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Protection and Alienability of Real Property Interests Under the Florida Recording Statute

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COMMENT

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I. Introduction

The modern American, as an investor, as a semi-migrant home owner, as a maximum-money mortgagee or as a creditor, requires protection of his interests in land to the fullest extent that the law can provide. One method of protection is by the use of what is commonly known as a "recording act." This is an attempt to show how Florida has strived to achieve this goal and the extent that it has succeeded through its recording act and judicial constructions.

It is the court's constructions of this act which have attempted to satisfy the socially necessary attributes of land—maximum alienability and maximum protection with minimum defeasbilities. In this never-ending process, the court has considered the purpose and scope of the act, presumptions and burden of proof and the effect of fraud, duress, forgery and mistake. In the process they have been faced with problems of constructive notice, actual notice, estoppel and possession affecting the priorities of original parties, mortgagees, creditors, purchasers at execution sales, mechanics' lienholders and a few special parties. These are the factors and problems to be considered.

II. Generally

History, Scope and Purpose. The recording statute was passed in Territorial Florida on November 15, 1828. It stands,[1] after 123 years, with no important change[2] (except for the 1941 amendment which added the last two paragraphs):

> No conveyance, transfer or mortgage of real property, or of any interest therein, nor any lease for a term of one year or longer, shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to law; nor shall any such instrument made or executed by virtue of any power of attorney be good or effectual in law or in equity against creditors or subsequent purchasers for a valuable consideration and without notice unless the power of attorney be recorded before the accruing of the right of such creditors or subsequent purchaser.
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> Grantees by quit-claim, heretofore or hereafter made, shall be

1. Fla. Stat. § 695.01 (1951).

2. History of the statute: Rev. Stat. (1892) § 197, Gen. Stat. (1906) § 2480, Rev. Gen. Stat. (1920) § 3822, Comp. Gen. Laws; (1927) § 5698. Carr v. Thomas, 18 Fla. 736 (1882), held Fla. Laws 1873, c. 1939 § 5, making void deeds unrecorded within six months of execution, to be unconstitutional.

> deemed and held to be bona fide purchasers without notice within the meaning of the recording acts;
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> Provided, however, that this section shall not apply to quit-claims heretofore made, the priority of which shall be contested by suit commenced within one year of the effective date of this law.

The court early decided that the "object of this statute is to disclose to the world the holder of the legal title, in order that purchasers for value might be protected against the secret deeds of the grantor."[3] To this extent, the statute was merely curative in nature;[4] its purpose was not to convey title, or create a lien.[5] However, it does purpose to convey some interest since it has been held that an unrecorded deed does not vest an absolute estate but leaves in the grantor a power of divestment that can even descend to his administrator.[6] Thus, " . . . the absolute title remains in the grantor in abeyance until the deed is recorded. . . ."[7] Its main effect is to give constructive notice of all recorded instruments to all who might be bound to search for them[8] and to create an estoppel in those failing to record.[9] The court has properly restricted this effect to documents[10] and covenants[11] within the chain of title required to be recorded under the statute.[12] Similarly, the court has held that proper documents improperly prepared and not entitled to recordation do not have this effect even though admitted to record.[13]

Burden of Proof and Presumptions. A purchaser or creditor with actual notice is not protected by the statute. The burden of proof is upon one claiming under the unrecorded instrument to show notice to the recorded party or his privy. There is a rebuttable presumption of *bona fides* in a grantee of record.[14]

Effect of Fraud, Duress, Mistake and Forgery. Under the general principle, "To hold that a man's land is to be forfeited and sold for the debt of another for which indebtedness he is in no manner responsible, is inconsistent with justice and abhorrent to equity,"[15] the court has refused to give effect

