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THE EQUITABLE LIEN IN FLORIDA*

RALPH A. BOYER** AND BARRY KUTUN***

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Equity is a roguish thing, for law we[e] have a measure know what to trust to[o], [e]quity is according to the conscience of him that is [o]hancellor, and as that is larger or narrower so[e] is equity. 'Tis all one as if they should make the [s]tandard for the measure we call a foot, a chancellor's foot; what an uncertain measure would this be? One chancellor has a long foot, another a short foot, a third an indifferent foot; 'tis the same thing in the chancellor's conscience.[1]

I. INTRODUCTION

The general characterization of equity which prefaces this paper seems particularly appropriate to the equitable lien. The equitable lien is a remedial device of considerable flexibility adaptable to a wide variety of circumstances. Judicial definitions and explanations of the lien are usually framed in generalities so broad as to be of little utility.[2]

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1. SELDEN, TABLE TALK 43 (1927). Interestingly enough, Justice Terrell in Jones v. Carpenter, 90 Fla. 407, 413, 106 So. 127, 129 (1925), stated that the equitable lien is "not a limitless remedy to be applied according to the measure of the conscience of the particular chancellor any more than, as an illustrious law-writer said, to the measure of his foot."

2. See, *e.g.*, Society of Shakers v. Watson, 68 Fed. 730, 739 (6th Cir. 1895).

> It is simply a right of a special nature over the thing, which constitutes a charge or incumbrance upon the thing, so that the very thing itself may be proceeded against in an equitable action, and either sold or sequestered under a judicial decree, and its proceeds in the one case, or its rents and profits in the other, applied upon the demand of the creditor in whose favor the lien exists.[3]

Except for the vendor's lien, this paper will examine the Florida law on equitable liens generally. An attempt will be made to delineate the circumstances giving rise to such a lien, and to attempt to determine what standards, if any, have been established. The vendor's lien is perhaps the best known example of an equitable lien and is worthy of separate treatment. For that reason, it is excluded from this article and has been discussed separately.[4]

The equitable lien is one of several remedial devices employed to prevent unjust enrichment. As such, it is desirable to compare and distinguish it from related devices. The constructive trust is one of the other remedies with a similar objective.

A legalistic, but rather meaningless distinction, notes that in a trust there are two estates in the same property[5]—the legal estate in the trustee and the equitable estate in the beneficiary—whereas in an equitable lien situation there is a legal and equitable title in one person with that title being subject to a special right, encumbrance or charge in favor of another.[6] Insofar as the constructive trust is concerned, it is not a trust in the ordinary sense at all, and it is not contemplated that there shall be any continuing duties between the "trustee" and "beneficiary." Rather, the gist of the remedy is the forced conveyance from the "trustee" to the "beneficiary" so that the person entitled to the property does in fact obtain it. In general terms, a constructive trust arises where a person who holds title to property is subject to an equitable duty to convey it to another, on the ground that the title holder would be unjustly enriched if he were permitted to retain it.[7]

The constructive trust prevents unjust enrichment by compelling the defendant to convey or surrender property to the plaintiff. The equitable lien achieves a similar result by giving the plaintiff a security interest in the property held by the defendant.[8] In some situations the

3. Jones v. Carpenter, 90 Fla. 407, 412, 106 So. 127, 129 (1925).

4. See Boyer v. Evans, *The Vendor's Lien*, 20 U. MIAMI L. REV. 767 (1966).

5. 4 POMEROY, EQUITY JURISPRUDENCE § 1234 n.5 (5th ed. 1941).

6. This special right is not an *estate* of any kind; it does not entitle the holder to a conveyance of the thing nor to its use; it is merely a right to secure the performance of some outstanding obligation, by means of a proceeding directed against the thing which is subject to the lien. 4 POMEROY, *op. cit. supra* note 5.

7. 4 SCOTT, TRUSTS § 462.1 (2d ed. 1956).

8. *Id.* at § 463.

equitable lien is available as an alternative remedy to the constructive trust, whereas in other situations it is not. Thus, if the defendant wrongfully uses money of the plaintiff in purchasing property, the plaintiff is entitled at his option either to a constructive trust or an equitable lien.[9] If the former remedy is used, as it likely would be if the property increases in value, the defendant has to convey the property to the plaintiff. If the equitable lien remedy is used, the property is sold on foreclosure of the lien, and the proceeds are used to pay the plaintiff's claim.

In case the plaintiff's equitable interest in the property is less than the complete ownership of all (or a specific portion) of the title, then the remedy of equitable lien is available, but that of constructive trust is not. Thus, for example, if a person makes improvements upon the property of another as a result of fraud or a mistake of such a character that he is entitled to restitution, he can enforce an equitable lien but cannot impose a constructive trust.[10] Similarly, if an owner wrongfully uses the money of another to make improvements on his own property, the other party is entitled to enforce an equitable lien, but not a constructive trust.[11]

Subrogation is also a remedy for the prevention of unjust enrichment. Subrogation may be defined generally as "the substitution of one for another as a creditor so that the new creditor succeeds to the former's rights in law and equity; a legal operation by which a third person who pays a creditor succeeds to his rights against the debtor as if he were his assignee."[12] A person is subrogated to the position of an obligee when the person's property has been used to discharge an obligation of another.[13] Subrogation is not allowed where the payment of another's debt is officious. Subrogation is allowed and the payment considered not officious under the following circumstances: payment made by mistake; payment made under fraudulent inducement or other wrongful conduct; payment by a surety for his debtor; and payment made to protect an interest of the payor.[14] Further, money used by a debtor without consent of its owner in discharging a debt of the debtor entitles the owner of the money to be subrogated to the position of the creditor.[15]

When subrogation is proper, the subrogated party can enforce such rights as the creditor had prior to the payment of the debt. If the creditor had a claim secured by a mortgage, pledge or lien, then the party paying the claim is entitled to enforce a similar security interest. On subrogation

9. *Ibid.*
10. *Ibid.*
11. *Ibid.*
12. WEBSTER, DICTIONARY (3d New Int'l Unabr. ed. 1959). For a broader survey of subrogation see the article in this issue, Cappucio, *Subrogation in Florida*, 20 U. MIAMI L. REV. 000 (1966).
13. 4 SCOTT, *supra* note 7, at § 464.
14. *Ibid.*
15. *Ibid.*

the plaintiff gets the same rights as the satisfied creditor, neither more nor less.[16] Thus, if the paid creditor had priority, the party subrogated to the creditor's rights is entitled to priority; if the creditor had a lien, the subrogated party likewise gets a lien. In this respect, subrogation differs from equitable liens in that in the former situation the subrogee accedes to a pre-existing lien or one already established, whereas in the case of equitable liens, the lienor acquires a new lien which never before existed.

The equitable lien should also be distinguished from the common-law possessory lien. In addition to the fact that one is cognizable in law and the other in equity, a fundamental difference is that the equitable lien does not depend on possession.[17] In fact, lack of possession in the lienor is normally a prerequisite to, and a chief advantage of, the equitable lien. A Florida appellate court has stated: "The established rule for imposition of an equitable lien is that the property in litigation must be in the possession of the defendant . . . ."[18]

An equitable lien can arise either from a written contract, showing the intention to charge particular property with the debt, or it can be "declared by a court of equity out of general considerations of right and justice as applied to the relations of the parties and the circumstances of their dealings."[19]

This study of the Florida law will commence with an examination as to what property may be subjected to an equitable lien, and then, as to what relationships and circumstances have given rise to the imposition of such a lien.

II. TYPES OF PROPERTY SUBJECT TO THE IMPOSITION OF AN EQUITABLE LIEN

A. *In General*

It can be stated generally that *any* property which is capable of identification and subject to legal process,[20] so that it may be sold by

16. *Ibid.*

17. The equitable lien differs essentially from a common-law lien; the latter being the mere right to retain possession of some chattel until a debt or demand due the person thus retaining it is satisfied; possession being such a necessary element that if it is voluntarily surrendered by the creditor the lien is at once extinguished, while in the former or equitable lien possession remains with the debtor or person who holds the proprietary interest.

Jones v. Carpenter, 90 Fla. 407, 413-414, 106 So. 127, 129 (1925); 1 JONES, LIENS § 28, at 26 (3d ed. 1914).

18. Richard Bertram & Co. v. Barrett, 155 So.2d 409, 412 (Fla. 1st Dist. 1963).

19. 1 JONES, LIENS § 27, at 25 (3d ed. 1914). Equitable liens arising from written contracts showing an intention to charge particular property with a debt, instead of being discussed under a single heading as a separate major topic, are treated throughout this article wherever they arise within a particular relationship or circumstance examined.

