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CURATIVE ACTS AND LIMITATIONS ACTS DESIGNED TO REMEDY DEFECTS IN FLORIDA LAND TITLES — I-IV

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One who is about to acquire an estate or other interest in real property must, if his investment is to be reasonably secure, ascertain that no unremedied defects of title are disclosed by the records of the transactions by means of which the title has devolved or been affected. Those transactions begin with that time in the usually distant past when the land was transferred by the sovereign to private ownership and extend through the consummation of the most recent one that concerns the property in question. The investigation necessary to give this degree of assurance is difficult and time-consuming, and the problem involved becomes increasingly intricate with the multiplication of relevant transactions that is the normal accompaniment of the lapse of time.[1]

PART I — TITLE DEFECTS NOT DISCLOSED BY THE RECORDS

Even an investigation of the type mentioned and an accurate evaluation of the data that it makes available do not insure the validity of the title under consideration. The official records, in the absence of a Torrens or title-registration act, include no conclusion as to the state of the title but consist solely of copies of the evidences of title from which a prospective purchaser must at his peril form his own opinion;[2] and after relying upon them he may learn to his detriment that matters not of record have vested the title elsewhere than in the individual who is shown by the records to be its owner. Many interests

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[1]See Aigler, *Title Problems in Land Transfers*, 24 MICH. St. B.J. 202 (1945); Basye, *Streamlining Conveyancing Procedure*, 47 MICH. L. REV. 935, 936 (1949).

[2]State *ex. rel.* Douglas v. Westfall, 85 Minn. 437, 438, 89 N.W. 175 (1902) (dictum).

arise through operation of law as the result of extraneous facts and family relationships that do not have their origin in written instruments and are obviously not within the scope of the typical recording act. These interests persist, therefore, even as against a subsequent good faith purchaser, in spite of the fact that they are not disclosed by the records.[3] Thus, a title obtained by adverse possession is not within the scope of a typical recording act and is superior to that of a subsequent good faith purchaser who accepts a conveyance from the owner of the record title after the title by adverse possession has been perfected.[4] This result follows even when the adverse possessor, after perfecting his title, has gone out of possession before the good faith purchase has been consummated.[5]

Similarly, land may have been homestead at the time that an attempt was made to convey it; and that fact may not be, and indeed usually is not, disclosed by the records. Under such circumstances the deed can be invalidated even as against a good faith purchaser or his successors unless it was executed in accordance with the constitutional or statutory requirements applicable to the conveyance of homestead;[6] and a devise is rendered nugatory when the land in

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[3]*Cf.* Aigler, *supra* note 1, at 204; PATTON, LAND TITLES §29, n.58 (1938).

[4]*E.g.*, Faloon v. Simshauser, 130 Ill. 649, 22 N.E. 835 (1889); Schall v. Williams Valley R.R., 35 Pa. 191 (1860); MacGregor v. Thompson, 7 Tex. Civ. App. 32, 26 S.W. 649 (1894); Mugaas v. Smith, 33 Wash.2d 429, 206 P.2d 332 (1949); PATTON, LAND TITLES §29, n.58 (1938); 4 TIFFANY, REAL PROPERTY §1177 (3d ed. 1939); see also Annot., 9 A.L.R.2d 850 (1950); Haymond, *Title Insurance Risks,* Title News, Apr. 1929, p. 8.

[5]Authorities cited note 4 *supra.* Priority over one who purchases in good faith from the record-title owner after the adverse possessor has perfected his title and gone out of possession, has been accorded even to an adverse possessor who, at a time between the beginning and the completion of the period of his adverse possession, himself obtained a deed from the record-title owner that he failed to record. *Accord,* Nolan v. Powell, 64 So. 566 (Ala. 1913); Winters v. Powell, 180 Ala. 425, 61 So. 96 (1912). In support of this position, it has been stated that, since the title would have been perfected as against the subsequent good faith purchaser by adverse possession alone without the aid of the deed obtained by the adverse possessor during the running of the statutory period, it would be anomalous to hold that the result is affected by his failure to record that deed. See Nolen v. Powell, *supra,* at 567. This holding seems sound; and it has been approved; see Haymond, *supra* note 4, at 10, n.31. It has also been criticized, however; see Note, 26 HARV. L. REV. 762 (1913); 4 TIFFANY, REAL PROPERTY §1177 (3d ed. 1939).

[6]Jahn v. Purvis, 145 Fla. 354, 199 So. 340 (1940); *cf.* Estep v. Herring, 154 Fla. 653, 18 So.2d 683 (1944); Bigelow v. Dunphe, 144 Fla. 330, 198 So. 13 (1940); Bigelow v. Dunphe, 143 Fla. 603, 197 So. 328 (1940); Church v. Lee, 102 Fla. 478, 136 So. 242 (1931); Byrd v. Byrd, 73 Fla. 322, 74 So. 313 (1917).

question is homestead and unsusceptible of devise under the law of the jurisdiction, even though the records do not show its homestead character or that the testator is survived by individuals so related to him as to bring into play the constitutional or statutory prohibition of its being willed.[7] The marital status of a grantor, whether shown by the records or not, also determines the statutory formalities with which he must comply in conveying his Florida land. If he is a married man, both his grantee and subsequent good faith purchasers from the latter take subject to his wife's right of dower unless she relinquishes it properly.[8] If the grantor is a married woman who has not been declared a free dealer, her conveyance of Florida land is void unless her husband joins in the conveyance.[9] Even when the records disclose no irregularity, defects of title may arise under some circumstances from the fact that the grantor in a past transaction was a minor[10] or non compos mentis.[11]

A purchaser who relies on the records may at times be subjected to loss because the facts set forth in the records do not actually exist. A good faith purchaser of a record title dependent upon a prior deed to which the signature of the grantor was forged is, for example, subordinate to the true owner.[12] So also is one who in purchasing land

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[7]*Cf., e.g.,* Lockhart v. Sasser, 156 Fla. 339, 22 So.2d 763 (1945); Jackson v. Jackson, 90 Fla. 563, 107 So. 255 (1925); Norton v. Baya, 88 Fla. 1, 102 So. 361 (1924); Caro v. Caro, 45 Fla. 203, 34 So. 309 (1903); DeCottes v. Clarkson, 43 Fla. 1, 29 So. 442 (1901); Crosby and Miller, *Our Legal Chamelon,* 2 U. FLA. L. REV. 12, 56 (1949).

[8]*Cf.* FLA. STAT. §§731.34, 693.02 (1953), Blount v. Bost, 97 Fla. 449, 121 So. 472 (1929).

[9]FLA. STAT. §§693.01, 708.04, 708.08 (1953), Phillips v. Lowenstein, 91 Fla. 89, 107 So. 350 (1926); *cf.* Miller v. Phillips, 157 Fla. 175, 25 So.2d 194 (1946); Protective Holding Corp. v. Cornwall Co., 127 Fla. 252, 173 So. 804 (1936); Cornell v. Ruff, 105 Fla. 504, 141 So. 535 (1932). *But cf.* Kerivan v. Fogal, 156 Fla. 92, 22 So.2d 584 (1945).

[10]PATTON, LAND TITLES §29, n.58 (1938); Haymond, *Title Insurance Risks,* Title News, Mar. 1929, p. 3; *cf.* Putnal v. Walker, 61 Fla. 720, 55 So. 844 (1911).

[11]Authorities cited note 10 *supra.* It has been held in a few jurisdictions that the deed of an insane person is absolutely void even as against one who, at the time he acquired the land, had no knowledge of the insanity. *E.g.,* Galloway v. Hendon, 131 Ala. 280, 31 So. 603 (1901); *cf.* Dougherty v. Powe, 127 Ala. 577, 30 So. 524 (1900). In most jurisdictions, including Florida, however, such a deed is merely voidable; and it can be avoided only if the transaction was unfair to the grantor or if the grantee had knowledge of the grantor's insanity. *E.g.,* Hassey v. Williams, 127 Fla. 734, 174 So. 9 (1937).

[12]*Accord, e.g.,* Smith v. Markland, 223 Pa. 605, 72 Atl. 1047 (1909); *cf.* Lee v. Kellogg, 108 Mich. 535, 66 N.W. 380 (1896); Macomber v. Kinney, 114 Minn. 146,

relies in good faith upon the showing of the records that the title had been conveyed to his immediate or remote grantor, when in reality that showing is attributable to the fact that the name of the grantee had been, unknown to that person, fraudulently altered in the prior deed before it was recorded.[13] Other fraudulent material alterations of a deed prior to its record, when made by one other than the true owner, lead to similar results.[14] And when the signature of the spouse of a grantor is forged to an instrument, the result of the transaction is, even as against a good faith purchaser under that instrument, the same as if the signature had not been added.[15] A good faith purchaser also takes subject to a recorded mortgage even though at the time of his purchase he relies on the record of a forged release of the mortgage.[16] Such a purchaser, who relies on the record of a deed in the chain of title, likewise ordinarily acquires no rights against the grantor who executed it, when the deed has been recorded without the authority of the grantor and without his having delivered it or having regarded it as a legally effective instrument.[17]

128 N.W. 1001 (1910); Gustine v. Westenberger, 224 Pa. 455, 73 Atl. 913 (1909); Wright v. Blocker, 144 Fla. 428, 434, 198 So. 88, 90 (1940) (dictum); Forcum v. Brown, 251 Ill. 301, 314, 96 N.E. 259, 264 (1911) (dictum); Austin v. Dean, 40 Mich. 386, 388 (1879) (dictum).

[13]*Accord,* Pry v. Pry, 109 Ill. 466 (1884); Nesland v. Eddy, 131 Minn. 62, 154 N.W. 661 (1915).

[14]Wallace v. Harmstad, 15 Pa. 462 (1850).