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3. Emerson v. Ross' Ex'x, 17 Fla. 122, 135 (1879); Billings v. Stark, 15 Fla. 297 (1875) (". . . to prevent fraud by parties concealing the fact of a conveyance to a bona fide purchaser without notice.").
4. Hollywood, Inc. v. Clark, 153 Fla. 501, 15 So.2d 175 (1943).
5. Hunter v. State Bank, 65 Fla. 202, 61 So. 497 (1913).
6. Emerson v. Ross' Ex'x, 17 Fla. 122 (1879).
7. Ballard v. Lippman, 32 Fla. 481, 487, 14 So. 154, 156 (1893).
8. Luria v. Bank of Coral Gables, 106 Fla. 175, 142 So. 901 (1932).
9. Drawdy v. Lake Josephine Co., 149 Fla. 756, 1 So.2d 631 (1941); Hart v. Lake Josephine Co., 149 Fla. 754, 1 So.2d 635 (1941); Holbrook v. Betton, 5 Fla. 99 (1853).
10. Pierson v. Bill, 138 Fla. 104, 189 So. 679 (1939).
11. Volunteer Security Co. v. Dowl, 159 Fla. 767, 33 So.2d 150 (1947).
12. Garrett v. Fernauld, 63 Fla. 434, 57 So. 671 (1912); Mansfield v. Johnson, 51 Fla. 239, 40 So. 196 (1906).
13. Lassiter v. Curtiss-Bright Co., 129 Fla. 728, 177 So. 201 (1937).
14. West Coast Lumber Co. v. Griffin, 56 Fla. 878, 48 So. 36 (1909); Feinberg v. Stearns, 56 Fla. 279, 47 So. 799 (1908); Lake v. Hancock, 38 Fla. 53, 20 So. 811 (1896).
15. Houston v. Forman, 92 Fla. 1, 6, 109 So. 297, 298 (1926).

to recorded deeds procured by fraud,[16] duress[17] or forgery,[18] unaccompanied by the element of estoppel.[19] The rule, however, appears to be that a bona fide purchaser without notice and for value is protected by recording under the statute if he purchases from a fraudulent grantor who is estopped[20] to assert his fraud or from a grantor by mistake.[21] The distinction appears to be made between void and voidable titles, although the court has not specifically discussed the problem in this light.

III. Notice, Estoppel and Possession

Constructive Notice. As has been so often expressed by the court, constructive notice is the backbone of the statute—the effect of recorded instruments.[22] To obtain this effect, the instruments must be properly executed,[23] proved,[24] acknowledged[25] and within the chain of title.[26] It is not necessary, however, that the instrument be recorded in the proper book,[27] thus placing the burden on the abstractor to search all books.

The court has never given a very complete definition of constructive notice other than that it is " . . . notice imputed to a person not having actual notice,"[28] amounting to a "legal inference."[29] This legal inference of notice is cast upon the subsequent purchaser and creditor not only as to what is actually exhibited in the record[30] but also as to facts discernible by a reasonably prudent man if the records were examined.[31] The recordation of one mortgage imputes no notice of unrecorded mortgages and contracts between the same parties held in one running account by the mortgagee.[32]

Constructive notice of other matter not of record has been held to have been given by the recording of an instrument. Examples are plats;[33]