20. If the property were not subject to a forced sale, the imposition of an equitable lien would be a futile gesture. A similar recognition is evident in the Mechanics' Lien Law

judicial decree, may be subjected to the imposition of an equitable lien.[21] In Florida both personalty and realty may be so encumbered.[22] The equitable lien has extended to such property as a leasehold interest,[23] the proceeds of a note,[24] a bank deposit,[25] a legatee's interest in an estate,[26] homestead property,[27] and the realty of shareholders of a dissolved corporation.[28]

B. *Homestead Property*

The question as to whether Florida homestead property can be subjected to the imposition of an equitable lien was considered at a very early date. In *Jones v. Carpenter*[29] the trustee of a bankrupt corporation sought to impose an equitable lien upon the defendant's homestead. The complaint alleged that the now insolvent defendant, while president of the bankrupt corporation, had wrongfully withdrawn funds to pay for certain improvements to his home. The principal defenses which were asserted were: first, that painting and repairing did not constitute valuable improvements; and second, that the property was the defendant's homestead and therefore exempt under the Florida Constitution, Article 10, section 1. The defendant contended that the exception to the homestead exemption, allowing a lien for the erection or repair of improvements, was inapplicable.[30]

The lower court dismissed the complaint and the trustee appealed. On review the supreme court considered the defendant's conduct to be fraudulent and surreptitious. The defendant contributed to the bank-

which permits a lien to be impressed on any legal or equitable interest in real property which can be reached and sold by legal process. FLA. STAT. § 84.011(12) (1965), defining "owner."

21. See *infra* notes 22-28.

22. Robertson v. Robertson, 12 Fla. Supp. 126 (Broward Cir. Ct. 1957), *aff'd*, 106 So.2d 590 (Fla. 2d Dist. 1958); cases cited *infra* notes 23-28.

23. Oliver v. Mercaldi, 103 So.2d 665 (Fla. 2d Dist. 1958). See BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 35.04(3) (1960) [hereinafter cited as BOYER].

24. Treadwell v. Exchange Nat'l Bank, 127 Fla. 40, 172 So. 914 (1937).

25. Mizner Land Corp. v. Abbott, 128 Fla. 489, 175 So. 507 (1937); Lockett v. Robinson, 31 Fla. 134, 12 So. 649 (1893).

26. *In re* Barker's Estate, 75 So.2d 303 (Fla. 1954); *In re* Warner's Estate, 160 Fla. 460, 35 So.2d 296 (1948).

27. Jones v. Carpenter, *supra* note 3.

28. Lake Sarasota, Inc. v. Pan Am. Sur. Co., 140 So.2d 139 (Fla. 2d Dist. 1962).

29. See note 27 *supra*.

30. An indebtedness for money borrowed to purchase materials, or pay for labor bestowed in improving lands, or money expended in the purchase of such materials, or in payment for such labor, is not an obligation contracted "for the erection of improvements," nor an obligation contracted for such labor, and is not within the exceptions of the constitutional provisions. The contract in such case is to repay money loaned or expended, and not a contract to pay for the erection of improvements, or for labor on the premises. Lewton v. Hower, 18 Fla. 872, 882-83 (1882). The exception to the exemption, contained in art. X, § 1, reads as follows:

But no property shall be exempt from sale for taxes or assessments, or for the payment of obligations contracted for the purchase of said property, or for the erection or repair of improvements on the real estate exempted, or for house, field or other labor performed on the same.

ruptcy of the corporation by withdrawing funds without authority. Then he applied the funds to improvements on his own home and claimed immunity by virtue of the homestead exemption. In reversing the lower court, the supreme court allowed the trustee to impress an equitable lien on defendant's homestead. The court recognized that had the defendant borrowed the funds from the corporation, the corporation would not have been entitled to such a lien. However, in support of the decision, the court stated:

> A homestead in this country is . . . designed to keep sacred and inviolate the home for the family regardless of the amount of the indebtedness or the number of creditors of the head of the family. . . . [B]ut it cannot be employed as a shield and defense after fraudulently imposing on others.[31]

It is important to take note of the circumstances presented. Any legal remedy would have been inadequate since the defendant-thief was insolvent; a money judgment against him would have been an empty judgment. No legal remedy against the premises was available. The defendant's conduct was fraudulent. The significance of these factors will be noted in other cases.

The case of *Spach v. Kleb*[32] presents an interesting contrast to the *Jones* case. In *Spach,* the defendant-partners had represented on their financial reports that certain realty, on which their business was conducted, was part of the partnership assets, and they secured credit on that representation. Later, the partners sold the realty and continued the business under a lease arrangement. They applied the proceeds of sale to pay off the respective mortgages on their homesteads. Eleven months later the partners filed a voluntary petition for bankruptcy. Thereupon, the trustee in bankruptcy sought to impose an equitable lien on the partners' homestead property in the amount that was applied against the mortgage from the sale of the partnership realty. The trustee contended that the creditors were defrauded by the representation of the financial report. The lower court dismissed the trustee's complaint and he appealed. The supreme court affirmed holding:

> [T]he failure to apply proceeds from the sale of partnership realty to the payment of creditors' claims . . . in no way sets up a special equity in the creditors that would entitle them to specific liens upon the assets of the partnership which had theretofore been divided between the partners and converted into exempt property.[33]

The court also stated that the complaint failed to charge any "bad faith" in the sale of the property. It only charged that the failure to apply

31. Jones v. Carpenter, *supra* note 3, at 417, 106 So., at 130.
32. 112 So.2d 21 (Fla. 3d Dist. 1959).
33. *Id.* at 24.

the proceeds of sale to the payment of creditors was a fraud upon the creditors. Thus, the case can be distinguished from *Jones*. Here the financial statement showing the realty to be a partnership asset was true at the time; the sale of the partnership asset by the partners was an authorized act; and only the diversion of the funds into exempt homesteads prejudiced the creditors. It was the partners' own funds which they used to disencumber their homesteads; meanwhile they remained personally liable for debts of the partnership. Of course, personal liability is of little utility to firm creditors if all individual assets are immune to execution and the partners individually go through bankruptcy proceedings. Nevertheless, there is still another important distinction from the *Jones* case. In *Jones*, the money was taken without authority, that is *stolen*, from a third party, a corporation and separate legal entity, and applied to the improvement of the thief's homestead. Apparently then, the third party, or its creditors, was entitled to trace the funds and impose an equitable lien in order to obtain restitution when legal relief against the *thief* was inadequate because of insolvency.

A claimed lien on the homestead can also arise out of a loan of money coupled with an oral agreement. Thus, in *Craven v. Hartley*,[34] Mrs. Craven purchased realty and borrowed monies from Hartley to complete payments to the seller. The property at the time was not claimed as homestead by Mrs. Craven. Thereafter Hartley instituted suit against Mrs. Craven and her husband to establish an equitable lien. Hartley alleged that Mrs. Craven orally promised to execute a mortgage in his favor for the amount advanced for the purchase of the property. The chancellor held in favor of an equitable lien, and the decision was per curiam affirmed on appeal to the Florida Supreme Court.[35] After the appeal, Mrs. Craven petitioned the chancellor to adjudicate her property a homestead and exempt from forced sale. She alleged that after institution of the original suit, but before the final decree, her husband died and she had become a head of the household entitled to homestead benefits. She further alleged that at the time of the final decree she was residing on the affected property. The chancellor denied her petition and she appealed. The supreme court held that an equitable lien attached once Hartley loaned the money and she applied it to the purchase price of the land, taking title in her name. Therefore, the property was not homestead at the time the lien attached. The court further stated:

> The doctrine of equitable liens does not depend on written instruments, but may arise from a variety of transactions to which equity will attach that character. The fact that they may be predicated on a parol agreement is not obnoxious to the

34. 102 Fla. 282, 135 So. 899 (1931).

35. Craven v. Hartley, 95 Fla. 704, 116 So. 481 (1928). This resumé of the facts is contained in the majority opinion of 102 Fla. 282, at 284, 135 So. 899, at 900.

> statute of frauds because they arise by operation of law from the conduct of the parties.[36]

Justice Ellis, in his dissenting opinion, stated that the *Craven* decision as held by the majority stands for the following proposition:

> Where one advances money to another for the purchase of land relying upon the other's promise to pledge the land to be acquired as security for the loan, an equitable lien arises in favor of the lender upon the land acquired against the borower.[37]

It is interesting to note that the one concurring and two dissenting opinions each would have handled the problem differently. The concurring opinion opined that Hartley was "subrogated" to the rights of the vendor and therefor entitled to an equitable lien within the constitutional exception to the homestead exemption. One dissenting opinion declared that a married woman cannot solely pledge realty purchased by her as security for the loan without her husband's consent, notwithstanding the homestead problem. Therefore, "a lender cannot legally be said to rely upon the promise."[38] The other dissent indicated that since the decree was entered *after* the property had become homestead, the land was not subject to forced sale.

