldwin Co. v. Blaisdell*[67] and in *Buck v. Triplett*[68] the Florida Court quieted the title of the holder of a tax deed by applying the following statute:[69]

> "Wherever a tax deed has been issued . . . conveying or attempting to convey . . . real estate . . ., no action shall be brought by the former owner thereof . . . against the grantee in said tax deed . . . where the grantee . . . [has] paid the taxes assessed against the land described in the said tax deed for . . . twenty successive years, at any time after the issuance of said tax deed, but the grantee in said tax deed, . . . may, at his option, file a bill to quiet the title to the lands described in said tax deed . . . ."

In neither decision was the statement made that the tax deed in question or the proceedings leading to its issuance were irregular, but in each an obvious purpose of the suit was to remedy such possible irregularities. If the deed was irregular merely with reference to formal defects of a type that could be cured even by a pure curative act, it could of course be validated by this act—a curative act with a limitations provision. If, however, the deed was void for jurisdictional defects, it could not by the generally accepted view be validated by such an act unless the possession of the land during the running of the period was such as to give the delinquent taxpayer an action for its recovery;[70] and in neither decision was it stated who had possession during the twenty-year period. If, as is perhaps true, the

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[67]82 So.2d 587 (Fla. 1955).

[68]159 Fla. 772, 32 So.2d 753 (1947).

[69]FLA. STAT. §196.09 (1955). An accompanying statute, *id.* §196.11, not mentioned in either decision, reads as follows:

> "The provisions of §§196.09 and 196.10 shall apply whether there has or has not been any actual possession of said premises described in the tax deed by the grantee in the tax deed, his heirs, devisees or assigns, except that if a tax deed has been issued, conveying or attempting to convey real estate in the actual possession of a legal owner thereof, and the legal owner, his heirs, devisees or assigns, continue in the possession thereof for a period of one year after the issuance of the tax deed before, any action at law or proceeding in equity is commenced to dispossess the party . . . in possession, then the provisions of said sections shall not apply."

[70]See note 45 *supra* and accompanying text.

Court was willing to apply the statute to the situation last stated regardless of who had possession of the land during the running of the period, most of the authorities it cites do not support it.

In the *Baldwin Co.* case the Court relied primarily upon *Putzer v. Homeridge Properties, Inc.*[71] In the latter case, the holder of the tax deed was in actual, open, and notorious possession of the land during the running of the four-year limitations period of the statute,[72] which was properly applied. In the *Buck* case, the Court stated:[73]

> "[T]he general rule is that statutes of this character[74] are not unconstitutional. See 34 Am. Jur., Sec. 18 et. seq; 51 Am. Jur., p. 995, Sec. 1155. At an early date we impliedly recognized the legislative power to enact similar statutes. See Florida Savings Bank v. Brittain et al., 20 Fla. 507; Carncross v. Lykes, 22 Fla. 587."

Section 18 of the title "Limitation of Actions" in 34 *American Jurisprudence* states that the legislative body ordinarily can enact statutes of limitations applicable to existing causes of action provided the time left in which to sue is not unreasonable. Section 20 of the same title, however, reads as follows:

> "Although the right to commence . . . an action may be lost by delay, it is a well-established principle that the right to defend against a suit for the possession of property is never outlawed. Hence, a statute cannot be sustained as one of limitations where it requires a party in full possession and enjoyment of property to bring an action within a given time or else forfeit it. A person in the possession of property cannot be required under penalty of forfeiture to bring an action against one claiming an adverse interest or title to such property."

Section 1155 in 51 *American Jurisprudence,* which was cited in the *Buck* case, is in the title "Taxation." That section merely deals

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[71]57 So.2d 848 (Fla. 1952). In the *Baldwin Co.* case the Court applied FLA. STAT. §95.23 (1955) as well as §196.09 to the facts at hand. What has been said as to the relevance of possession in connection with §196.09 is equally pertinent to §95.23.

[72]FLA. STAT. §196.06 (1955).

[73]159 Fla. 772, 774, 32 So.2d 753, 754 (1947).