16. *Id.* at 1, 109 So. at 297.
17. Hall v. Forman, 94 Fla. 682, 114 So. 560 (1927).
18. Wright v. Blocker, 144 Fla. 428, 198 So. 88 (1940) (the statute of limitations is inapplicable to such a deed though it remains on record for more than twenty years).
19. Houston v. Forman, 92 Fla. 1, 109 So. 297 (1926).
20. Neal v. Gregory, 19 Fla. 356 (1882).
21. Lusk v. Reel, 36 Fla. 418, 18 So. 582 (1895).
22. Emerson v. Ross' Ex'x, 17 Fla. 122 (1879); Billings v. Stark, 15 Fla. 297 (1875). Drawdy v. Lake Josephine Co., 149 Fla. 756, 1 So.2d 631 (1941) held that a recorded mortgage was constructive notice to an adverse possessor.
23. New York Life Ins. Co. v. Oates, 141 Fla. 164, 192 So. 637 (1939).
24. Edwards v. Thom, 25 Fla. 222, 5 So. 707 (1889).
25. Hall v. Forman, 94 Fla. 682, 114 So. 560 (1927).
26. Volunteer Security Co. v. Dowl, 159 Fla. 767, 33 So.2d 150 (1947); Pierson v. Bill, 138 Fla. 104, 189 So. 679 (1939); Garrett v. Fernauld, 63 Fla. 434, 57 So. 671 (1912); Mansfield v. Johnson, 51 Fla. 239, 40 So. 196 (1906).
27. Cawthon v. Stearns Culver Lumber Co., 60 Fla. 313, 53 So. 738 (1910); Ivey v. Dawley, 50 Fla. 537, 39 So. 498 (1905).
28. Sapp v. Warner, 105 Fla. 245, 255, 141 So. 124, 127 (1932).
29. *Ibid.*
30. Davis v. Brewer, 135 Fla. 752, 186 So. 207 (1939); Tyler v. Johnson, 61 Fla. 730, 55 So. 870 (1911).
31. Kemp v. Skivesen, 114 Fla. 667, 154 So. 688 (1934).
32. Battle v. Jennings Naval Stores Co., 74 Fla. 12, 75 So. 949 (1917).
33. Merrell v. Ridgely, 62 Fla. 546, 57 So. 352 (1912); Price v. Stratton, 45 Fla. 535, 33 So. 644 (1903).

court orders creating the power of the actors;[34] address of owner;[35] a clause of refusal to assume described mortgages, themselves not of record;[36] a clause showing purchase money to be part in cash, part by mortgage, though the mortgage is not recorded;[37] and restrictions in the chain of title showing that all lots in a certain subdivision are affected.[38] In the case of an ambiguity in the recorded instrument there is notice only if a reasonably prudent man would find it advisable to investigate further.[39]

An interesting statement appears in one case to the effect that since land purchased during a boom period is almost always purchased with the aid of mortgage money, this fact might be used in conjunction with other factors, but is insufficient of itself, to create constructive notice of a mortgage.[40]

Quit-Claim Deeds. Before the 1941 amendment, a purchaser under a quit-claim deed could not be a bona-fide purchaser without notice.[41] The court had previously realized the gross inequities of this situation, and had refused to extend this rule to the remote grantee, to prevent a bad rule from becoming worse.[42]The effect of the amendment is clearly to place all deeds on a par.

Actual Notice and Bona Fide Purchasers. Since only bona fide purchasers without notice are protected,[43] the court has had to determine what amounts to actual notice. The court, in defining actual notice, divided it into express and implied; express order was held to be "direct information"[44] and implied notice to be "notice inferred from the fact that the person had means of knowledge which it was his duty to use and which he did not use."[45] Consequently, implied actual notice is an "inference of fact"[46] to be distinguished from constructive notice, which is an "inference of law."[47]

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34. H.B. Claflin Co. v. King, 56 Fla. 767, 48 So. 37 (1909).
35. Davock v. Whealon, 156 Fla. 670, 24 So.2d 46 (1945); *cf.* Davis v. Brewer, 135 Fla. 752, 186 So. 207 (1939).
36. Pierson v. Bill, 133 Fla. 81, 182 So. 631, *on rehearing*, 134 Fla. 594, 184 So. 124 (1938), *appealed from retrial*, 138 Fla. 104, 189 So. 679 (1939).
37. Kemp v. Skivesen, 114 Fla. 667, 154 So. 688 (1934).
38. Hall v. Snavely, 93 Fla. 664, 112 So. 551 (1927).
39. Bright v. Buchman, 39 Fed. 243 (N.D. Fla. 1889).
40. Pierson v. Bill, 133 Fla. 81, 87, 182 So. 631, 633 (1938).
41. Braddy & Hale Fishery Co. v. Thomas, 93 Fla. 326, 112 So. 55 (1927); Fries v. Griffin, 35 Fla. 21, 17 So. 266 (1895); Snow v. Lake's Adm'r. 20 Fla. 656 (1884).
42. Rabinowitz v. Keefer, 100 Fla. 1723, 132 So. 297 (1931) (Ellis, J., dissenting), asked how far back is remoteness); Rabinowitz v. Hawk, 100 Fla. 44, 129 So. 501 (1930).
43. Lee v. Sas, 53 So.2d 114 (Fla. 1951); Cone Bros. Const. Co. v. Moore, 141 Fla. 420, 193 So. 288 (1940); Williams v. Neeld-Gordon Co., 86 Fla. 59, 97 So. 315 (1923); Bowen v. Grace, 64 Fla. 28, 59 So. 563 (1912); Ward v. Spively, 18 Fla. 847 (1882).
44. Sapp v. Warner, 105 Fla. 245, 255, 141 So. 124, 127 (1932).
45. *Ibid.*
46. *Ibid.*
47. *Ibid.*

