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COMMENTS ON MINNESOTA LAWS, 1943, CHAPTER 529, RELATING TO LIMITATIONS OF ACTIONS AFFECTING TITLE TO REAL ESTATE*

By George M. Maloney**

THE MAJOR question confronting a lawyer when considering Chapter 529 of Minnesota Laws of 1943 is whether a title examiner can take a 50 year abstract and pay no attention to what may have happened in the title prior to that time. The discussion that follows will be limited principally to that question. Chapter 529 appears to have been patterned after Chapter 293 of the Wisconsin Laws of 1931, although Wisconsin imposes a 30 year rather than a 50 year limitation period. A note in the Harvard Law Review refers to the Wisconsin statute as the most far reaching expedient yet adopted to restore the effectiveness of the recording system in validating transactions in land. The Minnesota statute is not, however, an exact copy of the Wisconsin statute. Such weaknesses as it has, or, in any event, its principal weakness, are due to its departures from its model.

The Minnesota statute is undoubtedly constitutional in a broad sense, and there appears to be ample support for the proposition that a person may constitutionally be required to record evidence of a pre-existing or vested right. That is what the Wisconsin statute does, among other things. Any doubt on this point is removed by the Minnesota Supreme Court's decision in Klasen v. Thompson* in which the question arose whether a statute requiring the recording of a tax certificate could constitutionally require a person who had previously purchased a tax certificate to record it. The Court decided that this could be required.

The Minnesota statute, in requiring a man to record a notice of his rights, follows the Wisconsin pattern, and is undoubtedly constitutional. Had it stopped there, it would probably have been a more effective law. Unfortunately, it went farther, and in Section 2 requires the bringing of an action within one year from the filing of the notice and states that, unless such action is so commenced, all

*This article comprises the substance of a discussion on the same statute as that involved in the article on page 23, which occurred at the same meeting as that at which said article was read.

**Of the Minneapolis bar.

2(1933) 189 Minn. 254, 248 N. W. 817. See also 121 A. L. R. 909.
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rights under said notice shall terminate. Now this is perfectly all right so far as a matured cause of action is concerned. But what about the case of a remainderman who is merely waiting for an octogenarian life tenant to pass on, and who has filed his notice? What action can he bring? Suppose, for example, and this is something that is not wildly imaginative at all, that in 1893 a 25 year old father died leaving his homestead to his 24 year old wife and a five year old son. The widow quit claims to Jones. Of course he receives only a life estate, because that is all the widow had to convey. Today the widow is 76 years old, which is not an improbable age. To comply with Chapter 529 the son would have to file a notice before January 1, 1944. That, quite probably, he can constitutionally be required to do. Then the statute says that within one year from the filing of such notice he must bring an action or his rights will be terminated. Supposing that son were to consult his lawyer as to what action he could bring, what would counsel tell him? The grantee of the life tenant is living on the land, and the life tenant is still alive. Just what action could be brought against the grantee of the life tenant? He is in legal possession of the property. He isn't contesting the rights of the remainderman. The remainderman is simply waiting for the life tenant to die, and then go in and take the estate. In other words, the life tenant's right to possession of the property is perfectly consistent with the existence of a remainder. Jones' claim antedates the 50 year statute. If the assumption that there is no proper action for the son to bring be correct, then are we not in a situation where the statute requires a man literally to do that which is impossible and which, nevertheless, is a prerequisite to retaining his legal estate?

Also the question arises, can a trustee on a long term trust deed be required to foreclose before maturity in the absence of a default? This isn't just a matter of having to record the notice. That, quite probably, is constitutional. No, the statute says that he must, within a year from the recording of his notice, bring action or his rights are terminated. Here is a trust deed, not matured and not in default; just what action is the trustee under that trust deed going to bring? If anyone thinks that he can bring an action or that he can be forced to bring an action as a prerequisite to retaining his right, it is suggested that he read the case of Jentzen v. Pruter. In that case the Court was confronted with our mortgage statute of limitations passed in 1909. It involved the question of whether

\[ (1921) 148 \text{ Minn. 8, 180 N. W. 1004}. \]
that statute could affect a mortgage which had been taken prior to that time and force a man into action where the mortgage itself had not matured. The Court, in the opinion, said:

"The legislature had no constitutional power to limit the time to commence an action to vindicate a right under an existing contract to a date anterior to the inception of any cause of action arising out of the contract. A statute, which in this manner bars the existing contract rights of claimants without affording them an opportunity to assert them, is not a statute of limitations, but an attempt to arbitrarily impair the obligation of the contract. . . . The statute must be held to have no application to a conveyance made before its passage and given to secure an obligation not maturing within 15 years from its date."