[15]*E.g.,* Sherod v. Ewell, 104 Iowa 253, 73 N.W. 493 (1897). This defect is of course fatal when the joinder of the spouse is a prerequisite to the validity of the conveyance. This is the situation in Florida, for example, when the grantor is a married woman other than a free dealer—FLA. STAT. §708.08 (1953); *cf.* Miller v. Phillips, 157 Fla. 175, 25 So.2d 194 (1946) — or when the property conveyed is a Florida homestead. FLA. CONST. art. X, §4; Estep v. Herring, 154 Fla. 653, 18 So.2d 683 (1944); Jahn v. Purvis, 145 Fla. 354, 199 So. 340 (1940); *cf.* Hutchinson v. Stone, 79 Fla. 157, 84 So. 151 (1920); Evans v. Summerlin, 19 Fla. 858 (1883). And the forgery of the signature of the grantor's wife may be serious when, as in Florida, her signature is necessary for the relinquishment of her dower. FLA. STAT. §693.02 (1953).

[16]D'Wolf v. Haydn, 24 Ill. 526 (1860); *accord,* Lancaster v. Smith, 67 Pa. 427 (1871).

[17]*E.g.,* Gould v. Wise, 97 Cal. 532, 32 Pac. 576 (1893); *accord,* Van Amringe v. Morton, 4 Whart. 381 (Pa. 1839); *cf.* Allen v. Ayer, 26 Ore. 589, 39 Pac. 1 (1895). It has been held, however, that a grantor who has been negligent in the custody of an undelivered deed is estopped as against a subsequent good faith purchaser to deny that he delivered it. *E.g.,* Merck v. Merck, 83 S.C. 329, 65 S.E. 347 (1909); see 4 TIFFANY, REAL PROPERTY §1035 (3d ed. 1939). The degree of negligence required thus to estop the grantor ordinarily is great. Gould v. Wise, *supra; cf.* Tisher v. Beckwith, 30 Wis. 55, 58 (1872) (dictum).

Similar results may follow even as against a subsequent good faith purchaser when a deed that has been placed in escrow is wrongfully delivered to the grantee by the holder in escrow, in spite of the fact that the condition upon which it was to become effective has not occurred.[18] And a good faith purchaser of course does not acquire ownership when his title is dependent upon a deed that was wrongfully executed and recorded by another individual who had the same name as the grantee in the deed that precedes it in the recorded chain of title.[19]

Although the record of an instrument shows that the certificate of acknowledgment recites that a party to the instrument appeared before the certifying officer, the falsity of that assertion can be shown in many jurisdictions even as against one who subsequently purchases the land in good faith.[20] It also can be shown that an instrument that

[18]If the grantor has not permitted the grantee to take possession of the land, he is superior to one who purchases it in good faith from the grantee after the the deed has been wrongfully delivered to the grantee by the holder in escrow, *e.g.*, Blakeney v. HOLC, 192 Okla. 158, 135 P.2d 339 (1943); Clevenger v. Moore, 126 Okla. 246, 259 Pac. 219 (1927); 4 TIFFANY, REAL PROPERTY §1051 (3d ed. 1939); *accord,* United States v. Payette Lumber & Mfg. Co., 198 Fed. 881 (S.D. Idaho 1912); *cf.* 3 AMERICAN LAW OF PROPERTY §12.68 (Casner ed. 1952); Dixon v. Bristol Sav. Bank, 102 Ga. 461, 465, 31 S.E. 96, 98 (1897) (dictum); see Comment, 16 CALIF. L. REV. 141 (1928). *Contra,* Schurtz v. Colvin, 55 Ohio St. 274, 291, 45 N.E. 527, 531 (1896) (dictum); Comment, 37 YALE L.J. 357 (1928). The grantor is also superior to such a good faith purchaser even when the deed has been wrongfully delivered out of escrow and the grantee has taken possession of the land without the consent of the grantor, Clevenger v. Moore, *supra. But cf.* Comment, 37 YALE L.J. 357 (1928). When, however, the grantor puts the grantee in possession of the land and the holder in escrow wrongfully delivers the deed to the grantee, the grantor is estopped to assert that a good faith purchaser from the grantee does not have title. Quick v. Milligan, 108 Ind. 419 (1886); Comment, 16 CALIF. L. REV. 141, 143 (1928); *cf.* Haven v. Kramer, 41 Iowa 382 (1875); Schurtz v. Colvin, 55 Ohio St. 274, 45 N.E. 527 (1896). Such an estoppel is not raised in Florida — Houston v. Forman, 92 Fla. 1, 109 So. 297 (1926); *cf.* Houston v. Adams, 85 Fla. 291, 95 So. 859 (1923) — or Wisconsin — Everts v. Agnes, 4 Wis. 356, 367 (1855) (dictum) — in favor of a good faith purchaser from a grantee who after having been given possession of the land by the grantor has obtained the deed from a well-intentioned holder in escrow by making fraudulent representations to him. The contrary position has been taken in Georgia; *cf.* Dixon v. Bristol Sav. Bank, 102 Ga. 461, 31 S.E. 96 (1897).

[19]Holland v. Blanchard, 262 S.W. 97 (Tex. Civ. App. 1924); 3 AMERICAN LAW OF PROPERTY §12.58 (Casner ed. 1952); Rood, *Registration of Land Titles,* 12 MICH. L. REV. 379, 389 (1914); *cf.* Forcum v. Brown, 251 Ill. 301, 96 N.E. 259 (1911).

[20]*E.g.*, Grider v. American Freehold Land Mtge. Co., 99 Ala. 281, 12 So. 775 (1893); Mays v. Hedges, 79 Ind. 288 (1881); *cf.* Allen v. Lenoir, 53 Miss. 321 (1876); Williamson v. Carskadden, 36 Ohio St. 664 (1881); Donahue v. Mills, 41 Ark. 421, 426 (1883) (dictum); Johnston v. Wallace, 53 Miss. 331, 338 (1876) (dictum);

has been spread upon the records was acknowledged before an individual who was not authorized to take acknowledgments[21] or that the acknowledgment was taken outside the territorial area in which the officer who took it was commissioned to act[22] or that the acknowledgment was forged.[23] In all of these instances the effect is the same as if no attempt had been made to acknowledge the instrument.[24] The consequences resulting from a defective acknowledgment of the types under consideration are of course dependent upon the nature of the conveyance to which it is appended — whether, for example, the conveyance is of homestead property or of the separate property of a married woman or whether it involves the relinquishment of an inchoate right of dower — and upon the law of the jurisdiction where the land lies that is in effect at the time of the conveyance.

The foregoing examples of matters not of record that may defeat or impair a record title are merely illustrative, since no attempt is

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Pickens v. Knisely, 29 W. Va. 1, 16, 11 S.C. 932, 937 (1886) (dictum). *But cf.* Kerr v. Russell, 69 Ill. 666 (1873); Heeter v. Glasgow, 79 Pa. 79 (1875); Williams v. Baker, 71 Pa. 476 (1872).

In Florida the falsity of a recital in the certificate of acknowledgment that a party to the instrument personally appeared before the officer can be shown when that party has been subjected to fraud or duress in connection with the execution of the instrument. Hutchinson v. Stone, 79 Fla. 157, 84 So. 151 (1920). In the absence of fraud, duress, mistake or accident, however, the recital cannot be rebutted. New York Life Ins. Co. v. Oates, 141 Fla. 164, 192 So. 637 (1939). Each of these Florida cases involved an instrument to which a married woman became a party prior to May 13, 1943, the effective date of FLA. STAT. §693.03 (1953), and at a time, therefore, when her separate acknowledgment was required.

[21]*E.g.,* Village of Vermont v. Miller, 161 Ill. 210, 43 N.E. 975 (1896); *cf.* Davenport & R.I. Bridge Ry. & Terminal Co. v. Johnson, 188 Ill. 472, 59 N.E. 497 (1900); Franklin Sav. & Loan Co. v. Riddle, 216 S.C. 367, 371, 57 S.E.2d 910, 911 (1950) (dictum).

[22]*E.g.,* Hagan Bros. v. Beaty, 201 Ala. 678, 79 So. 250 (1918); *cf.* Wagner v. Davidson, 127 Okla. 199, 260 Pac. 37 (1927); Stewart v. Stewart, 19 Fla. 846, 848 (1883) (dictum) (acknowledgment taken before a justice of the peace outside his county may be void). *But cf.* Odiorne v. Mason, 9 N.H. 24 (1837); Kinsman v. Loomis and Wood, 11 Ohio 475 (1842); Moore v. Vance, 1 Ohio 1 (1821).

[23]*Cf.* White v. Manigan, 138 Tenn. 139, 141, 196 S.W. 148 (1917) (dictum).

[24]*Accord,* Hagan Bros. v. Beaty, 201 Ala. 678, 79 So. 250 (1918); Village of Vermont v. Miller, *supra* note 21; Wagner v. Davidson, *supra* note 22; White v. Manigan, *supra* note 21. It has been held, however, that an acknowledgment is valid although it was taken before an individual who was continuing in good faith to act as an authorized officer after the expiration of his commission. Sousley v. Citizens Bank, 168 Ky. 150, 181 S.W. 960 (1916); Brown v. Lunt, 37 Me. 423 (1854); First Nat'l Bank of Sweetwater v. Fowler, 8 Tenn. App. 128 (1928). In this connection see FLA. STAT. §117.06 (1953).

made to compile a complete enumeration of these hazards to which a purchaser may be subjected. Professor John R. Rood has listed nineteen such possibilities that can exist under the law of some jurisdictions;[25] and he, too, stresses the fact that his compilation is not all-inclusive.

PART II — STATUTES OF LIMITATIONS AND THE DOCTRINE OF ADVERSE POSSESSION

It has long been recognized as desirable to afford some protection to one in possession of real property under a claim of ownership even when he has no shadow of right to the true title. The first attempt made to achieve this objective consisted of the enactment of statutes of limitations of the traditional type that divest the true owner of his right to recover his land after it has been adversely possessed for a stated period. Statutes of this sort[26] were enacted in the thirteenth century. Such statutes, usually patterned upon the English Statute of Limitations of 21 James I, chapter 16 (1623), are in effect in all American jurisdictions.[27] Sections 95.12, 95.14, and 95.16 to 95.21 of Florida Statutes 1953 are the relevant statutes in Florida. The functioning and effect of statutes of this kind are too well known to merit consideration here. Attention will be directed, however, to certain of the principles underlying their operation that are equally applicable to many statutes of other types that have been enacted more recently in the effort to eliminate other defects of title that are not affected by statutes of limitations of the original kind.