[74]FLA. STAT. §196.09 (1955).

generally with so-called short statutes of limitations applicable to tax deeds. Section 1160 of the same title contains this statement:

> "When . . . the tax deed is void on jurisdictional grounds either upon its face or because of a fatal infirmity in the tax sale proceeding, it is everywhere held, even in states in which possession for the requisite period under a tax deed void on its face will operate as a bar, that the statute will not operate in favor of a void tax deed unless actual possession is taken thereunder. A void tax deed does not carry with it constructive possession, whether the land described in the deed is occupied or unoccupied. Moreover, the general rule seems to be that although a tax deed is valid upon its face and the invalidity arises because of some latent irregularity in the proceedings, possession under the deed is essential to the assertion of the bar of the statute . . . ."

In *Carncross v. Lykes,*[75] which was cited in the *Buck* case, the description of land on the assessment roll was indefinite. A statute provided that a former owner should not commence a suit to set aside any deed made in pursuance of any sale of lands for taxes, or against the grantee in such a deed to recover the lands, unless he began it within one year after the tax deed was recorded.[76] It was held that the delinquent taxpayer was not precluded by the statute from bringing an action to recover the land from the holder of the tax deed, since the tax deed under these circumstances was not one made "in pursuance of any sale of lands for taxes." The decision did not deal with the significance of possession in the operation of statutes of limitations.

In *Buck v. Triplett* the Court also cited *Florida Savings Bank v. Brittain.*[77] In the latter case, the land in question had not been properly assessed on the assessment roll. The plaintiff obtained a tax deed to the land and several years after it had been recorded brought ejectment against the owner of the land. A statute[78] almost identical with the one involved in *Carncross v. Lykes* was in effect. It was held

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[75]22 Fla. 587 (1886).

[76]Fla. Laws 1872, c. 1887, §20. The statute exempted from its operation instances in which the land in question was not subject to taxation and those in which the taxes were paid or tendered.

[77]20 Fla. 507 (1884).

[78]Fla. Laws 1874, c. 1976, §63.

that, since the statute dealt with the barring of an action by a former owner and not with the action of the holder of a tax deed to recover the land from the former owner, the lapse of a year subsequent to the recording of the tax deed did not make the tax deed conclusive evidence in its holder's action of the regularity of the proceedings leading to its issuance. The opinion contains a dictum that a statute can make a tax deed which is regular in form conclusive evidence of the regularity of all antecedent proceedings and that the statute under consideration has this effect when an action is brought by the former owner of land to recover it from the holder of the tax deed.[79]

The principle stated in this dictum, if accepted without qualification, would bar a landowner from recovering his land from the holder of a tax deed void for jurisdictional defects even if that holder had not possessed the land throughout the running of a stated limitations period. As applied to such a situation, the principle is opposed by the great weight of authority.[80]

In several Florida cases the decision has been reached through the application of section 95.23 of Florida Statutes 1955 to the facts at hand. That section is a curative act with a limitations provision and reads as follows:

> "After the lapse of twenty years from the record of any deed or the probate of any will purporting to convey lands no person shall assert any claim to said lands as against the claimants under such deed or will, or their successors in title.
>
> "After the lapse of twenty years all such deeds or wills shall be deemed valid and effectual for conveying the lands therein described, as against all persons who have not asserted by competent record title an adverse claim."

In *Moyer v. Clark*[81] the defendant had on July 1, 1932, purchased unimproved land and had taken title in the name of Nutting by a deed that was recorded on December 9, 1932. Nutting had conveyed this land to the defendant on July 2, 1932, by a deed that was not recorded until May, 1953. After Nutting's death, her administratrix had on April 20, 1953, conveyed the land to the plaintiff, who allegedly took with knowledge of the defendant's unrecorded deed. It was correctly held that the fact that the deed to Nutting had been recorded for

[79]20 Fla. 507, 514 (1884).
[80]See notes 47, 48 *supra* and accompanying text.
[81]72 So.2d 905 (Fla. 1954).

twenty years did not under section 95.23 invalidate Nutting's conveyance to the defendant and that the defendant's title was superior to that of the plaintiff if the plaintiff took his deed with knowledge of the deed from Nutting to the defendant.