Actual notice must be affirmatively alleged and proved,[48] and is a question of fact for the jury.[49]

Where a person with an unrecorded contract for deed informs the subsequent purchaser of his contract and advises him to search the record, though the search of the record is fruitless, the prior unrecorded contract takes precedence since the subsequent purchaser had actual notice.[50] An express assumption clause is actual notice of a right of redemption.[51] Attesting an unrecorded document,[52] knowledge of facts that in law create a vendor's lien[53] and acting as agent in an unrecorded transaction[54] are additional situations which the court has held to warrant a finding of actual notice.

The court refused, however, to find actual notice where there was actual notice to a fiduciary of the defendant,[55] a latent ambiguity[56] and a rumor in the community of which the subsequent purchaser was not a member.[57]

In order for a purchaser to be protected, he must continue without notice until the consideration passes.[58]

Failure to record and estoppel. Failure to record, no matter for how short a time, creates an estoppel against the non-recording party in favor of those who secure a subsequent interest in the property whether or not they relied on the record and regardless of whether the subsequent interest is recorded.[59] This estoppel has been held to be entirely consistent with the Florida Constitution and statutes.[60] This detriment to the prior interest holder if he does not record, plus the benefit of constructive notice if he does, are the inducements to effect an immediate recordation of instruments.

One may also lose his rights to the property by an "equitable estoppel."[61] This estoppel was first applied to persons claiming land under patents not yet issued[62] and immediately limited to situations where the facts

48. Kearnes v. Hill, 21 Fla. 185 (1885).
49. Sirkin v. Schupler, 90 Fla. 68, 105 So. 151 (1925).
50. Cantrell v. Herring, 144 Fla. 576, 198 So. 206 (1940).
51. Luria v. Bank of Coral Gables, 106 Fla. 175, 142 So. 90 (1932).
52. Thompson v. Maxwell, 16 Fla. 773 (1878).
53. Bowen v. Grace, 64 Fla. 28, 59 So. 563 (1912).
54. Gamble v. Hamilton, 31 Fla. 401, 12 So. 229 (1893); *cf.* Blackburn v. Venice Inlet Co., 38 So.2d 43 (Fla. 1948).
55. Luria v. Bank of Coral Gables, 106 Fla. 175, 142 So. 901 (1932).
56. Rambo v. Dickinson, 92 Fla. 758, 110 So. 352 (1926).
57. Hopkins v. O'Brien, 57 Fla. 444, 49 So. 936 (1909).
58. Standard Oil Co. v. Mehrtens, 96 Fla. 455, 118 So. 216 (1928). *But cf.* Myers v. Van Buskirk, 96 Fla. 704, 119 So. 123 (1928), where the court in weighing two equitable interests gave favor to the subsequent purchaser, who had clothed himself with the legal title before the recordation of the prior equitable interest, and stated that it made no difference that the purchase price had not yet been paid.
59. McCahill v. Travis Co., 45 So.2d 191 (Fla. 1950); Van Eepoel Real Estate Co. v. Sarasota Milk Co., 100 Fla. 438, 129 So. 892 (1930).
60. New York Life Ins. Co. v. Oates, 141 Fla. 164, 192 So. 637 (1939).
61. Coram v. Palmer, 63 Fla. 116, 58 So. 721 (1912). This appears to be what is more correctly termed estoppel by laches, a type of equitable estoppel.
62. *Ibid*; Hagen v. Ellis, 39 Fla. 463, 22 So. 727 (1897).