The period of a statute of limitations that divests an owner of his right to recover his land does not begin to run against him until there accrues to him a cause of action to recover the possession of the land.[28] Such a cause of action of course cannot accrue as long as

[25]Rood, *supra* note 19, at 379.

[26]20 HEN. III, c. 8 (1236); 3 EDW. I, c. 39 (1275).

[27]*Cf.* 3 AMERICAN LAW OF PROPERTY 758, n.8 (Casner ed. 1952); Taylor, *Titles to Land by Adverse Possession,* 20 IOWA L. REV. 551, n.1 (1935).

[28]*E.g.,* Northern Pac. Ry. v. Smith, 62 Mont. 108, 203 Pac. 503 (1921); 3 AMERICAN LAW OF PROPERTY 803 (Casner ed. 1952); 4 TIFFANY, REAL PROPERTY §§1152, 1184 (3d ed. 1939); *cf.* Hill v. Gordon, 45 Fed. 276 (C.C.N.D. Fla. 1891) (adverse possession for 7 years, the statutory period in Florida, cannot defeat the lien of a judgment that attached to the land before the adverse possession began); Drawdy v. Lake Josephine Co., 149 Fla. 756, 1 So.2d 631 (1941) (adverse possession for the statutory period cannot extinguish the lien of a mortgage that was of record when the adverse possession began); Hart v. Lake Josephine Co., 149 Fla. 754, 1 So.2d 635 (1941); Elwell v. Barbrick, 279 Mass. 272, 181 N.E. 184 (1932);

he himself remains in possession or before some other person takes possession of the land. By the generally prevailing view, furthermore, a life tenant or his grantee cannot under any circumstances start a statute of limitations to run in his favor and against the remainderman or reversioner by asserting a claim of ownership in fee during the continuance of the life estate.[29] This rule has its origin in the fact that

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Groesbeck v. Seeley, 13 Mich. 329 (1865); Baker v. Kelley, 11 Minn. 480 (1866); Ferenbaugh v. Ferenbaugh, 104 Ohio St. 556, 136 N.E. 213 (1922); Broad v. Warnecke, 144 S.W.2d 1005 (Tex. Civ. App. 1940); Buty v. Goldfinch, 74 Wash. 532, 133 Pac. 1057 (1913); Murrison v. Fenstermacher, 166 Kan. 568, 573, 203 P.2d 160, 163 (1949) (dictum); Newton v. Weiler, 87 Mont. 164, 172, 286 Pac. 133, 137 (1930) (dictum); COOLEY, CONSTITUTIONAL LIMITATIONS 523 (7th ed. 1903); 1 WALSH, REAL PROPERTY §21 (1947).

The rule stated in the text is of course supported also by the many cases — see note 29 *infra* — that hold with the generally but not universally accepted view that even the possession of a life tenant or that of a life tenant's grantee under a claim of ownership in fee cannot be adverse to the remainderman or reversioner during the continuance of the life estate. It is supported by analogy, too, by the cases that apply the modern American holding that such negative easements as the right to receive light and air from across the land of another and the right to have additional lateral support by another's land cannot be obtained by adverse user. This holding is attributable to the nonexistence of any action during the running of the statutory period by which the owner of the servient estate can obtain redress from the individual making the use. *Cf., e.g.,* Stein v. Hauck, 56 Ind. 65 (1877); Pierre v. Fernald, 26 Me. 436 (1847); 4 TIFFANY, REAL PROPERTY §1194 (3d ed. 1939).

[29]*E.g.,* Interstate Realty & Inv. Co. v. Bibb County, 293 Fed. 721 (5th Cir. 1923); Dallas Compress Co. v. Smith, 190 Ala. 423, 67 So. 289 (1914); Sadler v. Campbell, 150 Ark. 594, 236 S.W. 588 (1921); Thompson v. Pacific Elec. Ry., 203 Cal. 578, 265 Pac. 220 (1928); Woman's Home and Foreign Missionary Soc'y v. Bank of America Nat'l Trust and Sav. Ass'n, 15 Cal. App.2d 682, 59 P.2d 1060 (1936); Mathis v. Solomon, 188 Ga. 311, 4 S.E.2d 24 (1939); Dunlavy v. Lowrie, 372 Ill. 622, 25 N.E.2d 67 (1939); Chambers v. Chambers, 139 Ind. 111, 38 N.E. 334 (1894); Jeffries v. Butler, 108 Ky. 531, 56 S.W. 979 (1900); Armor v. Frey, 253 Mo. 447, 161 S.W. 829 (1913); Clark v. Parsons, 69 N.H. 147, 39 Atl. 898 (1897); Jefferson v. Bangs, 197 N.Y. 35, 90 N.E. 109 (1909); RESTATEMENT, PROPERTY §222 (1936); 3 SIMES, FUTURE INTERESTS §776 (1936); 4 TIFFANY, REAL PROPERTY §1184 (3d ed. 1939); *cf.* Content v. Dalton, 122 N.J. Eq. 425, 194 Atl. 286 (Ct. Err. & App. 1937); Haynes v. Boardman, 119 Mass. 414, 415 (1876) (dictum); Ontelaunee Orchards, Inc. v. Rothermel, 139 Pa. Super. 44, 47, 11 A.2d 543, 544 (1939) (dictum). It should be noted, however, that when the statutory period begins to run against a possessory interest that is an estate in fee tail or fee simple conditional, and when the owner of that interest can bar the remainder or reversion subsequent to it by a common recovery, as at common law, or by a statutory substitute therefor, the period also starts to run against the remainder or reversion. This result is attributable to the quasi-illusory nature of such a future estate and to the concepts that developed at common law with reference to it. RESTATEMENT, PROPERTY §227 (1936). Estates in fee tail and fee simple conditional do not exist in Florida, FLA. STAT. §689.14

during the existence of the life estate the remainderman or reversioner has no right to possession and consequently cannot maintain an action to recover the land;[30] and it is sound in principle.

An unwarranted deviation from this rule has occasionally been made, however, in connection with the right extended to the remainderman or reversioner in many jurisdictions to bring suit during the continuance of the life estate either to quiet his title as to adverse claims or to remove clouds from his title. A few states authorize by statute the bringing of such a suit;[31] and Florida[32] and a number of other states[33] permit it even in the absence of statutory sanction. On principle[34] and by the prevailing view, the running of the limitations period is not started against the remainderman or reversioner by the mere fact that he can bring a suit of this type[35] or an analogous statutory proceeding[36] or even by the fact that he has an election, which he does not exercise, to treat the wrongful act of the life tenant as a disseisin that forfeits the life estate.[37]

(1953); *accord,* Arnold v. Wells, 100 Fla. 1470, 131 So. 400 (1930).

[30]*E.g.,* Interstate Realty & Inv. Co. v. Bibb County, *supra* note 29; Bishop v. Johnson, 242 Ala. 551, 7 So.2d 281 (1942); Woman's Home and Foreign Missionary Soc'y v. Bank of America Nat'l Trust & Sav. Ass'n, *supra* note 29; Mathis v. Solomon, *supra* note 29; Allison v. White, 285 Ill. 311, 120 N.E. 809 (1918); Superior Oil Corp. v. Alcorn, 242 Ky. 814, 47 S.W.2d 973 (1930); 3 SIMES, FUTURE INTERESTS §776 (1936); Basye, *supra* note 1, at 949.

[31]*E.g.,* IOWA CODE §649.1 (1954); NEB. REV. STAT. §25-21,117 (1943).

[32]Commercial Bldg. Co. v. Parslow, 93 Fla. 143, 112 So. 378 (1927); Anderson v. Northrop, 30 Fla. 612, 629, 12 So. 318, 322 (1892) (dictum).

[33]*E.g.,* Lansden v. Bone, 90 Ala. 446, 8 So. 65 (1890); Superior Oil Corp. v. Alcorn, 242 Ky. 814, 47 S.W.2d 973 (1931); Aiken v. Suttle, 72 Tenn. 103 (1879); Ward v. Chambless, 238 Ala. 165, 171, 189 So. 890, 894 (1939) (dictum); Teal v. Mixon, 233 Ala. 23, 25, 169 So. 477, 479 (1936) (dictum).

[34]3 AMERICAN LAW OF PROPERTY §15.8 (Casner ed. 1952); 2 POWELL, REAL PROPERTY §301 (1952); RESTATEMENT, PROPERTY §222, comment *d* (1936); 3 SIMES, FUTURE INTERESTS §778 (1936); 4 TIFFANY, REAL PROPERTY §1184 (3d ed. 1939); 1 WALSH, REAL PROPERTY §21 (1947).

[35]*E.g.,* Dallas Compress Co. v. Smith, 190 Ala. 423, 67 So. 289 (1914); Superior Oil Corp. v. Alcorn, 242 Ky. 814, 47 S.W.2d 973 (1930); Armor v. Frey, 253 Mo. 447, 161 S.W. 829 (1913); Maxwell v. Hamel, 138 Neb. 49, 292 N.W. 38 (1940); Aiken v. Suttle, 72 Tenn. 103 (1879); *cf.* Groves v. Groves, 57 Miss. 658 (1880); Clark v. Parsons, 69 N.H. 147, 39 Atl. 898 (1897); Jefferson v. Bangs, 197 N.Y. 35, 90 N.E. 109 (1909); Note, 2 MINN. L. REV. 137 (1918).

[36]See authorities cited in note 34 *supra; cf.* Hayden v. Hill, 128 Ark. 342, 194 S.W. 19 (1917). The action of trespass to try title in the nature of a suit to quiet title, such as is permitted by statute in Texas, is an example of such a proceeding. See Lester v. Hutson, 167 S.W. 321 (Tex. Civ. App. 1914).