The decision contains a dictum, however, to the effect that section 95.23 validates and renders unimpeachable a deed or will that has been of record twenty years except as to those who have asserted by competent record an adverse claim.[82] As thus stated, the dictum would permit the statute to validate a deed even as to an imperfection that is beyond the reach of a mere curative act and without regard to whether the actual or constructive possession of the individual sought to be precluded has been invaded during the running of the limitations period. The dictum is largely couched in the terms of the statute, however, and seemingly is not significant as indicating the position of the Court with reference to the underlying constitutional question.

Two Florida cases have so applied section 95.23 as to indicate on a merely precursory consideration that, in the case of a defect in the title of an opposing claimant that is beyond the remedial power of a mere curative act, they abrogate the rule that the period of a curative act with a limitations provision does not begin to run against the right of a landowner to recover his land until he has a cause of action to recover it. Actually, however, they are consistent with that rule.

In *Grable v. Nunez*[83] the owner of an interest in a trust estate consisting of real property had conveyed it by a deed absolute in form. After the deed had been recorded for twenty-nine years, the heirs of the grantor sought by suit to nullify the instrument as an absolute conveyance and to have it construed as a mortgage. It was held that even if the deed was intended as a mortgage the heirs of the grantor were precluded by section 95.23 from establishing that fact.

The decision is correct and is consistent with the rule under consideration. The statutory limitations period of twenty years from the recording of the deed, as applied to the facts at hand, merely extinguished the right of the grantor to show that the instrument was intended as a mortgage. At no time did he have a right to recover the land, since both the possession of it and the right to possess it were contiguously in the trustee of the original trust. The grantor had no right, therefore, to recover the land to be extinguished by the statute.

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[82] *Id.* at 906.

[83] 64 So.2d 154 (Fla. 1953).

In *Montgomery v. Carlton*[84] it was held that a deed was not invalidated as between the parties by the fact that the grantor's acknowledgment was taken by the grantee. It was further held that even if the contrary were true the expiration of the twenty-year period of section 95.23 would cure the defect. The holding is consistent with the rule under consideration, since the curing of a defective acknowledgment is usually within the remedial power of a mere curative act.[85]

The decision in *Wright v. Blocker*[86] could have been sustained through the application of the rule. The Court, however, stated the *ratio decidendi* of the case in other terms. The underlying facts of the case were these: The defendant, an incompetent person, owned a life estate and the plaintiffs owned the remainder in a tract of land. In 1912 a deed purporting to convey the remainder to the defendant and to have been executed and acknowledged by the plaintiff was recorded. The plaintiffs in 1939 sought to enjoin the defendant from asserting title to the remainder, on the ground that the deed was a forgery and that the plaintiffs knew nothing of it until 1939. The defendant objected to the introduction of evidence that the deed was a forgery, relying upon the expiration of the limitations period of section 95.23. It was held that the statute was inapplicable to a forged deed and that the evidence was admissible. It is not true that a statute of limitations is never applicable to a forged deed. A forged deed can, for example, give color of title to an adverse possessor who has no knowledge of the forgery.[87] The reason actually underlying the inapplicability of the limitations provisions of section 95.23 to the allegedly forged deed in question lies in the absence of a cause of action during the stated limitations period by which the plaintiff remaindermen could have obtained the land. Their remainder interest could not become possessory until the termination of the defendant's life estate.[88]

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[84]99 Fla. 152, 126 So. 135 (1930).

[85]*E.g.*, Maxey v. Wise, 25 Ind. 1 (1865). An additional reason why the rule under consideration is not violated by the holding in *Montgomery v. Carlton* is found in the fact that the grantee of the allegedly defective deed had been continuously in possession of the land.

[86]144 Fla. 428, 198 So. 88 (1940).