are not available to both parties.[63] It is also available as a defense where a party is actively misled even though the instrument is recorded.[64]

Possession. Possession is another element that can defeat an otherwise perfect record title, since a purchaser or creditor is bound by the unrecorded rights of the occupants at the time of the transaction.[65] The court has variously termed the notice created by possession as constructive,[66] actual[67] and implied actual notice[68] and has given possession the same effect as recordation.[69] Such possession must not be casual or temporary[70] but must resemble that required for adverse possession; that is, it must be open, notorious, visible, exclusive and continuous.[71] Inclosure and cultivation,[72] or using the land for its only value, *e.g.*, firewood, is sufficient.[73] Instances of insufficient possession include: where the land involved was everglade land mostly under water and therefore incapable of possession;[74] where an agent cultivated only a few acres of a large parcel;[75] where tenants continued in possession but paid rent to the prior grantee;[76] and where the grantee merely surveyed the land, dug holes to test the soil and displayed the land to prospective purchasers.[77] No conclusive rule has been formulated where one tenant in common holds possession for the other.[78] Each case must be resolved in light of its individual facts and the general rule stated above.[79]

IV. Parties Under the Statute

Original Parties. Consistent with the purpose of the statute, recording has no effect on the original parties to the instrument since neither is a sub-

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63. Price v. Stratton, 45 Fla. 535, 33 So. 644 (1903).

64. *E.g.*, Elizabethport Cordage Co. v. Whitlock, 37 Fla. 190, 20 So. 255 (1896).

65. Bright v. Buchman, 39 Fed. 243 (N.D. Fla. 1889); Ellis v. Everett, 79 Fla. 493, 84 So. 617 (1920); McRae v. McMinn, 17 Fla. 876 (1880). Crozier v. Ange, 85 Fla. 120, 95 So. 426 (1923), held that possession by insane grantor at time of execution of mortgage by grantee put mortgagee on notice as to grantor's capacity.

66. *E.g.*, Scott v. Simmons, 151 Fla. 628, 10 So.2d 122 (1942); Marion Mortgage Co. v. Grennan, 106 Fla. 913, 143 So. 761 (1932).

67. Ellis v. Everett, 79 Fla. 493, 84 So. 617 (1920).

68. *See* Reasoner v. Fiskelli, 114 Fla. 102, 105, 153 So. 98, 99 (1934).

69. Massey v. Hubbard, 18 Fla. 688 (1882).

70. Scott v. Simmons, 151 Fla. 628, 10 So.2d 122 (1942).

71. Ellis v. Everett, 79 Fla. 493, 84 So. 617 (1920); Carolina Portland Cement Co. v. Roper, 68 Fla. 299, 67 So. 115 (1914); Tate v. Pensacola Gulf, Land & Development Co., 37 Fla. 439, 20 So. 542 (1896).

72. Ellis v. Everett, 79 Fla. 493, 84 So. 617 (1920).

73. Tate v. Pensacola Gulf, Land & Development Co., 37 Fla. 439, 20 So. 542 (1896).

74. McCahill v. Travis Co., 45 So.2d 191 (Fla. 1950).

75. Hopkins v. O'Brien, 57 Fla. 444, 49 So. 936 (1909).

76. Stockton v. National Bank of Jacksonville, 45 Fla. 590, 34 So. 897 (1903).

77. Carolina Portland Cement Co. v. Roper, 68 Fla. 299, 67 So. 115 (1914).

78. Ellis v. Everett, 79 Fla. 493, 84 So. 617 (1920); Tyler v. Johnson, 61 Fla. 730, 55 So. 870 (1911).

79. Ellis v. Everett, 79 Fla. 493, 84 So. 617 (1920).

sequent purchaser or creditor.[80] Nor is the purpose of the act to give notice to the grantor.[81]

Mortgagees. Basically the rights and liabilities of a mortgagee parallel those of a grantee. He is deemed a purchaser to the extent of his interest and is so protected by recordation to the extent of that interest.[82] For example, a recorded mortgage securing future advances is protected to the extent of the advances, provided that the purpose and extent of the advances are explicitly stated with enough information to ascertain the amount advanced.[83] An early opinion declaring an unrecorded mortgage a mere nullity[84] has been disregarded by later courts since if it has no other effect, it is still good as between the original parties.[85]