[37]Mixter v. Woodcock, 154 Mass. 535, 28 N.E. 907 (1891). In this case, a widow

In Iowa, however, the fact that a remainderman or reversioner can prior to the time that his estate becomes possessory bring suit to quiet his title is held to start the statute of limitations to run against him as soon as notice is brought home to him that the land is being possessed under a claim adverse to his title by the life tenant or by a grantee to whom the life tenant has purported to convey in fee simple.[38] This view was followed for a time in Nebraska;[39] but it was abrogated there in 1940 by a decision that was grounded in part upon the position to the contrary that is taken in section 222 of the *Restatement of Property* of 1936.[40]

The Florida Court, although usually purporting to recognize that as a general rule neither laches nor the statute of limitations begins to operate against the owner of a remainder following a life estate until that estate terminates,[41] follows the Iowa doctrine at least to the extent of holding that the contrary is true when the life tenant to the knowledge of the remainderman claims the fee through a source other than that in which the life estate and the remainder have their origin.[42]

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who actually obtained only a life estate under the will of her husband occupied the land until her death 30 years later under a good faith claim of ownership of the fee. On three occasions she purported to mortgage the land in fee. The plaintiff, who held the last of these mortgages, the other two evidently having been satisfied, foreclosed it at about the time that the widow died and sought by writ of entry to recover the land from one who was in possession of it. He contended that the possession of the widow had been adverse to the reversioner at least from the time that she executed the first of the mortgages 24 years before her death. It was held, however, that even if her execution of the mortgages could have been treated by the reversioner as a disseisin that entitled him to forfeit her life estate at once, it was a disseisin only at his election and did not start the limitations period to run against him. See Bordwell, *Disseisin and Adverse Possession,* 33 YALE L.J. 285, 287 (1924).

[38]Nevelier v. Foster, 186 Iowa 1307, 173 N.W. 879 (1919); Ward v. Meredith, 186 Iowa 1108, 173 N.W. 246 (1919) (applying the doctrine to a contingent remainderman); Garrett v. Olford, 152 Iowa 265, 132 N.W. 379 (1911); Marray v. Quigley, 119 Iowa 6, 92 N.W. 869 (1902).

[39]*E.g.,* RESTATEMENT, PROPERTY 152 (Tent. Draft No. 6, 1934); Sternberg, *Nebraska Against the Weight of Authority,* 17 NEB. L. BULL. 347, 349 (1938); *cf.* Criswell v. Criswell, 101 Neb. 349, 163 N.W. 302 (1917).

[40]Maxwell v. Hamel, 138 Neb. 49, 292 N.W. 38 (1940); Unick v. St. Joseph Loan and Trust Co., 146 Neb. 789, 792, 21 N.W.2d 752, 754 (1946) (dictum).

[41]Mullan v. Bank of Pasco County, 101 Fla. 1097, 1112, 133 So. 323, 329 (1931) (dictum); Commercial Bldg. Co. v. Parslow, 93 Fla. 143, 151, 112 So. 378, 381 (1927) (dictum).

[42]Commercial Bldg. Co. v. Parslow, 93 Fla. 143, 112 So. 378 (1927); *cf.* Mullan v. Bank of Pasco County, 101 Fla. 1097, 1110, 133 So. 323, 328 (1931) (dictum); Anderson v. Northrop, 30 Fla. 612, 631, 12 So. 318, 323 (1892) (dictum). When

In *Commercial Building Company v. Parslow*,[43] for example, Domineco Ghira devised his homestead to his wife for life, remainder to his daughter in fee simple. The devise was void because of the constitutional prohibition of the willing of homestead when its owner has children.[44] The wife, Dominga, with the acquiescence of the daughter, Euphemia, and a son, Francis, both of whom were adults, took possession of the homestead immediately upon the death of her husband and continued to occupy it until her death three years later. Under the then existing law[45] the wife was merely entitled to elect between dower in the homestead and a child's part; and dower at that time was a one-third interest for life.[46] She and the children believed that the devise of the homestead was valid, however, and consequently she failed to make her election within the permitted period of twelve months.[47] She actually obtained in the homestead, therefore, only an unassigned right of dower; and the homestead, subject to this right, passed to the children.[48] The son, who died less than three weeks after his father, devised all of his property to his sister for life and then to the plaintiffs forever. His interest in the former homestead of course actually passed in accordance with the terms of this devise. The wife, claiming under the void devise of her husband, occupied the former homestead until her death three years later, whereupon Euphemia, claiming in fee under Domineco's void devise of the remainder, took and maintained possession of the former homestead for a period in excess of that of the statute of limitations. Thereafter she conveyed this property in fee to the defendant corporation, which erected a substantial office building upon it and remained in possession for a period longer than that of the statute of limitations.

Subsequently the plaintiffs brought suit during the life of Euphemia to quiet their title to the remainder interest they had obtained under Francis's will in the share of the former homestead that had

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the claim in fee of the life tenant is unknown to the remainderman during the statutory period, the remainderman is not barred in Florida. *Cf.* Wright v. Blocker, 144 Fla. 428, 198 So. 88 (1940) (declining to apply limitations provisions of FLA. STAT. §95.23 (1953) to validate a recorded forged grant of the remainder to the life tenant).

[43]93 Fla. 143, 112 So. 378 (1927).

[44]FLA. CONST. art. X, §4.

[45]FLA. COMP. GEN. LAWS §5484 (1927); Jahn v. Purvis, 145 Fla. 354, 199 So. 340 (1940).

[46]FLA. COMP. GEN. LAWS §5493 (1927).

[47]*Id.* §5496.

[48]*Id.* §5484; Jahn v. Purvis, 145 Fla. 354, 199 So. 340 (1940); Mullan v. Bank

passed to him by descent from Domineco. In denying this relief, the Court pointed out that Euphemia and thereafter her grantee, the defendant, had occupied the land during the continuance of the life estate she received under Francis's will, claiming ownership in fee under the void devise of Domineco. It held that since this claim was based upon the void devise, a source other than that from which Euphemia's life estate and the plaintiffs' remainder arose, and since this claim and the occupancy under it were at all times known to the plaintiffs, and since, also, the plaintiffs could from the beginning have maintained a suit to quiet their title to the remainder against the claim, the possession of either the life tenant or that of her grantee, the defendant, was sufficient to divest the plaintiffs of their remainder.

The decision is clearly based upon the rule just stated[49] and cannot be sustained on any other ground. It is true that when a landowner, after the statutory period has started to run against him, so transfers his title as to create a present estate and a future estate in it, the statute continues to run even against the future estate thus created.[50] It is true, also, that Dominga took possession of the former homestead under a claim that the devise of Domineco vested a life estate in her and a remainder in fee in Euphemia. It is true, furthermore, that Francis's devise creating the life estate and the remainder in his share was subsequent to Dominga's taking possession. But when a widow with a mere right to have dower assigned in her deceased husband's homestead takes possession of the homestead under a claim of ownership in fee by virtue of either a void devise from him[51] or a void conveyance from him during his life,[52] her possession is not adverse to his heirs unless at least she otherwise evidences to them that her claim is hostile to their interests. Similarly, Dominga's possession of the homestead under her invalid claim to a life estate for herself followed by a remainder in fee for Euphemia was not adverse to Francis, her possession being consistent with her right to have dower

of Pasco County, 101 Fla. 1097, 133 So. 323 (1931).

[49]See also Mullan v. Bank of Pasco County, 101 Fla. 1097, 1113, 133 So. 323, 329 (1931) (dictum) — in which, however, no reference is made to the right of a remainderman to quiet his title against an adverse claim — and Anderson v. Northrop, 30 Fla. 612, 631, 12 So. 318, 323 (1892).

[50]*E.g.*, Hubbard v. Swofford Bros. Dry Goods Co., 209 Mo. 495, 108 S.W. 15 (1908); 3 AMERICAN LAW OF PROPERTY §15.8 (Casner ed. 1952); RESTATEMENT, PROPERTY §§222, 226 (1936); 3 SIMES, FUTURE INTERESTS §782 (1936); 4 TIFFANY, REAL PROPERTY §1152 (3d ed. 1939).

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

[52]Jahn v. Purvis, 145 Fla. 354, 199 So. 340 (1940).

assigned in the homestead. Since Dominga's possession was not adverse to Francis, the devise he made to Euphemia for life, remainder to the plaintiffs in fee, was not a transfer by an owner of his title after the statute had started to run against him. Consequently, the decision cannot be sustained as coming within the rule that such a transfer which creates a present estate and a future estate in the interest of the transferor does not prevent the running of the statute even against the future estate thus created.

Probably the deviation in Florida from the rule that a life tenant or his grantee cannot start a limitations period to run in his favor against the remainderman during the continuance of the life estate is limited to a situation such as that in the *Commercial Building Company* case, in which the life tenant's claim of ownership in fee is to the knowledge of the remainderman based on a transaction prior to that which gives rise to the life estate and the remainder. Existing dicta, when considered alone, indicate that the Iowa doctrine in its entirety may be in effect in this state. Thus it has been said that the statute of limitations will run against the remainderman during the continuance of the life estate when to his knowledge "there has been [an] ouster and disseisin of the life tenant or by one claiming by, through or under him . . . under claim of right" or when the remainderman has "actual knowledge of the repudiation or abandonment by the life tenant of his status as such, and of the holding by him of the property under a different and adverse right . . . ."[53] It is believed, however, that the significance of these dicta is overcome by somewhat inconsistent statements made in the very decisions in which they were enunciated.[54] In *Model Land Co. v. Crawford*,[55] furthermore, the Court in construing section 95.23 of Florida Statutes 1953 questioned, but did not expressly repudiate, the doctrine that a claim of fee by the life tenant's grantee can be adverse to the remainderman during the continuance of the life estate.

The departure by the Florida Court from the generally accepted rule that a limitations period does not run against a remainderman during the existence of a prior life estate, even if confined to factual situations like that in the *Commercial Building Company* case, is undesirable. The trend that it represents should not be extended in

[53]Mullan v. Bank of Pasco County, 101 Fla. 1097, 1112, 133 So. 323, 329 (1931) (dictum); Commercial Bldg. Co. v. Parslow, 93 Fla. 143, 151, 112 So. 378, 381 (1927) (dictum).