[87]*E.g.*, Shingler v. Bailey, 135 Ga. 666, 70 S.E. 563 (1911); Tennis Coal Co. v. Hensley, 198 Ky. 616, 250 S.W. 509 (1923); Hitt v. Carr, 62 Ind. App. 80, 108, 109 N.E. 456, 466 (1915) (dictum).

[88]The defendant life tenant in the *Wright* case did not enter the land under a claim of fee originating in a transaction other than that in which his life estate

*Thompson v. Thompson*[89] also was decided on the basis of section 95.23. This decision violates the rule that the period of a curative act with a limitations provision does not begin to run against the right of a landowner to recover his land, in the case of a defect in the title of an opposing claimant that is beyond the remedial power of a mere curative act, until there accrues to the landowner a cause of action for the recovery of his land. In the opinion of this writer, therefore, the decision is unsound.

These are the facts on which the case is based: A husband, motivated by a desire to defraud his creditors and under the erroneous belief that they could subject his homestead to the payment of their claims, made a gratuitous conveyance of that property to his wife in 1926 by a deed that was recorded at once. The couple had several children at the time, all of whom were over the age of six. The wife died in 1951 and left a will by which she devised that property to one of the children, the defendant. The husband and the other children brought suit in 1953 to have the deed and will declared ineffectual to vest the property in the defendant. It was held that the homestead was vested in the wife and passed by her will to the defendant, since the deed had been recorded for more than twenty years and all of the plaintiffs had been sui juris for more than seven years and had had both actual knowledge of the deed and constructive notice of it from its record.

The gratuitous conveyance of the homestead to the wife was void. The Florida Constitution provides that nothing contained therein shall prevent the owner of homestead from devising it in the manner prescribed by law if he has no children.[90] The provision is construed as invalidating a gratuitous conveyance of homestead to a wife by a husband who has children, both when he conveys to her indirectly[91]

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and the plaintiffs' remainder arose. The situation therefore does not fall within the undesirable rule in effect in Florida that the life tenant's possession is adverse to the remainderman under such circumstances. See Part II of this article, 8 U. FLA. L. REV. 365, 374-78 (1955).

[89]70 So.2d 555 (Fla. 1954).

[90]Art. X, §4.

[91]Jackson v. Jackson, 90 Fla. 563, 107 So. 255 (1925); Norton v. Baya, 88 Fla. 1, 102 So. 361 (1924); *accord,* Florida Nat'l Bank v. Winn, 158 Fla. 750, 30 So.2d 298 (1947) (rule applied to a gratuitous conveyance of a husband's homestead through an intermediary to him and his wife as tenants by the entirety); Norman v. Kannon, 133 Fla. 710, 182 So. 903 (1938); Bess v. Anderson, 102 Fla. 1127, 136 So. 898 (1931); *cf.* McEwen v. Larson, 136 Fla. 1, 185 So. 866 (1939); Barnott v. Proctor, 128 Fla. 63, 174 So. 404 (1937).

through a third party intermediary and when he conveys to her directly.[92]

It was held in the *Thompson* case, however, that the void gratuitous conveyance of the homestead and the subsequent devise of it by the grantee wife to the defendant son were rendered immune from attack by the husband and the other children by the expiration of the limitations period of section 95.23.

The possession of a wife under a void conveyance to her by her husband of his homestead is not adverse to him when both continue to live on the land after the conveyance.[93] It is evident, therefore, that in the *Thompson* case the husband had no cause of action to recover the land from his wife while she lived, since she did not have even a merely voidable title to it and he was at least in joint possession of it with her.

Even more clearly, the children whose interests were extinguished had no such cause of action during the running of the twenty-year limitations period that the void conveyance was recorded. The lineal descendants who inherit an estate in the homestead are those in being at the death of its owner.[94] During the life of the owner, consequently, the children have only an expectancy with reference to the homestead. This expectancy is not protected by the due process clause from extinction by a change during the life of the owner of homestead in the statute controlling its descent.[95] The protection extended to it by the Florida Constitution,[96] however, should not be abrogated by the lapse

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[92]Church v. Lee, 102 Fla. 478, 136 So. 242 (1931); *cf.* Semple v. Semple, 82 Fla. 138, 89 So. 638 (1921). The construction under consideration is not abrogated by FLA. STAT. §689.11 (1955), which empowers a husband to convey real estate directly to his wife, since the statute cannot derogate from the rights accorded by the Constitution to the children of an owner of a homestead. Church v. Lee, *supra;* Jackson v. Jackson, *supra* note 91.