There are, however, a few situations unique to mortgages under the recording statute. Where the mortgagee, intending to substitute a new mortgage, files a satisfaction of his claim without the debt being paid, a true estoppel may defeat the new mortgage; however, the court will probably require reliance by the new claimant.[86] It is important to notice that although an assignee of the mortgage may be estopped by constructive notice of the recording statute, this alone is not sufficient to make him *male fides* as to the note under the recording statute.[87] It should be noted that an assignment of a mortgage has been held not to be an interest in land, but only an assignment of a lien, and as such is not required to be recorded within the purview of this statute.[88]

Creditors. Creditors must have reduced their claims to liens, the statute does not refer to general creditors.[89] This construction is imperative since the whole purpose of the statute would otherwise be destroyed, as an abstractor could never check all possibilities. With the exception that lien rights attach only the beneficial interest of the debtor, the lien-creditor has the same rights and protection as other parties under the statute.[90] This beneficial interest, of course, may be enlarged by defenses of estoppel and

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80. Licata v. DeCorte, 50 Fla. 563, 39 So. 58 (1905); *see* Hams v. Marshall, 43 F.2d 703 (2d Cir.), *cert. denied*, 282 U.S. 822 (1930); Stewart v. Mathews, 19 Fla. 752 (1883).

81. State *ex rel.* Dixon v. Trustees of Internal Improvement Fund, 20 Fla. 402 (1884) (defendant had issued both a prior equitable interest to plaintiff who recorded and a subsequent legal title to a third party).

82. Sauer v. Florida R.R., 227 Fed. 718 (S.D.N.Y. 1915); Warner v. Watson, 35 Fla. 402, 17 So. 654 (1895).

83. Bullock v. Fender, 140 Fla. 448, 192 So. 167 (1939).

84. McKeown v. Collins, 38 Fla. 276, 21 So. 193 (1896).

85. *See* Hams v. Marshall, 43 F.2d 703 (2d. Cir.), *cert. denied*, 282 U.S. 822 (1930) (although the mortgage is good as between the parties under § 47 of the Bankruptcy Act [11 U.S.C. § 75 (1946)] it is not good as against the trustee in bankruptcy).

86. *See* Elizabethport Cordgage Co. v. Whitlock, 37 Fla. 190, 20 So. 255 (1896).

87. Taylor v. American National Bank, 64 Fla. 525, 60 So. 783 (1913).

88. Garrett v. Fernauld, 63 Fla. 434, 57 So. 671 (1912).

89. Ringling Trust & Savings Bank v. Whitfield Estates, 32 F.2d 92 (5th Cir.), *cert. denied*, 280 U.S. 573 (1929); Rogers v. Munnerlyn, 36 Fla. 591, 18 So. 669 (1895); Eldridge, Dunham & Co. v. Post, 20 Fla. 579 (1884).

90. See Smith v. Pattishall, 127 Fla. 474, 176 So. 568 (1937).

constructive notice.[91] Where the debts were not incurred in reliance on ownership the court has restricted the creditor's rights to protect a more deserving unrecorded equitable interest.[92] When there is a possibility of a subsequent transfer of title of a fraudulent nature the recordation is only evidence of the execution and not of the intent of the debtor.[93]

Execution Purchasers. The rights of an execution purchaser are those of a lienholder.[94] Thus, if the lienholder had notice of unrecorded claims, either actual or constructive, before judgment, the purchaser takes subject to those claims.[95] An exception is made of a vendee under a contract for deed who acquires his vendor's title at a sheriff's sale, since the vendee is estopped to deny liability of the obligation under which he acquired possession.[96] The only interest the vendee acquires is to the extent of the amount paid at the sale.[97]