[54]Cases cited note 41 *supra*.

[55]155 Fla. 323, 326, 20 So.2d 122, 124 (1944).

the direction of further encroachments on the principle that a limitations period that divests one of the right to recover his land does not begin to run against him until he has a cause of action to recover possession of the land.[56]

The statutes of limitations on which the doctrine of the acquisition of title by adverse possession is based have only a limited effect in remedying defects of title, since they do not become operative as the result of the mere lapse of time. The limitations period that they establish does not begin to run while the land is unoccupied; and it does not run even after the claimant takes possession unless his pos-

[56]A further unwarranted departure from this principle has been made in many jurisdictions in the case of a tenant for years. Such a tenant should not be permitted to start the statute of limitations to run in his favor against his landlord by an assertion of a claim of fee in himself or some person other than the landlord. Even if the act of the tenant is regarded as sufficient to give the landlord an election to forfeit the term and to recover the land at once, it should not itself be deemed an exercise of that election with the result that the statute begins to run against him even if he brings no action to recover the land. 3 SIMES, FUTURE INTERESTS §779 (1936); WARREN, CASES ON PROPERTY, *Note on Reversions and Remaindermen*, 208-09 (2d ed. 1938). A few cases follow this view at least to the extent of holding that a mere denial of the tenancy by the tenant for years and the assertion of a claim of fee in himself, even when the denial and assertion in question are brought to the attention of the landlord, do not forfeit the term of years or start the statute to run in favor of the tenant. Sutton v. Casseleggi, 5 Mo. App. 111 (1878), *rev'd on other grounds*, 77 Mo. 397 (1883); Bedlow v. New York Floating Dry Dock Co., 112 N.Y. 263, 19 N.E. 800 (1889); *cf.* De Lancey v. Ganong, 9 N.Y. 9 (1853); Doe d. Graves v. Wells, 10 A. & E. 427, 113 Eng. Rep. 162 (K.B. 1839); Whiting v. Edmunds, 94 N.Y. 309, 314 (1884) (dictum).

By the weight of American authority, however, a tenant for years can start the statute to run against his landlord by asserting openly and continuously a claim of fee in himself or some third person under such circumstances that the landlord obtains knowledge of his claim. *E.g.*, Wells v. Sheerer, 78 Ala. 142 (1884); Tillotson v. Doe *ex dem.* Kennedy, 5 Ala. 407 (1843); Patterson v. Hansel, 67 Ky. 654 (1868); Greenwood v. Moore, 79 Miss. 201, 30 So. 609 (1901); Willison v. Watkins, 28 U.S. (3 Pet.) 43, 48 (dictum); Ponder v. Cheeves, 104 Ala. 307, 313, 16 So. 145, 147 (1894) (dictum); Mattis v. Robinson, 1 Neb. 3, 8 (date not stated) (dictum); Greeno v. Munson & Munson, 9 Vt. 37, 40 (1837) (dictum); *cf.* Rigg v. Cook, 9 Ill. 336, 351 (1847) (dictum); Hollowell v. Caldwell County, 288 Ky. 89, 96, 155 S.W.2d 481, 485 (1941) (dictum); Nessley v. Ladd, 29 Ore. 354, 374, 45 Pac. 904, 908 (1896) (dictum); 2 TIFFANY, LANDLORD AND TENANT §192 (1910). Courts that take this position also hold that a conveyance in fee to a third person by a tenant for years and a taking possession by the grantee makes the possession of the grantee adverse to the landlord as of the time that the landlord learns the nature of the conveyance and the change of possession. *Cf., e.g.*, Trustees v. Jennings, 18 S.E. 257 (1893). Dicta in the Florida decisions are in general accord with the cases cited above, *e.g.*, Little v. Kendrick, 152 Fla.

session has the characteristics required by the statute of the jurisdiction.[57] Neither does it begin to run against the owner of a present estate[58] or, in most jurisdictions, against the owner of a future estate[59] until the parties are so situated that the owner has a cause of action to recover the land from the adverse possessor. Consequently, other types of statutes have been enacted in the attempt to remove title imperfections in a more extensive range of factual situations. Many curative acts, for example, have been passed in the attempt to achieve this objective.

PART III — CURATIVE ACTS WITHOUT LIMITATIONS PROVISIONS

Curative acts are statutes that purport to validate at once retrospectively certain past transactions or proceedings, which theretofore were ineffectual because there had been a failure to comply in their consummation with legal requirements then in effect.[60] They allow no period subsequent to their effective date in which an individual adversely affected by their operation can attack a prior transaction or proceeding because of an irregularity that is within their scope. They, like the statutes of limitations in which the doctrine of adverse possession has its origin, are not recent innovations. Such statutes were enacted in some of the states prior to the adoption of the Federal Constitution;[61] and they have existed in Florida since the early days of

720, 12 So.2d 899 (1943); Kilvert v. Clark, 152 Fla. 35, 41, 10 So.2d 795, 798 (1942).

[57]*E.g.,* Palmer v. Greene, 159 Fla. 174, 31 So.2d 706 (1947); *cf.* Rood, *supra* note 19, at 392.

[58]*Ibid.*

[59]See notes 29-42 *supra* and text thereat.

[60]*Cf., e.g.,* Carle v. Gehl, 193 Ark. 1061, 1064, 104 S.W.2d 445, 447 (1937) (dictum); Schamblin v. Means, 6 Cal. App. 261, 264, 91 Pac. 1020, 1022 (1907) (dictum); Cranor v. Board of County Comm'rs, 54 Fla. 526, 529, 45 So. 455 (1907) (dictum); Swanson v. Pontralo, 238 Iowa 693, 700, 27 N.W.2d 21, 25 (1947) (dictum); Inhabitants of Otisfield v. Scribner, 129 Me. 311, 314, 151 Atl. 670, 671 (1930) (dictum); Pascagoula v. Delmas, 108 Miss. 91, 99, 66 So. 329, 332 (1914) (dictum); Anderson v. Lehmkuhl, 119 Neb. 451, 460, 229 N.W. 773, 777 (1930) (dictum); Meigs v. Roberts, 162 N.Y. 371, 378, 56 N.E. 838, 840 (1900) (dictum).

[61]N.C. Laws 1784, c. 24, for example, purported to validate at once retrospectively certain conveyances theretofore made by tenants in fee tail in possession for the purpose of barring remainders subsequent to the fee tail, although those conveyances were void as to such remainders at the time they were made. *Cf.* Basye, *supra* note 1, at 943 (stating that curative legislation has been employed for at least a century and a half).

the territory.[62] They are now to be found in every state.[63]

Most of the statutes designed to remedy defects in land titles that were enacted in Florida prior to the land boom of 1925 were of this type.[64] Among these acts are

(1) Chapter 1939 of the Florida Laws of 1873.[65]

(2) Chapter 5412 of the Laws of 1905, which purports to validate certain deeds and other instruments of married women that were executed prior to April 15, 1905, and were defective only in the omission from the certificate of acknowledgment of the statutory words *compulsion, constraint, apprehension, or fear.*

(3) Chapter 6217 of the Laws of 1911, which accords similar

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[62]*E.g.*, FLA. STAT. §694.01 (1953) (act of June 21, 1823) (validating certain instruments executed between Jan. 17, 1817, and Oct. 1, 1822, otherwise than according to the formalities of the Spanish law, provided such instruments should be recorded within six months of June 24, 1823); *id.* §694.02 (act of Feb. 4, 1835, §2) (providing that conveyances, etc., made prior to Feb. 14, 1835, by married women joined by their husbands should be as valid as if made by fine at common law).

[63]Basye, *Streamlining Conveyancing Procedure III*, 47 MICH. L. REV. 1097, 1128 (1949).

[64]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 these two types 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."

[65]This statute provided that deeds of Florida land executed thereafter in any other state or country might be executed according to the law of that state or country and stipulated that deeds "heretofore executed and acknowledged in compliance with . . . this act shall . . . be as valid as if the same had been executed after the passage of this act." The authorization for the subsequent execution of such deeds in this manner was omitted from the Revised Statutes of 1892 and has never been re-enacted, but that revision and all subsequent ones, including FLA. STAT. §694.05 (1953), have provided that "any deed . . . heretofore executed and acknowledged in accordance with the provisions of the act approved February 24, 1873, . . . shall be held good and valid." It is arguable that the re-enactment of this provision in each revision makes the word *heretofore* speak from the effective date of the revision and validates as between the parties a deed executed outside Florida otherwise than in accordance with the law of Florida but in conformity with the law of the jurisdiction where it was executed, even when it was executed subsequent to the repeal by omission of the act of 1873. It is probable, however, that the word retains the meaning that it had in the act of 1873 and is applicable only to deeds so executed prior to the enactment of that act.

treatment to such instruments executed before April 1, 1911.[66]

(4) Chapter 7849 of the Laws of 1919 — now incorporated in amended form in section 695.03 of Florida Statutes 1953 — which provides for the validation of all acknowledgments previously made in the manner that it authorizes and before the classes of officers that it designates.

(5) Chapter 5217 of the Laws of 1903, now section 117.06 of Florida Statutes 1953, which stipulates that all otherwise valid notarial acts that were done by any notary public in Florida before April 1, 1903, are valid even though they were done after the expiration of his term of office.

(6) Section 2 of chapter 5147 of the Laws of 1903, which provides that deeds theretofore made by a husband direct to his wife shall have the same effect as if the parties were not married.[67]

(7) Chapter 6183 of the Laws of 1911,[68] which provides that conveyances theretofore executed by corporations in accordance with its terms are valid.