Thus, in the *Craven* case, the homestead character of the land was not in issue, since the precise holding was that the equitable lien attached prior to the status of homestead. The lien attached as of the date on which the conduct of the parties gave rise to it, not as of the date of the court decree. This appears to be a sensible and just result. Summarizing, this equitable lien, arising out of a loan of money and a promise to give security, could be regarded as a substitute for an equitable mortgage. The difference, if any, would appear to be negligible so far as substantive rights are concerned. The theory of subrogation to an implied vendor's equitable lien would likewise appear equally efficacious.

In *Sonneman v. Tuszynski*,[39] the plaintiff advanced money to the defendant and rendered services as his housekeeper. The plaintiff had acted in expectation that the defendant would support and maintain her for the remainder of her life. With the assistance of proceeds contributed by the plaintiff, the defendant purchased a tourist camp. Plaintiff assisted in maintaining the camp until the defendant married, after which the defendant and his wife made the camp their home. Later, because of certain controversies with the plaintiff, she was forced to leave. Plaintiff, seventy-eight years young and penniless, then instituted an action to impress an equitable lien.

36. Craven v. Hartley, 102 Fla. 282, 286, 135 So. 899, 901 (1931).

37. *Id.* at 292, 135 So., at 903. This view being *contra* to the weight of authority. See 1 JONES, LIENS § 70 (3d ed. 1914).

38. *Id.* at 292, 135 So., at 903.

39. 139 Fla. 824, 191 So. 18 (1939).

The claim of lien was predicated on the defendant's promise to support and maintain her. The Florida Supreme Court, reversing the lower court, held that the defendant's property, which was then homestead, could be subjected to an equitable lien. The court based its decision on the theory that a special equity exists in behalf of a person advancing money, performing labor, and otherwise assisting in the accumulation of money and property.[40]

Since the money was advanced to purchase the camp, and since most of the services were rendered prior to the marriage of the defendant and the attachment of homestead status, the lien in *Sonneman*, as in *Craven*, may be regarded as attaching prior to the attachment of homestead status. It should not be concluded, however, that the existence of a homestead status at the time of advancing money in reliance on an oral agreement precludes the imposition of an equitable lien. In fact the contrary has been held.[41] In the most recent case dealing with this problem, the Third District Court of Appeals succinctly set forth the criteria it regards as necessary for the imposition of an equitable lien on homestead property.[42] "[T]o recover an equitable lien against real property used as a homestead it is necessary for the plaintiff to establish fraud[43] or 'reprehensible conduct.' "[44] The reported decision denied the lien and gave no facts. The cases of *Jones v. Carpenter*[45] and *Spach v. Kleb*[46] appear to support this rule, while *Craven v. Hartley*[47] and *Sonneman v. Tuszynski*[48] are not in point, since the lien there attached before homestead. *La Mar v. Lechlider*[49] appears to give scant support to the statement if "fraud" was intended in the usual sense of conscious wrongdoing.

In *LaMar*, the court recognizing that there was an absence of flagrant fraud, nonetheless concluded that denial of an equitable lien would render the homestead an instrument of fraud. In that case, the claimants added improvements to the defendants' homestead and paid off an existing mortgage in expectation of obtaining both an interest in the property and a living place for their old age. There was no showing that the defendants had not intended to perform the agreement at the time the plaintiffs were

40. See *infra* note 178 and accompanying text.

41. LaMar v. Lechlider, 135 Fla. 703, 185 So. 833 (1939), discussed *infra* text following note 49.

42. Clutter Constr. Corp. v. Clutter, 173 So.2d 761 (Fla. 3d Dist. 1965). The court reviewed without discussion the decisions cited in the text before stating its conclusions.

43. That "flagrant fraud" is not necessary, see LaMar v. Lechlider, *supra* note 41.

44. 173 So.2d, at 761-62. *But see* Smith v. Irvine, 68 So.2d 567 (Fla. 1953), holding that an action for damages because of fraud or misrepresentation does not give rise to an equitable lien simply because there may not be sufficient assets to satisfy a judgment.

45. *Supra* note 27.

46. *Supra* note 32.

47. *Supra* note 34.

48. *Supra* note 39.

49. *Supra* note 43. The case is also discussed in text following this note, and in text accompanying note 86 where a general basis for the lien is discussed.

improving the realty and paying the mortgage. Hence the claim of fraud was considerably weakened, in that the facts might well have indicated little more than a change of mind on the part of the defendants. However, to have not imposed the lien would have resulted in considerable benefit to, and enrichment of, the defendants, with considerable deprivation and inequity to the plaintiffs. To have permitted such a situation, even if innocently begun, might well be regarded as toleration of fraudulent or reprehensible conduct on the part of the defendants. Thus the conclusion of the appellate court might appear justified; however, such a test leaves room for considerable judicial discretion. Perhaps the only possible specific conclusion is that an equitable lien may be imposed on homestead property when the court decides that to not do so would be too inequitable.

III. CIRCUMSTANCES GIVING RISE TO THE IMPOSITION OF THE EQUITABLE LIEN

A. *Particular Relationships*

1. ATTORNEY–CLIENT

There are two types of liens applicable to the attorney-client relationship. The first, a retaining lien, entitles an attorney to hold his client's papers, money, securities and other property coming into the attorney's possession as a result of his professional employment.[50] The retaining lien is a possessory lien and is dependent on the attorney's possession of his client's property.[51] The other lien is called an "attorney's lien" or "charging lien." This is a type of equitable lien,[52] which allows the attorney to have a lien on the judgment obtained for his client. The basis of the lien, long recognized in Florida,[53] is that, "[i]t is considered reasonable and proper that an attorney, by whose labor and at whose expense a judgment has been obtained for his client, should have an interest in that judgment which the law will regard and protect."[54]

Since this paper is focused on property liens, the emphasis will be on the acquisition of a charging lien on property recovered rather than on liens impressed on a judgment for a sum of money. Owing to a lack of Florida decisions on many aspects of the problem, many questions are necessarily left unanswered.

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50. See generally, 1 JONES, LIENS §§ 113-152 (3d ed. 1914).

51. Chancey v. Bauer, 97 F.2d 293 (5th Cir. 1938); St. Ana v. Wheeler Mattison Drugs, Inc., 129 So.2d 184 (Fla. 3d Dist. 1961); 3 FLA. JUR. *Attorneys At Law* § 70 (1955).

52. See 1 JONES, LIENS § 155 (3d ed. 1914). "The charging lien is an equitable right. . . ." Chancey v. Bauer, *supra* note 51, at 294. Unlike some states, Florida has no statute either creating, confirming or modifying the charging lien. St. Ana v. Wheeler Mattison Drugs, Inc., *supra* note 51. See also Note, *Attorney & Client: Attorney's Charging Lien*, 4 U. FLA. L. REV. 58, at 59 (1951).

53. Carter v. Davis, 8 Fla. 183 (1858); Randall v. Archer, 5 Fla. 438 (1854).

54. 1 JONES, LIENS § 155, at 143 (3d ed. 1914).

It will be noted that the above quotation, as well as other texts[55] and some decisions,[56] refer to the lien as being on the judgment. The question naturally arises then as to whether a judgment is absolutely necessary. Without examining all the possibilities of a collusive settlement without the consent of the attorney,[57] most of which have not been litigated in Florida, the answer is clearly "no." If the settlement is made with the approval and aid of the attorney under the supervision of the court, the attorney may still be entitled to his lien if other circumstances warrant it.[58] Recovery is the important thing.

The lien may even be applied in favor of an attorney who has been discharged, so long as a recovery is later obtained. Thus, in *Winn v. City of Cocoa*,[59] allowing a discharged attorney a lien on an award later obtained in an eminent domain proceeding, the supreme court stated that "an attorney who conducts a suit has a lien for his fees from the fund recovered as long as it remains in the custody or control of the Court."[60]

In *Stern v. Stern*,[61] the supreme court denied to the wife's attorney in a divorce proceeding an equitable lien on her interest in formerly held entireties property. The court reasoned that when the wife is without funds to sustain the costs of litigation, the husband should bear the expenses.

Somewhat in contrast to the *Stern* case is *Robertson v. Robertson*,[62]

55. 1 JONES, LIENS § 153; 3 FLA. JUR. *Attorneys At Law*, § 71 (1955); 2 FLA. LAW & PRACTICE, *Attorney & Client* § 23 (1955); BROWN, PERSONAL PROPERTY 558 (2d ed. 1955).