[93]Jahn v. Purvis, 145 Fla. 354, 199 So. 340 (1940); *cf.* Gafford v. Strauss, 89 Ala. 283, 7 So. 248 (1890); Sanders v. Alford Bros. Co., 92 Fla. 718, 111 So. 278 (1926). *Contra,* Massey v. Rimmer, 69 Miss. 667, 13 So. 832 (1892); Hartman v. Nettles, 64 Miss. 495, 8 So. 234 (1886).

[94]FLA. STAT. §§731.27, 731.23 (1955).

[95]*Accord,* Jackson v. Jackson, 90 Fla. 563, 107 So. 255 (1925); *cf.* Saxon v. Rawls, 51 Fla. 555, 41 So. 594 (1906). No expectancy is protected by the due process clause from an alteration of the state of descent. *Cf., e.g.,* James v. DuBois, 16 N.J.L. 285 (Sup. Ct. 1837); Pollock v. Speidel, 27 Ohio St. 86 (1875); Jensen v. Jensen, 54 Wyo. 224, 89 P.2d 1085 (1939); Gilpen v. Williams, 25 Ohio St. 283, 300 (1874) (dictum).

[96]Art. X, §4.

of a statutory period during which the owner of the homestead is alive.[97]

The order of the trial court on the motion to dismiss the bill of complaint, which on appeal was quoted with seeming approval and affirmed in *Thompson v. Thompson,* was expressly grounded upon the decision in *Barnott v. Proctor.*[98] In that case the plaintiffs' parents in 1892, after all of the plaintiffs had been born, made a gratuitous conveyance of the plaintiffs' father's homestead to the plaintiffs' mother through a third party intermediary. These deeds were recorded at once. Subsequent thereto the father continued to reside on the property with the mother and the plaintiffs until his death intestate in 1900. At all times thereafter the mother continued to live on the former homestead, and the plaintiffs, or some of them, lived with her or on portions of it. She and they seemingly thought that the void conveyance of 1892 had effectively vested the title in her in fee simple; and she and they evidently regarded their presence on the land as being with her permission. Under the law in effect at the death of the father in 1900, a widow could elect between dower and a child's part in homestead, and if she failed to elect a child's part she was confined to dower in it.[99] The mother made no such election and actually held possession of the homestead, therefore, under a mere unassigned right of dower.

Subsequently, the mother on dates not specified in the opinion, with the acquiescence of all of the plaintiffs, conveyed some portions of the homestead to third persons and other portions of it to several of the plaintiffs, some of whom later conveyed to third persons the tracts so granted to them. In 1928 the mother without the knowledge of the plaintiffs mortgaged to the defendant Proctor the part of the homestead that she had not previously conveyed. He foreclosed the mortgage and purchased the property at the master's sale in 1931. In 1934, while a suit by him to dispossess the mother was pending in the county judge's court, the plaintiffs brought suit against him and their

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[97]The facts of the case of course do not bring the objecting children within the rule of certain Florida decisions that when a life tenant takes possession originally under a void claim of fee based on a transaction other than that from which his life estate and the subsequent remainder emanate, the 7-year limitations period runs against the remainderman during the continuance of the life estate if he is aware that the life tenant is claiming the fee. See Part II of this article, 8 U. FLA. L. REV. 365, 373-78 (1955).

[98]128 Fla. 63, 174 So. 404 (1937).

[99]Fla. Laws 1899, c. 4730, §1.

mother to have the mortgage declared invalid except as to her unassigned right of dower.