While most statutes designed to eliminate title defects that have been enacted in Florida since the beginning of the land boom of 1925 have contained limitations provisions, a few pure curative acts without such provisions have been enacted since that time. Among these are the following:[69]

(1) Chapter 10169 of the Laws of 1925, which provides for the validation under stated circumstances of certain instruments that had been spread upon the records for ten years before June 5, 1925, notwithstanding specified defects in their execution and acknowledgment.[70]

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[66]The corresponding current act, FLA. STAT. §694.04 (1953), contains like provisions with respect to such instruments executed before July 1, 1941. It is not, however, a pure curative act, since it contains a limitations period of one year from the effective date of the act for contesting the validity of the instruments within its scope. See also FLA. STAT. §693.03 (1953).

[67]This act now exists in amended form as FLA. STAT. §689.11 (1953).

[68]Now FLA. STAT. §§692.01-.02 (1953).

[69]This listing does not purport to be all-inclusive.

[70]This act in extensively amended form is now incorporated in FLA. STAT. §§694.08-.10 (1953). The present act is a curative act with a limitations provision.

(2) Chapter 10170 of the Laws of 1925,[71] which purports to apply retrospectively to conveyances executed prior to the effective date of chapter 5145 of the Laws of 1903 the provision of the 1903 act that real estate thereafter conveyed or granted without the use of words of limitation should pass a fee simple estate unless a contrary intention appeared in the instrument.

(3) Chapter 14838 of the Laws of 1931, now incorporated in amended form in section 694.12 of Florida Statutes 1953, which validates deeds and certain other instruments theretofore made and received bona fide and upon good consideration by or to a corporation in which the name of the corporation is improperly set out, provided the identity of the corporation plainly appears from the contents of the instrument or otherwise.[72]

(4) Section 1 of chapter 21696 of the Laws of 1943, now section 708.09 of Florida Statutes 1953, which validates all powers of attorney previously executed by one spouse to the other.

(5) Section 4 of chapter 23007 of the Laws of 1945, now section 709.02 of Florida Statutes 1953, which states that all releases of powers of appointment theretofore executed in accordance with the provisions of that act are valid.

(6) Chapter 25503 of the Laws of 1949,[73] which provides that ancient dedications of land to municipalities for park purposes for a period of thirty years or more shall not be challenged after the effective date of the act in instances in which the land has been put to some municipal use or has been conveyed by the municipality by a deed that has been recorded at least seven years.

As between the grantor and his immediate or remote grantee, a curative act ordinarily can cure retrospectively his failure to conform to technical requirements in the execution of a deed or similar in-

[71]Now FLA. STAT. §689.10 (1953).

[72]The number of instruments in connection with which there is occasion to rely upon this act in either its original or amended form is much reduced by the fact that Fla. Laws 1868, c. 1640, §18, now FLA. STAT. §608.48 (1953), provides that the misnomer of a corporation in any deed or instrument does not vitiate the instrument if the corporation is therein sufficiently described to indicate the intention of the parties.

[73]Now FLA. STAT. §95.36 (1953).

strument when the validation of the instrument merely carries into effect the intention he had when he executed it.[74] It can also cure a failure of this kind as against those who have succeeded to the grantor's rights in the period between the execution of the instrument and the passage of the act, provided they have not acquired thereby a vested right in the property to which the instrument pertains.[75] It cannot, however, extinguish such intervening vested rights of the grantor's successors.[76]

One of course has a vested right as that term is here employed when he purchases land without either actual or constructive notice that a prior defective instrument purporting to convey the land or an interest in it has been executed.[77] Neither a valid nor an invalid instrument that is spread upon the records gives constructive notice if it is not eligible for record;[78] and a curative act cannot make it give notice retrospectively to a purchaser who acquired his interest before the effective date of the act.[79] An individual who executes an instrument that is absolutely void retains his ownership of the property to which it relates and has a vested right of which he cannot be deprived by a subsequent curative act. Thus a curative act cannot vali-

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[74]*E.g.,* Dentzel v. Waldie, 30 Cal. 139 (1866); Summer v. Mitchell, 29 Fla. 179, 10 So. 562 (1892); Steger v. Traveling Men's Bldg. & Loan Ass'n, 208 Ill. 236, 70 N.E. 236 (1904); Maxey v. Wise, 25 Ind. 1 (1865) (omission of notary's seal cured); Grove v. Todd, 41 Md. 633 (1875); Charlotte Consol. Constr. Co. v. Brockenbrough, 187 N.C. 65, 121 S.E. 7 (1924); Vaught v. Williams, 177 N.C. 77, 97 S.E. 737 (1919); Stanley v. Smith, 15 Ore. 505, 16 Pac. 174 (1887).

[75]*E.g.,* Summer v. Mitchell, *supra* note 74; Steger v. Traveling Men's Bldg. & Loan Ass'n, *supra* note 74; Grove v. Todd, *supra* note 74; Charlotte Consol. Constr. Co. v. Brockenbrough, *supra* note 74; Vaught v. Williams, *supra* note 74; Stanley v. Smith, *supra* note 74; see Annot., 57 A.L.R. 1197 (1928).

[76]*E.g.,* 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).

[77]Fugman v. Jiri Washington Bldg. & Loan Ass'n, 209 Ill. 176, 70 N.E. 644 (1904).

[78]Lassiter v. Curtis-Bright Co., 129 Fla. 728, 177 So. 201 (1937); McKeown v. Collins, 38 Fla. 276, 21 So. 103 (1896); Edwards v. Thom, 25 Fla. 222, 5 So. 707 (1889); Graves v. Graves, 6 Gray 391 (Mass. 1856).

[79]Blackman v. Henderson, 116 Iowa 578, 87 N.W. 655 (1901); Merchants Bank v. Ballou, 98 Va. 112, 32 S.E. 481 (1899); PATTON, LAND TITLES §58 (1938); *cf.* Koch v. West, 118 Iowa 468, 92 N.W. 663 (1902).

date an instrument executed by an insane person[80] or a deed in which the description of the land is indefinite.[81] It has been held that an instrument is void in this sense when the person who executed it then had no power to execute it in the manner he attempted or any other.[82]

When no intervening vested rights are involved, a curative act can cure the omission of a seal of the grantor that was prerequisite to the passing of the legal title at the time the deed was executed;[83] and it can cure the omission of required signatures of witnesses[84] or of the seal of the notary taking the acknowledgment, not only when the acknowledgment is required merely to entitle the deed to record[85] or to permit the deed or a certified copy of the record of it to be introduced in evidence under statutory authority[86] as prima facie proof

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[80]Routsong v. Wolf, 35 Mo. 174 (1864).

[81]Orton v. Noonan, 23 Wis. 102 (1868) (tax deed).

[82]Swartz v. Andrews, 137 Iowa 261, 114 N.W. 888 (1908); Goshorn v. Purcell, 11 Ohio St. 641, 646 (1860) (dictum). In Swartz v. Andrews, *supra,* a wife gave her husband a purported power of attorney at a time when there was no method by which she could give him such a power. It was held that a relinquishment of her dower by him under the void power was beyond the aid of a curative act. It is usually held, however, that an invalid power of attorney executed by a married woman can be validated by a curative act, *e.g.,* Randall v. Kreiger, 90 U.S. (23 Wall.) 137 (1874); Dentzel v. Waldie, 30 Cal. 139 (1866).

[83]*E.g.,* James v. Gollnick, 100 Fla. 829, 130 So. 450 (1930), applying Fla. Laws 1925, c. 10169, which now exists in amended form as FLA. STAT. §694.08 (1953); Stanley v. Smith, 15 Ore. 505, 16 Pac. 174 (1887).

[84]Pinckney v. Morton, 30 F.2d 885 (5th Cir. 1929), applying Fla. Laws 1925, c. 10169, now incorporated in amended form in FLA. STAT. §694.08 (1953); Tucker v. Cole, 148 Fla. 214, 3 So.2d 875 (1941) (alternative holding); *cf.* James v. Gollnick, 100 Fla. 829, 130 So. 450 (1930).

[85]Pinckney v. Morton, *supra* note 84; James v. Gollnick, *supra* note 84.

[86]FLA. CONST. art. XVI, §21, is an example of such authority. It is to be observed that this provision does not make admissible without proof of execution an instrument that has been acknowledged but not recorded. Malsby v. Gamble, 61 Fla. 310, 320, 54 So. 766, 769 (1911) (dictum). It requires for this purpose both proof for record and recording. The constitutions or statutes of some other jurisdictions are similar in this respect, *e.g.,* ALA. CODE tit. 47, §§104, 108 (1941); *cf.* Postal Tel. Co. v. Brantley, 107 Ala. 683, 18 So. 321 (1895). Those of a few states give this effect to mere acknowledgment without recording, *e.g.,* PA. STAT. ANN. tit. 21, §46 (1955); *cf.* Sheaffer v. Baeringer, 346 Pa. 32, 29 A.2d 697 (1943). By the general rule an acknowledgment does not have this probative value in the absence of a statute so providing, *e.g.,* Hogans v. Carruth, 18 Fla. 587 (1882); Winlock v. Hardy, 14 Ky. (4 Litt.) 272 (1823); Webber v. Stratton, 89 Me. 379, 36 Atl. 614 (1896). A few early cases, however, hold to the contrary, Barbour v. Watts, 9 Ky. (2 A.K. Marsh.) 290 (1820); Williams v. Wetherbee, 2 Aik. 329 (Vt. 1827); *cf.* Milligan v. Dickson, 17 Fed. Cas. 376, No. 9603 (C.C.D. Pa. 1817).

that it was executed,[87] but also in most instances in which the acknowledgment is essential to the validity of the deed.[88] It can cure a defect in the acknowledgment of a deed improperly admitted to record so that the record will give constructive notice of the deed from the effective date of the act;[89] but it cannot make the record give notice retrospectively to purchasers who acquired interests in the land before that date.[90]

It has been held that a married woman who attempts to convey her land without a joinder of her husband that is required by law has a vested interest in it of which she cannot be deprived by a curative act.[91] Jurisdictions that require such joinder, however, have upheld curative acts that validate conveyances of a wife's land that have been made by separate instruments executed by the husband and wife.[92] They have also upheld acts that validate prior conveyances of a wife in the execution of which her husband joined without being named in the deed as a grantor.[93] It has been held, however, that a deed of gift which is void because not recorded within a required two-year period cannot be validated by a curative act.[94] Curative acts that purport to validate conveyances which are void because made by a wife directly to her husband have been held to be unconstitutional,[95] but the contrary position has been taken with reference to

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[87]*E.g.*, Summer v. Mitchell, 29 Fla. 179, 10 So. 562 (1892).