56. *E.g.*, Nichols v. Kroelinger, 46 So.2d 722 (Fla. 1950); Spethman v. Hofeldt, 141 Neb. 83, N.W.2d 620 (1942).

57. See generally on the problem Note, *Attorney & Client: Attorney's Charging Lien*, 4 U. FLA. L. REV. 58, 66-67 (1951); 7 AM. JUR. 2d *Attorneys At Law* § 306 (1963).

58. Robertson v. Robertson, 106 So.2d 590 (Fla. 2d Dist. 1958), allowing lien in suit for alimony unconnected with divorce after reconciliation and transfer of husband's assets to wife; Smith v. Tydings, 100 Fla. 1414, 131 So. 319 (1930), denying recovery because of an adequate remedy at law, not because of a settlement. See also Osius v. Hastings, *infra* note 59.

59. 75 So.2d 909 (Fla. 1954). In this case the landowner could have recovered attorney's fees in the condemnation award but did not ask for them. It was held that the statutory provision for such fees was for the benefit of the landowner and could be waived.

In Osius v. Hastings, 97 So.2d 623 (Fla. 3d Dist. 1957), it was held that when attorney employed under a contingent fee contract was discharged before termination of the controversy, attorney was not entitled to recover fee on contract or on quantum meruit before the client recovered on claim. The attorney also was held not entitled to a retaining lien but was entitled to an order establishing a lien upon any settlement, judgment or recovery thereafter obtained by the client.

60. 75 So.2d 909, at 912.

61. 50 So.2d 119 (Fla. 1951). In Lamoureux v. Lamoureux, 59 So.2d 9 (Fla. 1952), also involving a claim for legal fees growing out of divorce proceedings, a lien on property recovered for the wife was denied. The basis of the decision, although Stern v. Stern, *supra*, was cited, was that the attorneys alleged a contract for legal services, a contingent fee calling for a percentage of the sums and property recovered, and the court stated that the existence of such a contract and its terms were for the jury. Hence, the suit could be tried at law.

62. 106 So.2d 590 (Fla. 2d Dist. 1958), *affirming* 12 Fla. Supp. 126 (Broward Cir. Ct. 1957).

wherein the attorney was allowed an equitable lien on the proceeds of a property settlement which he had secured for his client in an action for separate maintenance (alimony unconnected with divorce). The trial court stated:

> Under the circumstances the court finds that there was an implied understanding between the attorney and client that a reasonable fee would be charged, and would of necessity be payable out of the property realized from the settlement.[63]

The cases of *Stern* and *Robertson* may be reconciled or distinguished in a number of ways. Since the Court spoke of the necessity of an agreement in *Stern*,[64] it may be that there was no agreement for a lien between the attorney and client in that case, as there was found to be in *Robertson*. Further, in *Stern* the property involved was formerly held in the entireties. This was property which the divorced spouse already owned, the effect of the divorce being merely to change her interest from a tenancy by the entireties to a tenancy in common. Thus, in a sense, the attorney did not recover the property for her in the divorce proceeding. In *Robertson*, on the other hand, the attorney did recover, from the husband, property for his client. In fact, the attorney recovered *all* of the husband's property, "stripped him clean," and thus made it impossible for the husband to pay the wife's attorney's fees.[65]

The general basis for the attorney's equitable lien is an agreement, express or implied, between the attorney and client that certain funds or property recovered on behalf of the client will be used to pay the attorney's fee.[66] This basis of the lien was reaffirmed in 1958 and 1959 by both the Second District Court of Appeal[67] and the Florida Supreme Court[68] in the case of *Billingham v. Thiele*. This case, denying a lien in the controversy in litigation, overruled one,[69] and reconciled[70] another, earlier supreme court case dealing with similar situations.

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63. 12 Fla. Supp., at 128. The conclusion of the chancellor as to an implied agreement was affirmed on appeal. 106 So.2d, at 592. The finding of an implied agreement is interesting in view of the fact that the original agreement between the attorney and client was that the lawyer would be paid a reasonable fee to be determined by the court and that the fee would be assessed against the husband. However, under the terms of the settlement, reconciliation and dismissal of the suit, all of the husband's property was turned over to the wife. Thus, payment by the husband was impossible. This was known to the wife who had to give him money so that he could leave town. Hence she must have realized that her attorney would have to be paid out of the property acquired from the settlement.

64. Stern v. Stern, *supra* note 61, at 120.

65. See the two reports, *supra* note 62; the delineated facts *supra* note 63.

66. Robertson v. Robertson, *supra* note 62; Billingham v. Thiele, *infra* notes 67, 68, and cases cited therein.

67. 107 So.2d 238 (Fla. 2d Dist. 1958).

68. 109 So.2d 763 (Fla. 1959).

69. Ward v. Forde, 154 Fla. 383, 17 So.2d 691 (1944). The district court of appeal could not reconcile this case, and the supreme court overruled it. See *infra* note 86 and accompanying text.

70. See, however, the discussion of Smith v. Tydings, *infra*, text following note 72.

In *Billingham* the attorney had been successful in getting certain ninety-nine year leases and agreements cancelled on his clients' property. Then, alleging an agreement for lien with the clients, the attorney sought to establish a lien on the property which was discharged on the outstanding leases. The lien was denied on the basis of a lack of agreement for such a lien, as the plaintiff admitted in his testimony that there was no such agreement.[71] The earlier cases reviewed by the court should be considered along with their interpretation in *Billingham.*

In *Smith v. Tydings,*[72] one of the cases reviewed, the plaintiff sought an equitable lien on his client's property after the litigation had been settled, and the attorney remained unpaid. The supreme court in that case, without further explanation, affirmed the lower court's decision that there was an adequate remedy at law. In *Billingham* the district court had remarked that "we must take this decision as being under the majority rule,"[73] and stated the majority rule:

> [Where] there is no express or implied agreement with a client regarding a lien for his services, or where there is no special equity set forth or any property in court or in the attorney's hand, the lien will not be allowed.[74]

It is submitted that *Billingham v. Thiele,*[75] does not satisfactorily explain *Smith v. Tydings.*[76] *Billingham* only explains the dismissal of *Smith:* "[T]he bill of complaint showed that the plaintiff had an adequate remedy at law in having said that the bill contained an agreement between the client and his attorney that the attorney should recover for his fees out of the land involved."[77] In addition to the fact that the reported *Smith* case says nothing about an agreement, the *Billingham* case proceeds to reconcile the cases on the presence or absence of an agreement. If the *Smith* bill did allege an agreement, as the court stated, it would appear that the attorney, on proof thereof, should have had a lien under the law as expounded in *Billingham;* yet the court held just the opposite. The apparent contradiction is confusing, and especially since it appears to have escaped the *Billingham* courts.[78]

In the case of *Alyea v. Hampton*[79] the court found that there was a

71. 107 So.2d, at 244. The written contract, 107 So.2d, at 239, only provided for proration of expenses among the unit owners on a unit basis without providing for any lien or charge on the realty or unit.

72. 100 Fla. 1414, 131 So. 319 (1930).

73. 107 So.2d 238, at 242.

74. *Id.* at 244.

75. 107 So.2d 238 (Fla. 2d Dist. 1958); *cert. denied,* 109 So.2d 763 (Fla. 1959).

76. *Supra* note 72.

77. 107 So.2d 238, at 241.

78. 109 So.2d 763 (Fla. 1959). The supreme court in discharging the writ of certiorari did not mention Smith v. Tydings, but seemed satisfied generally with the district court's rationalization of the cases and accordingly "receded from" Ward v. Forde, *infra* note 85.

79. 112 Fla. 61, 150 So. 242 (1933).

definite agreement between the attorney and client, and thus allowed an equitable lien on the property recovered. In *Scott v. Kirtley*,[80] the Florida Supreme Court, although there was apparently no *express* agreement for lien, nonetheless allowed the attorney an equitable lien. The court there held that since the client told the attorney that she was without funds and unable to pay a retainer or other fee at the time she engaged him, that an equitable lien may be *implied* and declared "upon the fundamental maxim of equity that no one shall be unjustly enriched at another's expense. . . ."[81] Somewhat in contrast to the *Scott* case is *Guthrie v. Home Bldg. & Loan Co.*[82] In this case, the Florida Supreme Court held that an attorney who foreclosed certain mortgages and secured the property thereunder for his client, did not have an equitable lien on the property recovered.