It was held that the plaintiffs, having been sui juris and having had knowledge for many years of the recorded void deeds of 1892, and having participated or acquiesced in conveyances by their mother of other portions of the homestead, were precluded from the relief they sought by chapter 10171 of the Florida Laws of 1925. Sections 1 and 2 of that chapter are the present section 95.23, on which the decision in the *Thompson* case is based. Section 3 of chapter 10171 gave to persons whose rights were adversely affected by the validation of deeds that had been of record for twenty years on May 22, 1925, the effective date of the act, or that would have been of record for that period at the expiration of six months from that date, six months from May 22, 1925, in which to institute suit to protect these rights.

The Florida Court has held that, when the possession of a widow is not inconsistent with her right to have dower assigned in the land in question, her possession is not sufficient to start the seven-year period of the adverse possession statute to run against the heirs.[100] It has been stated by way of dictum, too, that in order for her possession to become adverse to them there must be some open assertion of a hostile claim other than mere possession, and that notice of such claim must be brought home to them.[101] The principle embodied in this dictum that her possession becomes adverse under such circumstances is unsound as applied to a situation in which she is entitled to possession until her dower is assigned, because the heirs are not entitled to possession and cannot maintain ejectment.[102] Even the fact that the heirs have the right to have her dower assigned should not start a limitations period to run against them.[103] The principle represented by the Florida dictum has been rejected by some courts.[104] It has, however, been sanctioned by others.[105]

[100]Jahn v. Purvis, 145 Fla. 354, 199 So. 340 (1940); Mullan v. Bank of Pasco County, 101 Fla. 1097, 133 So. 323 (1931).

[101]Mullan v. Bank of Pasco County, 101 Fla. 1097, 1112, 133 So. 323, 329 (1931).

[102]Wofford v. Martin, 183 S.W. 603 (Mo. 1916); 4 TIFFANY, REAL PROPERTY §1188 (3d ed. 1939); *cf.* Perkins v. Perkins, 166 S.W. 915 (Tex. Civ. App. 1914).

[103]Foy v. Wellborn, 112 Ala. 160, 20 So. 604 (1896); 4 TIFFANY, *op. cit. supra* note 102, §1188.

[104]Wofford v. Martin, 183 S.W. 603 (Mo. 1916); Westmeyer v. Gallenkamp, 154 Mo. 28, 55 S.W. 231 (1900); Melton v. Fitch, 125 Mo. 281, 28 S.W. 612 (1894); *cf.* Robinson v. Allison, 124 Ala. 325, 27 So. 461 (1900); Perkins v. Perkins, 166 S.W. 915 (Tex. Civ. App. 1914).

[105]White v. Williams, 260 Ala. 182, 69 So.2d 847 (1954); Brinkley v. Taylor,

This principle, if recognized, sustains the holding in *Barnott v. Proctor* that the numerous assertions of ownership in fee by the widow, of which the children had knowledge, were sufficient to cause the six-months limitations period of chapter 10171 to run. It has, however, no applicability to the facts of *Thompson v. Thompson.* In the latter case the owner of the homestead was alive during the time that the twenty-year period of section 95.23 was said to have run. During that time the children had no right to have possession of the land. They of course could not even have had dower assigned to the wife while her husband was alive. Furthermore, under the present law the homestead is no longer subject to dower.[106]

Other Florida decisions have recognized that the limitations period of section 95.23 is subject to the restrictions applicable generally to the conventional statutes of limitations in which the acquisition of title by adverse possession has its origin. In *Walker v. Landress,*[107] for example, the plaintiff paid the consideration to have land conveyed to the defendant, who consequently held it subject to a resulting trust in favor of the plaintiff. After the deed to the defendant had been recorded for more than twenty years, he repudiated the trust and contended that under the express provisions of section 95.23 the deed to him had become immune from attack and that the existence of the resulting trust could not be shown. His contention was rejected on the ground that a statute of limitations does not begin to run in favor of a trustee until he repudiates the trust. And in *Wright v. Blocker*[108] it was held that the fact that a deed of a remainder to a life tenant has been recorded for the twenty-year period of section 95.23 does not preclude its being shown that the deed was forged, since statutes of limitations are inapplicable to forged deeds under which no possession has been taken.