[88]*E.g.*, Maxey v. Wise, 25 Ind. 1 (1865).

[89]*E.g.*, Jackson v. Hudspeth, 208 Ark. 55, 184 S.W.2d 906 (1945); Gatewood v. Hart, 58 Mo. 261 (1874).

[90]Authorities cited note 79 *supra*.

[91]Miller v. Hine, 13 Ohio St. 565 (1862). The implications of this decision become more readily apparent when it is compared with Goshorn v. Purcell, 11 Ohio St. 641 (1860).

[92]De Kyne v. Lewis, 5 N.J. Misc. 948, 139 Atl. 434 (Cir. Ct. 1927). A subsequent instrument executed by a husband to confirm his wife's conveyance does not constitute the joinder by him in her conveyance that is required in Florida. Carn v. Haisley, 22 Fla. 317 (1886) (no curative act involved).

[93]Hannan v. Wilson, 100 N.J. Eq. 528, 135 Atl. 809 (Ct. Err. & App. 1927). In Florida a husband effectively joins in his wife's conveyance without the aid of a curative act when he executes and acknowledges it without being named in the deed as a grantor, Evans v. Summerlin, 19 Fla. 858 (1883). The same position is taken in some other jurisdictions, *e.g.*, Stone v. Montgomery, 35 Miss. *83 (1858); Friedenwald & Co. v. Mullan, 57 Tenn. (10 Heisk.) *226 (1872); *accord*, Hills v. Bearse, 9 Allen 403 (Mass. 1864).

[94]Cutts v. McGhee, 221 N.C. 465, 20 S.E.2d 376 (1942).

[95]Elder v. Elder, 256 Pa. 139, 100 Atl. 581 (1917); Luther v. Luther, 22 Pa. Dist. 548 (C.P. 1913).

such conveyances that were sufficient when made to vest in the husband an interest that equity would enforce.[96]

The property of an owner cannot be transferred against his will to another by mere legislative fiat.[97] In denying the power of the legislature to deprive an owner arbitrarily of his property the New York Court of Appeals made this statement in *Wynehamer v. The People*:[98]

> "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 . . . ."[99]

A curative act is unconstitutional, therefore, when it produces a result that is at variance with the intention of the parties to the transaction. A few decisions further emphasize the intent-effectuating function of curative acts by holding that they cannot validate even formal defects in sheriff's deeds[100] and similar instruments[101] which purport to pass title to property without the consent of its owner. This position is properly rejected by most jurisdictions,[102] however,

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[96]Hallanan v. Hamilton, 104 N.J.L. 632, 142 Atl. 27 (Ct. Err. & App. 1928).

[97]Alabama Life Ins. and Trust Co. v. Boykin, 38 Ala. 510 (1863); Cromwell v. MacLean, 123 N.Y. 474, 25 N.E. 932 (1890); Booth v. Hairston, 193 N.C. 278, 136 S.E. 879 (1927); *cf.* Pearce's Heirs v. Patton, 46 Ky. (7 B. Mon.) 162, 169 (1846) (dictum).

[98]13 N.Y. 378, 392 (1856).

[99]This excerpt was quoted with approval in Murrison v. Fenstermacher, 166 Kan. 568, 574, 203 P.2d 160, 164 (1949), and Baker v. Kelley, 11 Minn. 480, 488 (1866).

[100]Ryan v. Carr, 46 Mo. 483 (1870).

[101]*Cf.* Goodykoontz v. Olsen, 54 Iowa 174, 6 N.W. 263 (1880) (tax deed); Bresser v. Saarman, 112 Iowa 720, 728-29, 84 N.W. 920, 922-23 (1901) (dictum) (tax deed).

[102]*E.g.*, Barrett v. Brown, 26 Cal.2d 328, 158 P.2d 567 (1945) (omission in tax deed of a required recital of the date of sale); Peck v. Fox, 154 Cal. 744, 99 Pac. 189 (1908) (omission in tax deed of a required recital of date when right of redemption expires); State Board of Education v. Remick, 160 N.C. 562, 76 S.E. 627 (1912) (alternative holding) (omission of required seal of sheriff on a tax deed); Rio Vista

since the sheriff or other officer, and not the owner of the property, is the party to the transaction at which the act is directed, and his intention is carried into effect through its operation.

The status of conveyances of Florida land executed without the use of technical words of limitation before the effective date of chapter 5145 of Florida Laws of 1903 illustrates a type of problem that often arises under curative acts. Prior to that date such conveyances were controlled by the common law and could not pass more than a life estate regardless of the clarity with which an intention to pass an estate of inheritance was manifested.[103] The statute referred to above provided that conveyances and grants made thereafter without the inclusion of words of limitation should pass the fee simple or other whole estate of the grantor unless a contrary intention appeared in the instrument. This statute was prospective only in its operation and did not affect instruments executed before its passage.[104] It was so amended in 1925, however, as to purport to be applicable also to instruments executed prior to the enactment of the original statute.[105]

The Florida Court in discussing this retrospective abrogation of the necessity of using the word *heirs* to pass a fee simple in a conveyance executed before 1903 stated in *Reid v. Barry*[106] that the constitutionality of the provision presented a question of some difficulty which it was unnecessary to resolve in the case then before it. The Illinois court in *Brelie v. Klafter,*[107] in denying to a contracting purchaser a recovery of his down payment for Florida land the title to which was dependent upon the passing of a fee simple by a deed executed in 1886 without the use of the word *heirs,* upheld this retrospective provision of the Florida statute. The other language used in this deed was not set forth in the record available to the court.

If the deed in question itself evidenced an intention to convey

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Hotel & Improvement Co. v. Belle Mead Development Corp., 132 Fla. 88, 102, 182 So. 417, 423 (1937) (dictum).

[103]Ivey v. Peacock, 56 Fla. 440, 47 So. 481 (1908); *accord,* Tyler v. Triesback, 69 Fla. 595, 69 So. 49 (1915); Reid v. Barry, 93 Fla. 849, 862, 112 So. 846, 852 (1927) (dictum).

[104]Ivey v. Peacock, *supra* note 103. In most states with statutes changing the common-law requirements for the creation of a fee simple, the modification is of this type and is applicable only to instruments becoming effective after the enactment of the statute; *cf.* RESTATEMENT, PROPERTY §27, comment *a* (1936).

[105]Fla. Laws 1925, c. 10170, now FLA. STAT. §689.10 (1953).

[106]93 Fla. 849, 861, 112 So. 846, 851 (1927).

[107]342 Ill. 622, 174 N.E. 882 (1931) (alternative holding).

the land in fee simple, which would be the case, for example, if the grant was to the grantee *in fee simple,* it would seem that the retrospective clause of the 1925 amendment could properly be applied to it to effectuate that intention.[108] Curative acts ordinarily can cure retrospectively a failure of one who executes an instrument to conform to then existing technical requirements when the result of the validation is only to give effect to the intention he had when he executed it.[109] If, however, the grant was merely to *A* without any expression in the granting clause, the habendum, or elsewhere in the deed, of an intention to pass the title in fee simple, it is submitted that the retrospective provision should not be applied to it. The parties to such a transaction may well have intended the result achieved under the law existing at the time they acted, namely, the passing of an estate for the life of the grantee. To permit a subsequent curative act to increase that estate to a fee simple would destroy the grantor's vested right in his reversion and deprive him of his property in it without due process of law. Even more clearly, one who purchases the reversion from such a grantor after the first deed was recorded and before the enactment of the curative act acquires a vested right that cannot be extinguished by the retrospective operation of the act.

Operation of Curative Acts on Defective Tax Deeds

By the correct view and weight of authority, a curative act can validate as against a delinquent taxpayer a tax deed that is inoperative only because of formal defects in its issuance and execution.[110] Occasional decisions have held, however, that to cure even these defects as against the taxpayer, who of course had no intention that the title to his land should pass, violates the rule that a curative act can operate only when it effectuates the intention of the parties to the transaction or proceeding sought to be validated.[111] These decisions are unsound because they fail to recognize that the party within the scope of the act is the taxing official and not the taxpayer. When his intention is carried into effect by the act, there is a compliance with the rule.

A curative act cannot validate a tax deed when the irregularity

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[108]*Cf.* Randolph v. New Jersey W.L.R.R., 28 N.J. Eq. 49 (Ch. 1877).

[109]Cases cited note 74 *supra.*

[110]Cases cited note 102 *supra.*

[111]Cases cited note 101 *supra; accord,* Ryan v. Carr, 46 Mo. 483 (1870) (sheriff's deed).

is one that has deprived the taxpayer of notice of the assessment or tax sale, to which he is entitled by statute, or that is otherwise so serious that the issuance of the deed was not within the jurisdiction of the taxing authorities.[112]

Operation of Curative Acts on Instruments Executed by Married Women That Are Invalid Because Not Properly Acknowledged

Even when an acknowledgment by a married woman or an acknowledgment by her on an examination separate and apart from her husband is a prerequisite to the validity of an instrument she executes,[113] a curative act can in most jurisdictions cure a defect in her acknowledgment when no vested rights of third persons intervene.[114]

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[112]Fariss v. Anaconda Copper Mining Co., 31 F. Supp. 571 (D. Mont. 1940) (lack of required service of notice); Inhabitants of Otisfield v. Scribner, 129 Me. 311, 151 Atl. 670 (1930) (tax assessed by an assessor not possessing qualifications prescribed by statute); Caplan v. Shaw, 126 W. Va. 676, 30 S.E.2d 132 (1944) (failure to describe land in tax deed). Even a curative act with a limitations provision cannot remedy such defects as against a delinquent taxpayer in possession of his land, *e.g.*, Sadder v. Smith, 54 Fla. 671, 45 So. 718 (1908) (material difference between description of land on assessment roll and in tax deed); Townsend v. Edwards, 25 Fla. 582, 6 So. 212 (1889) (land not assessed for year for which tax deed was issued); Sloan v. Sloan, 25 Fla. 53, 5 So. 603 (1889) (assessment by tax collector instead of by assessor); Carncross v. Lykes, 22 Fla. 587 (1886) (land not properly described on assessment roll); Baker v. Kelley, 11 Minn. 480 (1866) (land not advertised for sale as required by statute); Buty v. Goldfinch, 74 Wash. 532, 133 Pac. 1057 (1913) (lack of service in tax foreclosure suit); Wells v. Thomas, 78 So.2d 378, 382 (Fla. 1955) (dictum) (failure to give required notice); Johnston v. Ellsworth Trust Co., 63 Fla. 443, 447, 58 So. 249, 250 (1912) (dictum) (land improperly assessed with other land as owner unknown); Ensign v. Barse, 107 N.Y. 329, 340, 14 N.E. 400, 403 (1887) (dictum) (tax not authorized by law at time of assessment); Toronto v. Sheffield, 118 Utah 460, 466, 222 P.2d 594, 597 (1950) (dictum). Clearly, therefore, a mere curative act cannot remedy irregularities of this type.