The *Billingham* case reconciled *Scott* and *Guthrie* as follows:

> As we see it the Guthrie case does not override the Scott case, but it can be distinguished. The Guthrie case held that the attorney had no lien for his fees [sic] which his client acquired by reason of the attorney's services in the foreclosure proceedings *absent the arrangement or agreement* that he would have a lien whereas in the Scott case the attorney had, in view of all the facts, an understanding that his services would be payable out of what the client should realize as a result of the successful efforts of the attorney.[83]

This reconciliation, on the basis of an implied agreement in *Scott*, appears justified and presents no particular difficulty. The *Scott* decision was followed in *Knabb v. Mabry*,[84] wherein attorneys were granted a lien on the property recovered in a foreclosure decrée. The court felt that the circumstances were such that the defendant would be unjustly enriched at the attorneys' expense. Moreover there was an understanding between the parties that the attorneys would be paid out of the proceeds recovered for the client.

In *Ward v. Forde*[85] the attorneys had obtained an agreement to be paid a fee without mention of any security to be given to them. As a matter of fact, part of the fees were *paid*, in cash, by the defendants. Nevertheless, the attorneys sought an equitable lien for the balance due, and the court allowed the lien on the basis that it was equitable and just to do so.

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80. 113 Fla. 637, 152 So. 721 (1934).

81. *Id.* at 642; 152 So., at 723.

82. 116 Fla. 822, 156 So. 882 (1934).

83. *Supra* note 77, at 241 (Fla. 2d Dist. 1958). The Florida Supreme Court agreed with this reconciliation, 109 So.2d 763 (Fla. 1959).

84. 137 Fla. 530, 188 So. 586 (1939).

85. 154 Fla. 383, 17 So.2d 691 (1944). The suit in this case involved the removal of zoning restrictions. *Cf.*, Billingham v. Thiele, *supra* notes 67, 68 involving the removal of leases.

The *Ward* case proved irreconcilable on the issue of whether or not there was an agreement for lien between the attorney and client. Accordingly, The Supreme Court of Florida in *Billingham* receded from *Ward* and stated the Florida position:

> [I]n the absence of statutory authority, or an express contract or an implied agreement arising out of special equitable circumstances, an attorney is not entitled to the imposition of a charging lien on the real estate of his client.[86]

In *Greenfield Villages, Inc. v. Thompson*[87] it was held that the attorneys were entitled to an equitable lien on the basis of a special agreement between the attorneys and the client. The agreement was that the fees were to be paid out of funds received from the sale of certain properties.

Cases concerning probate or the administration of decedents' estates are worthy of consideration. In the early case of *Fuller v. Cason*[88] an attorney, claiming a lien, sought to enjoin his client from disposing of certain cattle which he obtained for her by establishing a nuncupative will. The Florida Supreme Court found that no lien attached for his services in establishing the will because the property vested in the administrator, not in the defendant. Therefore, the legatee had no such interest that would enable a lien to attach. The decision appears unduly technical. Title to the property, although lodging temporarily in the administrator en route, either had vested or ultimately would vest in the client. The method of asserting the lien may be questioned. Instead of enjoining the sale, perhaps the attorney should have brought a bill in equity to impress a lien on the cattle and had them sold to satisfy his claim.[89] Nonetheless, the rule that an attorney may impress a charging lien for services rendered in probate matters has been recognized by the Supreme Court of Florida. In *In re Warner's Estate*[90] the probate court was allowed to establish an equitable lien on a legatee's share in an estate for the amount of the services rendered by the attorney. The lien was enforced by directing the executors to withhold the amount of the fees from the legacy payable to the client. The client was a non-resident and his share of the estate was about to be transferred to an out-of-state bank.

The *Warner* case was later followed in *In re Barker's Estate*,[91] which also allowed the probate court to impress a lien for legal fees upon a client's share of an estate. In this case there was a contract that the attorneys would receive a certain percentage of the legatee's share in

86. 109 So.2d 763, 764 (Fla. 1959).
87. 44 So.2d 679 (Fla. 1950).
88. 26 Fla. 476, 7 So. 870 (1890).
89. See *infra* notes 90 & 91; Note, 4 U. FLA. L. REV. 58, at 64-65 (1951).
90. 160 Fla. 460, 35 So.2d 296 (1948). See 1 U. FLA. L. REV. 445 (1948).
91. 75 So.2d 303 (Fla. 1954). Scott v. Kirtley, *supra* note 80, authorized a lien for the attorney who secured for his client a child's portion of an estate.

return for their services. Thus, the case is in accord with the precedent which predicates the lien on a contract. However, the client disputed the attorneys' position concerning the contract, and the dissent[92] would have denied the lien on the basis that the County Judge's Court should have such jurisdiction only if there is no dispute as to the contract itself, its validity, or its terms providing for the attorney to be paid from the proceeds of the recovery.

Nichols v. Kroelinger,[93] also involving a decedent's estate, presents interesting questions of proper remedy, waiver, laches and statute of limitations. In this case the attorney had secured a judgment for his client which included attorney's fees. This judgment lay dormant for a total of eighteen years which was five years after the death of the client. At that time, since the estate had never been administered, the attorney attempted to have an administrator appointed to collect his fees. The court stated that any relief which the attorney may have had against his deceased client's estate was barred by the three year statute of limitations.[94] Accordingly, he could not have an administrator appointed against the consent of the client's widow. The court indicated, however, that the attorney might still proceed against the judgment to satisfy his charging lien. In this manner, the court apparently sanctioned survival of the remedy, assuming that the judgment was still enforceable,[95] after the statute of limitations had run on a claim for personal liability against the client. It is to be noted, however, that the court also spoke about the necessity for diligence, indicating that in some cases the lien, otherwise applicable, may be lost by waiver or laches.

2. BROKER–VENDOR–PURCHASER

Broker contracts are contracts for personal services and are generally regarded as fully remedial at law.[96] However, a few unusual cases have arisen in Florida, wherein brokers have sought to impose an equitable lien on property whose sale they negotiated. From the scant authority available, it appears that the broker will be successful in impressing such a lien only if he can qualify as a third person entitled to a vendor's lien.[97]

In *Moss v. Sperry*,[98] the broker alleged that the property was sold through his efforts, and, that by agreement with the vendor, the broker

92. *Id.* at 304.

93. 46 So.2d 722 (Fla. 1950).

94. FLA. STAT. § 734.29(1) (1963), barring claims after three years from the death of a person whose estate has not been administered.

95. FLA. STAT. § 55.081 (1965), provides a twenty-year statute of limitations on judgment liens.

96. Boyd v. Hunter, 104 Fla. 561, 140 So. 666 (1932); Levitt v. Axelson, 102 Fla. 233, 135 So. 553 (1931); King v. Wells, 100 Fla. 588, 130 So. 38 (1930).

97. See *infra* text following note 105 & 108.

98. 140 Fla. 301, 191 So. 531 (1939).

was to receive his commission from the proceeds of sale. It was further alleged that the vendor and purchaser were fraudulently conspiring to avoid his commission, and, that since the vendor was a non-resident, the broker could not obtain personal service in order to obtain a judgment at law against him. In addition, the land was now subject to an enforceable executory contract to convey, so that the vendor, although still holding legal title, had no beneficial interest subject to attachment. The vendor likewise had no title to other property within the jurisdiction subject to attachment. Hence, the broker's legal remedy was inadequate.

Nonetheless the Supreme Court of Florida found no basis for the imposition of a vendor's lien or an equitable lien as distinct from a vendor's lien, but reversed the trial court's dismissal on the basis that the broker was entitled to pursue the remedy of equitable attachment.[99] The court noted that the vendor would be entitled to no lien under the circumstances, and, therefore, found no basis for according a lien to the broker. Under the usual brokerage arrangement, the purchaser is entitled to pay all the purchase price to the vendor without regard to whether the vendor pays the broker. The broker's contract is with the vendor and is one for money only. After the sale, title vests in the vendee and the broker is not entitled to a lien. However, if the purchaser is obligated by agreement with the vendor to pay the broker's commission, then the broker is entitled to a lien of the vendor to the extent of the commission owing.[100]

The broker was unable to resort to a remedy of garnishment because that remedy applied only to debts actually due, and in *Moss* the debt to the broker was to become due only if the sale was actually consummated. The court then noted that the remedy of attachment was broader, but doubted whether it would lie where the obligation was contingent, as in the case under discussion. Noting that allegations of fraud warranted equitable jurisdiction, the court concluded that equitable attachment would lie to compel the payment of the broker's commission if the sale was consummated and the proceeds realized. The attachment would be dissolved when the debt was paid or when it became clear that the sale would not be consummated.[101]

Nicol v. Bressler,[102] involved facts similar to the *Moss* case except that title had already been transferred to the purchaser. The broker alleged that the property had been sold through his efforts, and that the vendor and vendee had fraudulently conspired to cheat him out of his commission. His claim for lien was denied. Justice Barns, speaking for

99. *Ibid.*

100. See also Winston v. Ahlman, *infra* note 105.

101. Moss v. Sperry, *supra* note 98, at 540. See also 3 FLA. JUR. *Attachment & Garnishment* § 10 (1955), for a discussion of equitable attachment.