It is, therefore, practically certain that it will be necessary to read this statute in the light of the possible existence of long term trust deeds, life estates, and long term leases. In Hennepin County a thing we have to consider, which is very serious, is old condition subsequent clauses, that is liquor clauses, with forfeiture provisions. In examining rural abstracts, support bonds are very frequently encountered. These are not merely occasional occurrences in title, but they are uncomfortably frequent, and to ignore those created prior to 1896 will involve considerable risk. Therefore, it is clear that we cannot safely pass the title for a client by simply saying that there is a patent from the United States, and then jumping down to 1896. Incidentally, Mr. Brehmer did not mention the matter of the rights of the United States, but it will probably be generally conceded that, if a 50 year abstract is taken, it will still be necessary to see to it that there was a patent from the United States, because there can be no dispute with the proposition that no state statute of limitations can bar the rights of the United States in its own property.

Now another feature that is common to both our statute and that of Wisconsin is the requirement that he who disregards claims over 50 years old must deal with a person in possession, if any, and be a bona fide purchaser. Should an argument arise in Wisconsin as to the marketability of a title by reason of a 30 year old claim, the seller's attorney could at least put an affidavit on record to show who was in possession. There is a statute in Wisconsin which has been in force for a number of years permitting the filing of affidavits with reference to possession of property and giving them a prima facie effect. In Minnesota there is no such statute. In fact, a person with such an affidavit might push it over on the register of deeds, but it is not supposed to be recorded.
Even in Wisconsin there might be a difference of opinion between two attorneys. The seller’s attorney might say, “The deed’s alleged title defect is over 30 years old, and therefore we can disregard anything before that.” The buyer’s attorney might say, “No. Here is the position you are in. Your client may have bought this property in blissful ignorance of this ancient defect, but I have examined the full chain of title and I know about it, and therefore my client is not a bona fide purchaser as against that defect.” The question really is, what does the statute mean by “bona fide purchaser”? If it means, as it is likely to be construed, someone with no notice of a more than 50 year old claim, then our statute does not seem to be very effective in permitting disregard of things over 50 years old. Now this last observation, while it may seem facetious, is, in fact, serious, because if it be conceded that examiners will have to go back in the chain of title beyond the 50 year period to check the existence of long term trust deeds, conditions subsequent, and the like, then in perusing the abstract other defects are going to be discovered which will deprive the client of his status as a bona fide purchaser.

The statute affords strong moral support for passing many of the defects in title which have been passed in the past. The Hennepin County Title Examiners, and the Examiners in other parts of the state, have for the most part been willing to rely upon cases such as the Benjamin v. Savage\(^4\) case cited by Mr. Brehmer, but if one meets some fellow who has got to have it written in the statute, the fact that the Supreme Court may have said that such and such a title is good doesn’t carry very much weight. The Title Examiners in Hennepin County desire a statute of the nature of 529 as amended by Chapter 124, and would probably lean towards a 40 year rather than a 50 year law, because it is that much more helpful. It might even be possible to go as far as Wisconsin and have a 30 or 35 year law. Such a statute should, however, be silent as to the matter of dealing with those in possession and should not make possession a test. The courts will take care of that. It is known, of course, that a man who is in possession of land cannot be barred of his rights by any statute of limitations. There is no question about that. You cannot force the man who is on the ground, enjoying his estate, to go into court and assert his rights. He has got them. It is for somebody else who is going to attack him and get him out to do that. Furthermore, so far as the rights of

\(^4\)(1923) 154 Minn. 159, 191 N. W. 408.
the person in possession are concerned, in our title opinion it is customary to tell the client he is bound to know the rights of those in possession. So, if by any chance anyone is in possession of the 50 year old claim, there is no need to mention it. Under the statute the court will take care of that, and the examiner is amply protected with his clients. The trouble with this business of being in possession and a bona fide purchaser is that we are trying to cure a record defect by non-record facts. Here the man says, "It is a defect. It is a matter of record." How is one going to get into the record this matter that the man who is buying the property is a bona fide purchaser and is dealing with the man in possession? In other words, we have a fine statute of limitations as against the man who has a 50 year old claim, but we probably do not have a statute of limitations which makes the title a good marketable title of record.

In Minneapolis there exists a bad situation with reference to liquor clauses affecting a great deal of property all over South Minneapolis around Lake Harriet and Lake Calhoun. The former owner who drew them knew how to draw a condition subsequent, and inserted these clauses in his deeds. They are still there and he is dead, and his wife is dead. His only daughter is dead. She was left as sole devisee under his will. Attorneys dealt with her at $25 per quit claim deed. It was a racket. The alternative was an action to quiet title, or registration of the title. All of us would be happy over there, as far as conditions subsequent and forfeiture clauses are concerned, if an annual recording were required, giving two months' leeway to enforce rights. In our particular situation this statute gives no relief because affidavits have been filed in the last 50 years. The daughter filed an affidavit saying that she was the sole heir-at-law of the owner.