[113]In Florida a married woman's conveyance of land or relinquishment of dower executed prior to May 13, 1943, the effective date of FLA. STAT. §693.03 (1953), was invalid unless properly acknowledged by her on an examination separate and apart from her husband, FLA. STAT. §693.03 (1941). Similarly, a conveyance of her husband's homestead was invalid, even when she joined in it, unless she acknowledged it in this manner. Shad v. Smith, 74 Fla. 324, 76 So. 897 (1917); Adams v. Malloy, 70 Fla. 491, 70 So. 463 (1915). And a mortgage of her husband's homestead was subject to the same rule. Hutchinson v. Stone, 79 Fla. 157, 84 So. 151 (1920); Bank of Jennings v. Jennings, 71 Fla. 145, 149, 71 So. 31, 32 (1916) (dictum). Compare these two cases with New York Life Ins. Co. v. Oates, 141 Fla. 164, 192 So. 637 (1939).

[114]*E.g.*, Downs v. Blount, 170 Fed. 15 (5th Cir. 1909) (acknowledgment and cer-

A few courts, however, have held to the contrary.[115] Occasionally these holdings have been based on the ground that a curative act cannot validate a deed that was absolutely void in its inception.[116] Sometimes they have been based on reasoning to the effect that at common law a married woman can convey her land or relinquish her inchoate right of dower only by a fine or common recovery in which she is joined by her husband; that when the legislature has provided a substitute for this method, it must be followed; and that the failure by a married woman to acknowledge the instrument as required by the statute establishing the substitute method renders the transaction void and beyond the reach of a curative act.[117]

The Florida Court in situations in which no curative act was involved has stressed the fact that under the law in effect until May 13, 1943,[118] the statutory provisions for a married woman's conveyance of her land, relinquishment of dower, or joinder in her husband's

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tificate not in conformity with statutory requirements); Lanzer v. Butt, 84 Ark. 335, 105 S.W. 595 (1907) (acknowledgment not taken by an authorized officer); Johnson v. Richardson, 44 Ark. 365 (1884) (certificate failed to show required separate examination of wife); Maxey v. Wise, 25 Ind. 1 (1865) (omission of required official seal of notary); Hackney v. Smith, 209 Ky. 806, 273 S.W. 476 (1925) (certificate failed to show required separate examination of wife); Eckles v. Wood, 143 Ky. 451, 136 S.W. 907 (1911) (certificate failed to recite as required that instrument was produced before officer and that he made its contents known to wife on an examination apart from her husband); Chesnut v. Shane's Lessee, 16 Ohio 599 (1847) (alternative holding) (certificate failed to recite as required that contents of instrument were made known to wife); Tate v. Stooltzfoos, 16 S. & R. 34 (Pa. 1827) (certificate failed to show required separate examination of wife); Barnet v. Barnet, 15 S. & R. 71, 73 (Pa. 1826) (dictum) (failure of certificate to recite as required that contents of instrument were made known to wife).

[115]Alabama Life Ins. and Trust Co. v. Boykin, 38 Ala. 510 (1863) (omission of required recitals in certificate); Russell v. Rumsey, 35 Ill. 362 (1864) (failure of certificate to recite as required that wife relinquished her dower); Grove v. Todd, 41 Md. 633 (1875) (acknowledgment taken before justice of peace beyond his territorial jurisdiction); Den on the demise of Robinson v. Barfield, 6 N.C. (2 Murph.) *391 (1818) (private act purporting to cure lack of required separate examination of wife); Klumpp v. Stanley, 52 Tex. Civ. App. 239, 113 S.W. 602 (1908) (alternative holding) (lack of required separate examination).

[116]*E.g.*, cases cited note 115 *supra*. Cooper v. Harvey, 21 S.D. 471, 113 N.W. 717 (1907), although not involving the lack of a married woman's acknowledgment, supports this position by analogy. It held that the omission of an acknowledgment of an assignment of a mortgage that is essential to the validity of a foreclosure by the assignee by advertisement is beyond the aid of a curative act.

[117]*E.g.*, Russell v. Rumsey, 35 Ill. 362 (1864); Grove v. Todd, 41 Md. 633 (1875).

[118]The effective date of FLA. STAT. §695.03 (1953).

conveyance or mortgage of his homestead, including the separate acknowledgment by her that then was required, were a substitute for the common-law fine or recovery by which her interests could be transferred or extinguished, and that it was necessary to comply with them.[119] It is probable, however, that the Court will adhere to the majority rule that a curative act can remedy a defective acknowledgment of a married woman when no vested rights of third persons have intervened. No Florida decision with reference to this matter has been found.

In *Summer v. Mitchell*[120] a conveyance of a husband's nonhomestead land in 1863 had been defectively acknowledged by him and his wife. It was held that the defect was cured by a subsequently enacted curative statute[121] so that the deed was admissible as prima facie proof of the title of a remote grantee in her action of ejectment against a defendant who was in possession otherwise than under the original grantor. It is to be observed that this decision is not authority for the doctrine that a defective acknowledgment of a married woman can be remedied by a curative act. Even if the defective acknowledgment of 1863 was cured only as to the husband, the title to the land passed to the grantee subject to the inchoate right of dower of the grantor's wife; and the deed became admissible in an action against a stranger to the title.

Pinckney v. Morton[122] deals with a complicated factual situation. Fuller and his wife in 1890 conveyed to the plaintiff a tract of Florida land that had at a prior time been patented to Fuller as his homestead. The deed was not separately acknowledged by Mrs. Fuller. Such an acknowledgment by a wife was at that time a prerequisite to the validity of either her husband's conveyance of his homestead[123] or her relinquishment of dower.[124] Mrs. Fuller obtained a divorce from Fuller

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119*E.g.*, Hutchinson v. Stone, 79 Fla. 157, 166, 84 So. 151, 154 (1920); Shad v. Smith, 74 Fla. 324, 330, 76 So. 897, 899 (1917); Bank of Jennings v. Jennings, 71 Fla. 145, 150, 71 So. 31, 32 (1916). When, however, the married woman had not been subjected to duress or fraud and no mistake or accident was involved, the recitals of the certificate of acknowledgment were conclusvie, *e.g.*, New York Life Ins. Co. v. Oates, 141 Fla. 164, 192 So. 637 (1939).

12029 Fla. 179, 10 So. 562 (1892).

121Fla. Laws 1873, c. 1939.

12230 F.2d 885 (5th Cir. 1929).

123*E.g.*, Shad v. Smith, 74 Fla. 324, 76 So. 897 (1917); *accord*, Hutchinson v. Stone, 79 Fla. 157, 84 So. 151 (1920); Bank of Jennings v. Jennings, 71 Fla. 145, 71 So. 31 (1916).

124FLA. STAT. §693.03 (1941).

in 1899. The plaintiff conveyed the land to Mrs. Fuller in 1920, and she reconveyed it to him in 1922. The defendant contracted in 1925 to purchase the land from the plaintiff. A curative act[125] was passed in 1925 that purported to cure under stated circumstances defects in the phraseology of acknowledgments and relinquishments of dower in instances in which the instrument had been spread upon the records for at least ten years before June 5, 1925, and one or more subsequent conveyances of the land had been made and recorded by persons claiming under the instrument. The defendant thereafter refused to purchase the land because of Mrs. Fuller's defective acknowledgment of the deed of 1890, and the plaintiff filed a bill for specific performance of the agreement. The United States Circuit Court of Appeals for the Fifth Circuit held that the curative act remedied the defective acknowledgment and that the plaintiff was entitled to the relief for which he prayed.

If, as probably was the case, the land was still Fuller's homestead when he conveyed it in 1890, a fact that of course does not necessarily follow from his having acquired it under the federal homestead laws at some prior time, the case supports the rule that a curative act can validate the defective acknowledgment of a married woman. The opinion contains no statement, however, that the land was Fuller's homestead at that time, although it refers to certain negotiations between the Fullers at the time of their divorce in 1899 as concerning "the homestead."[126] If the land was not homestead in 1890, the conveyance passed the title subject to Mrs. Fuller's inchoate right of dower. That right was terminated by her divorce[127] nine years later, and the fact that her acknowledgment was defective became inconsequential.

Part IV, entitled "Curative Acts with Limitations Provisions," will appear in the next issue.

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[125]Fla. Laws 1925, c. 10169, §1. This act provided no limitations period subsequent to its effective date during which theretofore defective instruments within its scope could be attacked. It now exists, subject to three later amendments, in FLA. STAT. §694.08 (1953) as a curative act with a limitations provision.

[126]30 F.2d at 886.

[127]Busch v. Busch, 68 So.2d 350 (Fla. 1953); North v. Ringling, 149 Fla. 739, 7 So.2d 476 (1940); Pawley v. Pawley, 46 So.2d 464, 472 (Fla. 1950) (dictum).