The statutes of limitations with reference to adverse possession are as clearly subject to the qualifications that they do not run against a landowner until he has a cause of action to recover the land[109] as they are to the restrictions that are applied to section 95.23 by the decisions discussed in the preceding paragraph. That qualification

111 Ark. 305, 163 S.W. 521 (1914); *cf.* Foy v. Wellborn, 112 Ala. 160, 166, 20 So. 604, 605 (1896) (dictum); Larson v. Anderson, 74 Neb. 361, 364, 104 N.W. 925, 926 (1905) (dictum); Hulvey v. Hulvey, 92 Va. 182, 187, 23 S.E. 233, 235 (1895) (dictum).

106FLA. STAT. §731.34 (1955).

107111 Fla. 356, 149 So. 545 (1933).

108This decision is discussed in more detail in the text at note 86 *supra.*

109See Part II of this article, 8 U. FLA. L. REV. 365, 371 (1955).

should have been applied to section 95.23 in the *Thompson* case, and the decision should have been the converse of that actually reached.

In factual situations closely paralleling that of *Thompson v. Thompson,* and perhaps in even some of those seemingly involved in the Florida tax-deed decisions previously discussed, it is probable that the Florida Court will continue to apply the limitations provisions of curative acts to the rectification of title defects that are beyond reach of mere curative acts, and that it will do so even when the result is to deprive the true owner of his right to recover his land at the expiration of a period during which no cause of action for its recovery is available. In such instances the owner is deprived of his property without due process of law.

Constitutional safeguards should be observed even in situations in which their operation defeats so desirable an objective as the attainment of greater certainty in the title to real property. It has been well said in another context that "if the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned."[110] The doctrine of stare decisis operates with even more than its normal vigor, however, when the principle applied in a former decision can be presumed to have been acted upon as a rule of contracts or property;[111] and particularly is this true when the principle is one that affects the title to land.[112] Even in such instances a court, while applying to a pending case a principle recognized in its earlier decisions that it now regards as erroneous, can announce that in cases arising from transactions taking place thereafter it will overrule the prior decisions.[113]

The doctrine of stare decisis does not require a court to extend the scope of former decisions that it has come to regard as erroneous.[114]

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[110]Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 483 (1934) (dissenting opinion).

[111]*E.g.,* Elzaburu v. Chaves, 239 U.S. 283 (1915); Brown v. Finley, 157 Ala. 424, 47 So. 577 (1908); Kissimmee v. State *ex rel.* Ben Hur Life Ass'n, 121 Fla. 151, 163 So. 473 (1935); Alta-Cliff Co. v. Spurway, 113 Fla. 633, 152 So. 731 (1933); Liberty Nat'l Bank & Trust Co. v. Loomis, 275 Ky. 445, 121 S.W.2d 947 (1938); Cunningham v. Steidman, 33 La. *44, 62 So. 346 (1913); Rabinowitz v. Keefer, 100 Fla. 1723, 1729, 132 So. 297, 299 (1931) (dictum).

[112]*E.g.,* Minnesota Co. v. National Co., 70 U.S. (3 Wall.) 332 (1865); State *ex rel.* Molter v. Johnson, 107 Fla. 47, 144 So. 299 (1932).

[113]*E.g.,* Payne v. City of Covington, 276 Ky. 380, 123 S.W.2d 1045 (1938); Wisconsin Lumber Co. v. State, 97 Miss. 571, 54 So. 247 (1911).

[114]*E.g.,* Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429 (1895); Rabinowitz v. Keefer, 100 Fla. 1723, 132 So. 297 (1931).

It is believed, therefore, that it is unsafe for a title examiner to rely on the expiration of the limitations period of a curative act as having cured a defect of title in a factual situation differing materially from those of the Florida decisions under consideration unless the defect could be rectified by a curative act without a limitations provision or unless the individual whose right to recover the land it is sought to preclude has had a cause of action for its recovery during the running of the period.

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TABLE OF HEADINGS AND SUBHEADINGS

*In Volume VIII, No. 4*



*In Volume IX, No. 2*