102. 159 Fla. 668, 32 So.2d 457 (1948).

the majority of the supreme court, held: "If the transaction between the buyer and seller had been completed with the broker looking on he could not have prevented it and his claim would have been the same as it is now . . . a claim for compensation against the party with whom he contracted—to-wit: the vending owner."[103] Justice Adams, dissenting, felt that the remedy at law was neither clear nor adequate, found no previous case exactly like this one, and apparently thought an equitable lien should lie. He noted: "Petitioner performed his duty; the purchaser became a party to the fraud, received the property and gained that which rightfully belonged to the petitioner."[104]

Since it did not appear that the plaintiff-broker alleged the defendant's insolvency, or other circumstances suggesting the inability of obtaining or collecting a money judgment against either the vendee or the vendor, the inadequacy of the legal remedy was not apparent. Thus, denial of an equitable lien would appear proper.

The most recent case dealing with this problem, *Winston v. Ahlman*,[105] allowed the broker to enforce a vendor's lien and is consistent with the theory of the cases previously discussed. The court there held that when part of the consideration for the purchase price of the property "is the assumption and payment by the purchaser of an indebtedness owing by the vendor to a third party, the latter may enforce a vendor's lien for the amount of the claim."[106] The true vendor's lien is raised on behalf of the vendor as security for payment of the purchase price when no security is expressly retained.[107] When part of the purchase price is the assumption of an obligation of the vendor, as, for example, the payment of a broker's commission, the vendor's obligee (in this case, the broker) is entitled to enforce a vendor's lien to the extent of the obligation. The position of the third party or broker is similar to that of a subrogee of the vendor's lien.[108]

3. IMPROVER–OWNER

Frequently improvers of real estate who would be entitled to a mechanics' or other statutory lien do not obtain such a lien because of failure to comply with statutory requirements. The circumstances under which such persons may be able to obtain an equitable lien is the subject matter of this section. For convenience, the cases are discussed under two

103. *Id.* at 669, 32 So.2d, at 457.
104. *Id.* at 669-670, 32 So.2d, at 458.
105. 131 So.2d 487 (Fla. 2d Dist. 1961).
106. *Id.* at 488.
107. See Boyer & Evans, *The Vendor's Lien*, 20 U. MIAMI L. REV. 767 (1966).
108. *Id.* at 773. The true vendor's lien is held not assignable. Therefore, it is probably more correct to refer to the third party, in this case the broker, as acquiring a vendor's lien rather than saying he is subrogated to a vendor's lien. As to subrogation, see *supra* note 12 and accompanying text.

categories: (1) those where the claimant failed to comply with the Mechanics' Lien Law; and (2) those where the claimant failed to satisfy the requirements of another statutory lien.

a. Failure to Comply with the Mechanics' Lien Law

The period of time covered by the cases under review, starting in 1893, witnessed many changes in the statutory law providing for mechanics' liens. No attempt is herein made to delineate the history of the Florida Mechanics' Lien Law,[108a] nor to set forth the requirements under such law at any particular time. The cases reviewed will merely indicate, as far as possible, why the particular claimant did not obtain a mechanic's lien at the time, and will reflect whether or not he was successful in obtaining an equitable lien. Although comparisons with the statutory requirements, then and now, will frequently be made, the purpose is not to explain the intricacies of the Mechanics' Lien Law. Instead, the purpose of this section is to attempt to find under what circumstances a claimant failing to qualify for a lien under the statute may be entitled to an equitable lien.

The first case to be considered, *Lockett v. Robinson*,[109] decided by the supreme court in 1893, involved the claim of a supplier of materials who apparently had contracted directly with the owner. The owner of the property, in financial difficulty, was forced to make an assignment for the benefit of creditors. Three days after the assigment, but within the time allowed under the statute, the plaintiff filed a notice of intention to claim a lien.[110] Upon suit by the assignee for creditors to enjoin the claimant from enforcing his lien on the land, a consent decree was entered wherein the property was to be sold and the proceeds deposited in a bank until the plaintiff's lien rights were adjudicated. The plaintiff then sought to impress an equitable lien on the proceeds of sale, and the supreme court reversed the trial court's dismissal and upheld the plaintiff's claim. The court held that the plaintiff could have a lien on the funds because the remedy afforded by the Mechanics' Lien Law

108a. FLA. STAT. ch. 84 (1965).

109. 31 Fla. 134, 12 So. 649 (1893).

110. It is not clear whether he filed a notice of intention to claim a lien or simply a claim of lien. Fla. Laws 1868, ch. 1632, as amended by Fla. Laws 1877, ch. 3042, had requirements for non-privity lienors to file a notice of intention to claim a lien and also requirements for filing a claim of lien. If the claimant did contract directly with the owner, as he alleged, it is likely that it was the claim of lien that he filed. Under the so-called UNIFORM MECHANICS' LIEN LAW, in Florida from 1935 to 1963, lienors in privity were not even required to file a claim of lien. Hendry Lumber Co. v. Bryant, 138 Fla. 485, 189 So. 710 (1939). The notice to owner requirements of the present act are found in FLA. STAT. § 84.061(2) (1965), and discussed in 2 BOYER at § 33.09 (1966), wherein a comparison is also made with the provisions of the act in effect prior to 1963. The claim of lien requirements under the present act are found in FLA. STAT. § 84.081 (1965), and discussed in 2 BOYER, at § 33.14, where a comparison is also made with the provisions in effect under the so-called Uniform Act.

could not furnish relief under the peculiar circumstances of the case.[111] It was also held that since the notice of lien was timely filed, the lien was effective against the assignee, although he had no notice of the plaintiff's rights until after delivery of the assignment. The decision was certainly just. When the parties agree to substituted security, they ought to be bound by the agreement. Further, an assignee normally gets no greater rights than his assignor, and even a purchaser without notice within the period of grace for filing liens takes subject to liens under the mechanics' lien provisions.[112] It should also be noted that current statutes have provisions for substituted security.[113]

In *Palmer v. Edwards*, [114] the plaintiff contracted to build a building for Edwards. Edwards had represented that a certain corporation owned the property, but this was not true as Edwards and his wife were the owners. The plaintiff completed construction in February and received payments until May when there was a balance of twenty-four hundred dollars owing. In November, Edwards sold the property to Stoll. Upon learning of the sale to Stoll, the plaintiff instituted an action for a declaratory decree, and, alleging insolvency of the Edwards, sought whatever equitable relief the court would give. The supreme court concluded, in a four to three decision, that the prayer for a declaratory judgment was superfluous, but held that although the plaintiff could have proceeded under the Mechanics' Lien Law, he was not limited to that procedure in this case. Accordingly the plaintiff was held entitled to an equitable lien under the doctrine announced in *Jones v. Carpenter*.[115] The lien was impressed on the fund owing by purchaser Stoll to the Edwards. The court concluded by stating, "One should not be barred from pressing a just claim if the law provides any means for him to do so."[116]

Several factors in the *Edwards* case are worth noting. The plaintiff had not filed a claim of lien, but this was unnecessary under the law then in effect as to lienors under a direct contract with the owner.[117] Suit was brought within a year after completion of the work, and thus was within the time limit allowed for lienors in privity to enforce their liens.[118] However, under the law then in effect, lienors in privity who did not file

111. Lockett v. Robinson, *supra* note 109. The case pointed out that at the time proceeds from the sale of land were not reachable directly by process except in equity.

112. See generally 2 BOYER, at § 33.17(2), where it is pointed out that the likelihood of unsuspected liens valid against a purchaser is lessened under the 1963 act.

113. FLA. STAT. § 84.241 (1965).

114. 51 So.2d 495 (Fla. 1951).

115. 90 Fla. 407, 106 So. 127 (1925).

116. Palmer v. Edwards, 51 So.2d 495, 497 (Fla. 1951).

117. FLA. STAT. § 84.14 (1961), repealed; Hendry Lumber Co. v. Bryant, 138 Fla. 485, 189 So. 710 (1939); Broderick v. Overhead Door Co., 117 So.2d 240 (Fla. 2d Dist. 1959). Under the present statute, every lienor is obligated to record a claim of lien in order to perfect a lien. FLA. STAT. § 84.081 (1965).