Mechanics' Lienholders. By statute[98] labor and material supplied in enhancing the value of land is of itself constructive notice of a mechanic's lien.[99] If work is started before the competing interest is recorded, the competing interest holder is estopped.[100] The effect of recording a mechanic's lien is not to create a new interest but to preserve the interest created at the time of the visible commencement of the work.[101] The court has intimated, but not held, that the commencement of work is constructive notice of a continuing contract and a subsequent recordation of a competing right is ineffective against the entire contract.[102] The unpaid amount on a construction mortgage, however, is deemed prior to mechanics' lien rights.[103]

Special Parties. The court has recognized a few special parties, the very nature of whose instruments give constructive notice, when recorded, of the factors giving rise to their power to act. When the instrument is that of a guardian[104] or an administrator,[105] a subsequent party, to protect himself, must look to the court records to ascertain the authority with which the fiduciary acted and the propriety of the transaction, as such subsequent

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91. *Ibid.*; Miller v. Berry, 78 Fla. 98, 82 So. 764 (1919).
92. Laganke v. Sutter, 137 Fla. 71, 187 So. 586 (1939); Petit v. Coachman, 51 Fla. 521, 41 So. 401 (1906); see American Freehold Land & Mortgage Co. v. Maxwell, 39 Fla. 489, 22 So. 751 (1897).
93. Beasley v. Coggins, 48 Fla. 215, 37 So. 213 (1904).
94. Mansfield v. Johnson, 51 Fla. 239, 40 So. 196 (1906); Doyle v. Wade, 23 Fla. 90, 1 So. 516 (1887).
95. Jacobs v. Scheurer, 62 Fla. 216, 57 So. 356 (1912); Licata v. DeCorte, 50 Fla. 563, 39 So. 58 (1905).
96. Latin-American Bank v. Roger, 87 Fla. 147, 99 So. 546 (1924).
97. *Ibid.*
98. FLA. STAT. c. 84 (1951). For review of this statute, see Comment, 6 MIAMI L. Q. 246 (1952).
99. People's Bank of Jacksonville v. Arbuckle, 82 Fla. 479, 90 So. 458 (1921).
100. Van Eepoel Real Estate Co. v. Sarasota Milk Co., 100 Fla. 438, 129 So. 892 (1930).
101. *Ibid.*
102. See People's Bank of Jacksonville v. Arbuckle, 82 Fla. 479, 90 So. 458 (1921).
103. *Ibid.*
104. Sapp v. Warner, 105 Fla. 245, 141 So. 124 (1932).
105. Rinehart v. Phelps, 150 Fla. 382, 7 So.2d 783 (1942).

party is bound by these records. Of a similar nature are the instruments of a trustee[106] and an escrowee;[107] the subsequent party must look to the authority given them. The signing of "X, trustee," is sufficient to put the purchaser on inquiry.[108]

V. Conclusion

We now return to our original query: Has Florida achieved the socially necessary attributes to land titles via the recording act and its constructional incidents? In the light of what has preceded let us observe graphically the problem that exists: If *A* conveys to *B* who does not record until after *A* conveys to *C*, even though he does so before *C* records, *C* will prevail as between *B* and *C*, since *B* is estopped.[109] However, if *C* refrains from recording until after *B* conveys to *D*, is *C* estopped as to *D*? *D* had no way of ascertaining *C's* rights, but since *B* allowed *A*, the common grantor, to retain his "power of divestment," *A's* exercise of it by conveying to *C* sapped the vitality from *B's* deed and *D* is thus actually outside the chain of title and must look to *B* for recompensation, if any.[110] The situation can be further complicated by the introduction of possession, void titles, actual knowledge and estoppel—all factors which the remote grantee must take into consideration,[111] with little or no opportunity of being able to ascertain them in advance.[112]

It is important to consider whether all of these defeasible characteristics are socially necessary when weighed against the competing value of the "clear title."

The element appearing most unjust and least desirable is possession. To allow possession as constructive notice of the occupants' rights would seem to defeat the object of the legislature—to reduce to record as many interests in land as are practicable. The fact that the interest-holder is given the same protection as recordation by his occupancy, negatives the inducement and pressure of the statute. Practical aspects should no longer deter the courts from rectifying this situation, since transportation and communication have become rapid and convenient and filing has become inexpensive and simplified. If the occupant's interest is worth protection, it is worth the minor inconvenience of recording to protect it, especially when measured by our yardstick of protection to the future title holder.