118. Hendry Lumber Co. v. Bryant, *supra* note 117; see FLA. STAT. § 84.21 (1961), repealed, as to the one-year statute of limitations on enforcement.

a claim of lien within the grace period after completion of the work were susceptible of losing their lien, if the property were sold to a bona fide purchaser for value without notice.[119] The sale to Stoll was within the year, but beyond the grace period for filing claims;[120] however, the case does not specify whether or not Stoll was a bona fide purchaser. Further, the lien imposed was not a mechanics' lien on the property, but an equitable lien on the proceeds owing from the sale. In short, it appears that the plaintiff made no effort whatsoever to impress a mechanics' lien on the land itself. Instead, he relied, at first, upon his contract rights for payment, and then, after sale, sought and obtained an equitable lien against the proceeds owing the vendor.

Under the facts, no one seemed to be prejudiced by the imposition of the lien, and no valid reason appeared for not imposing it. The purchaser, Stoll, paid no more for the land than he agreed to pay and he got the property unencumbered by a mechanics' lien. Other creditors of Edwards were not shown to be prejudiced by plaintiff's preferential claim on the sales proceeds, since he could have acquired such preference by impressing a lien against the land, and the time for impressing such a lien as against Edwards had not yet run. The plaintiff, since he had not proceeded under the Mechanics' Lien Law and then neglected to carry through, could not be held to be estopped on any theory of election of remedies or equitable estoppel by virtue of inducing others to rely on the position he had taken.

Lewinson v. Shaw,[121] illustrates the significance of the adequacy of the legal remedy. After construction of an apartment building, the owners and builder entered into an agreement whereby the builder would be paid from the proceeds of a mortgage which the owners were going to place on the property, if the builder would not file a mechanics' lien. Relying on this agreement, the builder refrained from filing a lien and then assigned the owners' note to the plaintiff. The defendant-owners did place a mortgage on the property, but refused to pay the indebtedness by then acquired by the plaintiff. In a suit to establish an equitable lien, the lower court dismissed the complaint without leave to amend. The supreme court, in upholding the dismissal, stated that the dismissal should have been with leave to amend the complaint. The court held that the complaint in the instant case lacked an essential element which was present in both *Jones* and *Palmer*, namely insolvency of the defendant.

In *Lewinson* the court predicated its decision on the failure of the plaintiff to allege the insolvency of the defendants. The court did not

119. Nathman v. Chrycy, 107 So.2d 782 (Fla. 3d Dist. 1959). The grace period for filing the claim was three months after the final performance of the labor or services or the final furnishing of materials.

120. As the text indicates, plaintiff had completed construction in February, and Edwards sold the property to Stoll in November of the same year.

121. 56 So.2d 449 (Fla. 1952).

appear to place any significance on the possibility or probability of the plaintiff (or his predecessor) having waived the right to a mechanics' lien by taking a note and thus electing not to proceed under the lien statute. As a practical matter, the conduct of the lien claimants in *Lewinson* and *Palmer* do not seem materially different in respect to their failure to attempt to enforce a statutory mechanics' lien. In neither case did the plaintiff make any effort to perfect a lien under the statute. Hence, it appears that failure of the claimant to proceed under the statute, or to make any effort at all to perfect a lien thereunder, does not, by itself, preclude him from establishing an equitable lien. Other circumstances may nonetheless warrant such a lien, *i.e.*, the inadequacy of the legal remedy. In the *Lewinson* case, if the owners were not insolvent, there would appear to have been no reason why the still available legal remedy of suit on the note, judgment and execution against property still owned by the defendants (the apartment building subject to the mortgage and presumably the proceeds of the mortgage), was not a complete and adequate legal remedy.

Inadequacy of the legal remedy because of contractual incapacity was the basis for the imposition of an equitable lien in *Ross v. Gerung*,[122] wherein church officials had entered into a contract for certain improvements to the church property. After completion of the improvements and failure of the church to pay, the plaintiff successfully sought an equitable lien upon the property of the unincorporated association. The supreme court held that since an unincorporated association could not be held liable for its contracts at law,[123] the remedy of a mechanic's lien, which is predicated on a contract for the improvement of real estate,[124] was not available to the plaintiff in the absence of a contract binding on the association.[125] Therefore there was no adequate remedy available to the plaintiff, and the property of the association could be subjected to an equitable lien, where there was no personal judgment sought against the association.[126]

In contrast to the previous cases are those where claimants have been denied an equitable lien because of their failure to pursue successfully the remedy provided by the Mechanics' Lien Law. In *Kimbrell v. Fink*,[127] two years after filing a claim of lien, the plaintiff sought an equitable lien.

122. 69 So.2d 650 (Fla. 1954).

123. See Henry Pilcher's Sons, Inc. v. Martin, 102 Fla. 672, 136 So. 386 (1931), which was cited by the supreme court.

124. This is true under both the present act and its immediate predecessor. See 2 BOYER, at § 33.04(1) (1966).

125. *Cf.*, however, arising under an even earlier act, Chapman v. Stephens Protestant Episcopal Church, 105 Fla. 683, 136 So. 238 (1931), *motion granted* 105 Fla. 683, 138 So. 630 (1932), *rehearing granted* 105 Fla. 683, 139 So. 188 (1932), *modified on other grounds*, 105 Fla. 683, 145 So. 757 (1933).

126. Ross v. Gerung, *supra* note 122.

127. 78 So.2d 96 (Fla. 1955).

Of course, at this time he had lost his right to foreclose the statutory lien.[128] As an additional basis for the intervention of equity the plaintiff alleged misrepresentations as to the ownership of the property at the time the contract was entered into, and acquiescence by the owner in the completion of the improvements. The supreme court held that the claimant was not entitled to an equitable lien. When the law creates both a *right* and a *remedy*, any limitations on the remedy are treated as limitations on the right.[129] Thus, since the plaintiff had lost his remedy by a built-in statute of limitations, he also lost the right to his lien. The court also found that the claimant had suffered no injury as a result of the misrepresentations about the ownership of the property, and that the claimant had had a right to a mechanic's lien which he lost through his own inaction by not foreclosing the lien in time.[130]

In the *Kimbrell* case the claimant had undertaken to comply with the Mechanics' Lien Law, and his own neglect and lack of diligence resulted in the loss of his statutory lien. In the other cases so far considered where an equitable lien was impressed, the claimant made no attempt to comply with the provisions of the statutory lien, and secondly, and perhaps more important, he sought the remedy of an equitable lien at a time when relief under the statute would have been available had he sought relief thereunder.

Quite similar to the *Kimbrell* case is *Blanton v. Young*.[131] This case also held that a contractor who had timely filed his claim of lien, but failed to institute foreclosure proceedings within the one-year period, was not entitled to an equitable lien. Thus, it appears fairly well established that, in the absence of misrepresentation or other wrongdoing on behalf of the owner inducing inaction, the claimant is not entitled to an equitable lien when he fails to foreclose a mechanics' lien within the period allowed.[132]

In *O. H. Thomason Builders' Supplies, Inc. v. Goodwin*,[133] the plaintiff-materialman failed to file a notice of lien within the prescribed time, but alleged institution of foreclosure proceedings within twelve months from the time he filed such notice.[134] The relief sought was either

128. FLA. STAT. § 84.21 (1961), repealed. The one year period of limitations is the same under the present act. FLA. STAT. § 84.221(1) (1965).

129. Kimbrell v. Fink, *supra* note 127.

130. The owner could or would have been liable for the imposition of a lien on his property on the basis that he contracted for the improvements by an agent, his son-in-law, or that he was estopped by his conduct to deny that the son-in-law was his agent.

131. 80 So.2d 351 (Fla. 1955).

132. *Accord*, Rood Co. v. Luber, 91 So.2d 629 (Fla. 1956); Wood v. Wilson, 84 So.2d 32 (Fla. 1956).

133. 152 So.2d 797 (Fla. 1st Dist. 1963).