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106. H.B. Claflin Co. v. King, 56 Fla. 767, 48 So. 37 (1909).
107. Ullendorff v. Graham, 80 Fla. 845, 87 So. 50 (1920).
108. H.B. Claflin Co. v. King, 56 Fla. 767, 48 So. 37 (1909).
109. *See* Van Eepoel Real Estate Co. v. Sarasota Milk Co., 100 Fla. 438, 444, 129 So. 892, 895 (1930).
110. See Key West Wharf & Coal Co. v. Porter, 63 Fla. 448, 58 So. 599 (1912), where the court held that one claiming title under one who is estopped is also estopped.
111. The purchaser can protect himself to a great extent by title insurance and by warranties in his deed.
112. Most mechanics' liens can be ascertained in advance by an inspection of the property and guarded against by requiring the execution of a waiver of liens for recent work.

No solution appears at hand to vitiate the effect of void titles nor does it seem socially desirable to change this.

Should actual knowledge by the immediate grantee defeat the remote grantee? As the statute now stands, it is impossible to arrive at any other construction. However, this segment of the law seems in need of rectification since it serves as a loophole to introduce a parol defeasance of perhaps only an off-chance finding by the immediate grantee. The better pattern is to allow actual notice to defeat the immediate grantee. A remote grantee without notice should be allowed protection of the recording statute as though he had been the immediate grantee *without* notice, in which case the unrecorded interest holder would nevertheless have lost his priority.

The element of estoppel by constructive notice demonstrated in the hypothet above is the basic effect of the statute[113] and only by construing the statute as based entirely on priority of recording, as in a few states,[114] can this element be eliminated. As to the immediate parties, the Florida judicial interpretation is entirely just, but as to the remote grantee is a definite burden.

In the last two elements, actual knowledge and estoppel, the bridge between justice to the immediate grantee of imperfect title, and the injustice to the remote grantee should be the concern of the court and the legislature. It must be assumed that the immediate grantee, mortgagee or relying creditor will exercise all of the reasonable precautions to protect himself by procuring:

(1) abstract of title;
(2) opinion of title;
(3) check of occupancy;
(4) insurance, if possible;
(5) immediate recordation.

In a recent case the court had reason to stress this, saying: "This is another of those unfortunate instances commonly resulting in losses and litigation, wherein a business man failed to procure legal counsel at the outset in handling the legal details of a real estate transaction and entrusted them to a 'real estate dealer.' The real estate dealer failed to have the title examined by legal counsel, and failed to promptly record the deed when it was delivered by the grantor. Except for the fact that the original agreements had been placed on record—though plaintiff did not know this at the time—plaintiff might have lost his entire investment in the property. If plaintiff had only exercised ordinary prudence in having his title examined when he purchased the property, this litigation, and the possibility of loss, could easily have been averted."[115]

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113. PATTON, LAND TITLES § 9 (1938).
114. Louisiana, Massachusetts and North Carolina. See *Id.* § 8.
115. Michaels v. Albert Pick & Co., 158 Fla. 877, 882, 30 So.2d 498, 501 (1947).

Despite the foregoing criticisms, it must be admitted precisely what the act has achieved:

(1) It provides a public storehouse for records, relieving the owner of the obligation to retain and preserve his muniments of title;
(2) It places all the records in one convenient location for cross-referencing;
(3) It displays to the world, with the few exceptions noted above, the priorities of the recording parties and the extent of their interests.

Certainly this is a long step from the English custom of requiring each to preserve his own instruments in the best way that he can.[116] The day of the homestead existing in the same family generation following generation has acceded to the concept of movement to follow the occupation, or the sun. Thus, the law must recognize the social factors that make it necessary to continue to strive for a freely alienable and protected title that can be ascertained expeditiously and inexpensively.

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116. PATTON, LAND TITLES § 5 (1938).