134. The case uses the phrase notice of lien twice but it is not clear just what is meant by this phrase. Under the lien law then in effect, lienors in privity (apparently applicable to the plaintiff) were entitled to file a claim of lien but did not have to do so if foreclosure

a mechanic's or equitable lien on the improved property. The First District Court of Appeal, apparently agreeing with the trial court, that the plaintiff failed to comply with the requirements for a mechanic's lien,[135] held that the plaintiff failed to allege and state any grounds entitling him to an equitable lien. The court did agree, however:

> There is no question, then, of the right of a person furnishing services or materials in the improvement of realty to seek an equitable lien thereon as security for the debt, even though he may not have complied with the requirements under the mechanic's lien laws of this state. To establish such equitable lien, however, he must allege and prove his entitlement to this lien within certain principles recognized by the courts.[136]

It was then noted that equitable liens may arise from two sources, either: (1) a written contract showing an intention to charge some particular property with a debt or obligation; or (2) declaration by a court out of general considerations of right and justice.[137] Since there was no allegation of a written contract showing an intent to impose a lien, the circumstances were reviewed to see if a lien should have been declared out of general equitable considerations. It was concluded that such a lien should not be declared for a number of reasons. For one thing, an equitable lien is generally not raised against a bona fide purchaser without notice, and the complaint did not negative the possibility of such purchaser. Other deficiencies were also revealed. There were no allegations that one of the defendants was an owner of any of the lots at the time he made an agreement to purchase the materials, or even that he had ever been an owner. Nor were there allegations that any of the defendants were guilty of any wrongdoings or misrepresentations on which the plaintiff relied to his disadvantage.

Although it is often stated that an equitable lien may be established where there is a written contract which shows an intention to charge some particular property with an obligation,[138] few, if any, of the cases

proceedings were instituted within one year after completion of services or supplying of materials. Non-privity lienors were authorized to file a notice of intention to claim a lien, often called a cautionary notice under the former statute, but there would be no reason for lienors in privity to file such a notice. See *supra* note 110 and text following note 116. Also under the statute then in effect, it was necessary on foreclosing a lien to file a notice of lis pendens. Trushin v. Brown, 132 So.2d 357 (Fla. 3d Dist. 1961); Stern v. Perma-stress, Inc., 134 So.2d 509 (Fla. 1st Dist. 1961). See also Phelps v. T. O. Mahaffey, Inc., *infra* note 144. Probably what is meant by the statement is that the claimant did not file a claim of lien, and on attempting to foreclose a lien, he failed to file a notice of lis pendens within the year's time.

135. The trial court held that plaintiff's notice of lien did not meet the requirements of the law, and that the foreclosure notice was not filed within the time allowed by law.

136. 152 So.2d 797, 799 (Fla. 1st Dist. 1963).

137. *Id.* at 800. See also *supra* text accompanying note 19; *infra* text following note 159. These bases of an equitable lien are frequently recited in the cases.

138. 1 JONES, LIENS § 27 (3d ed. 1914); see dicta in Jones v. Carpenter, 90 Fla. 407, 106 So. 127 (1925); O. H. Thomason Builders' Supplies, Inc., *supra* note 133.

herein considered imposed a lien on that basis. Thus, in *Tucker v. Prevatt Builders, Inc.*,[139] there was a written contract for improvements, performance by the plaintiff, insolvency of the owner, an assignment for creditors, a claim of lien by the plaintiff, and transferees with notice of the plaintiff's claim. It should be noted that the builder-claimant *orally* insisted upon a claim of lien when the owner was having his difficulties. Hence the probable basis of the lien was a general consideration of right and justice. In any event, an equitable lien was allowed although the court did not say expressly why a mechanics' lien could not be obtained. Probably the claimant did not record a claim of lien or make any overt effort to comply with the statute.

A case often cited as a classic example for the possible imposition of an equitable lien is *Green v. Putnam*.[140] In this case the plaintiff and defendant orally agreed for the joint development of certain property with a sharing of the profits derived from its contemplated sale. The parties also agreed that there would be a written partnership agreement, and work was commenced with the plaintiff supervising the construction. Later, the plaintiff refused to proceed until the partnership agreement was executed. On the defendant's refusal, the plaintiff filed a notice of lien. The Florida Supreme Court held that assuming, but not deciding, that there was no valid mechanic's lien established,[141] the facts of this case "may well be a classic example where equity may intervene to impress a lien to prevent inequity or unjust enrichment of one party as against another."[142]

In the case of *Armstrong v. Blackadar*,[143] the plaintiff had contracted with the owner's son to make certain repairs to a dwelling damaged by fire. The plaintiff was under the impression that the son was the owner, but the owner, who spoke little English, saw the plaintiff make the repairs and even remarked on what a good job the plaintiff was doing. Unknown to the plaintiff, there was an unrecorded contract for sale between the owner and the defendants. Two weeks after completion of the work, the purchasers moved onto the premises. The plaintiff immediately

139. 116 So.2d 437 (Fla. 1st Dist. 1959).

140. 93 So.2d 378 (Fla. 1957).

141. The trial court had held that there was a profit-sharing joint enterprise and such relationship is inconsistent with the existence of a mechanic's lien. Accordingly, it dismissed the complaint. The trial court had found that the defendant was in exclusive management and control and that there was no provision for sharing losses. The supreme court held that the chancellor was in error on his concept of a joint venture, and that mutual control and an intention to share losses are essential characteristics of a joint venture. Accordingly, the decision was reversed.

142. 93 So.2d, at 380. It is to be noted that the case does not hold that an equitable lien is in fact to be impressed in the instant case. It simply says that if a mechanic's lien cannot be imposed, perhaps an equitable lien may be. There was no showing or allegation of insolvency on the part of the defendant, fraud or other unconscionable conduct, or circumstances suggesting that a judgment and execution would prove to be an inadequate remedy.

143. 118 So.2d 854 (Fla. 2d Dist. 1960).

filed his notice of lien and had it served upon the defendant-purchasers. The Second District Court of Appeal held that the son was the father's agent, and thus a mechanics' lien would lie. However, it also held that, assuming that the plaintiff had no right to a mechanic's lien, he would be clearly entitled to an equitable lien. The basis for this assertion was that both the owner and the purchasers knew that the fire damage had to be repaired and that the owner was obligated by contract to repair those damages. The purchasers even saw the plaintiff make the improvements. Since the owner was obligated by contract to make the repairs, the purchasers had no cause to complain about the imposition of an equitable lien on the property now in their possession. Apparently the only *basis* for the imposition of an equitable lien was that the defendant-purchasers should be estopped from defending against a lien because they knew of and did not object to the improvements being made. This appears to be an extension, perhaps an unwarranted one, of the Florida decisions delineating the grounds for the imposition of an equitable lien when a statutory lien is also available. There was no allegation mentioned as to insolvency of the owner or any other reason for rendering inadequate the remedy at law. Of course, the statement as to an equitable lien may be regarded as dictum since the court did say that a mechanic's lien would lie. If the plaintiff had proceeded timely under the Mechanics' Lien Law, and that remedy were not barred, there would seem to be no need for resorting to an equitable lien.

In *Phelps v. T. O. Mahaffey, Inc.*,[144] the plaintiff was contacted by Mahaffey who introduced him to a Mr. Ruke and explained that they were desirous of paving certain property. Mahaffey told the plaintiff and Ruke to talk it over, and that whatever settlement they reached was up to them. Ruke and the plaintiff came to an agreement and the plaintiff commenced work. During the progress of the work, the plaintiff became concerned about who was to pay for the work. He was told by Mahaffey that if he had been told to go ahead, then he, Mahaffey, would stand behind Ruke and would take care of everything. Upon partial completion of the work, a bill was submitted to Mahaffey who stated that he would pay only one-sixth of the bill. Ruke refused to pay any part of it. Mahaffey submitted one-half the amount on condition that he be paid back when Ruke paid the bill. It was admitted by the plaintiff that Ruke never told him that he would pay for the improvements. Upon completion of the work, the plaintiff filed his claim of lien and within a year sought to foreclose upon it. Ruke and Mahaffey were joined as party-defendants. The facts revealed that Ruke was expected to lease the property from Mahaffey and was not an owner of the premises. However, a lease never materialized between Ruke and Mahaffey, and Ruke vacated the premises. Mahaffey answered the complaint by alleging that there was no privity between

144. 156 So.2d 900 (Fla. 2d Dist. 1963).

the plaintiff and himself, and therefore that his property could not be subjected to a mechanics' lien. Also, Mahaffey alleged that the plaintiff failed to file his notice of pendency of lien within the one-year period as required by statute.[145]

The lower court's decree in favor of the defendants was reversed on appeal. The appellate court held that the plaintiff was barred from establishing a mechanics' lien against the property, and dismissed the complaint entirely as against Ruke because he had no interest in the property.[146] However, the court held, after reviewing Florida cases on this point, that the plaintiff was entitled to an equitable lien. The court found that since there was no privity of contract between the plaintiff and the owner, the plaintiff *never had* the right to a mechanics' lien.[147] This coupled with the fact that Mahaffey's actions of failing to advise Mr. Phelps of the ownership of the property and of Ruke's interest—or lack of interest—misled Mr. Phelps, who "innocently and in good faith improved . . . property, enhancing its value and making it suitable for the contemplated use."[148] This was held to establish a prima facie case for the equitable lien.

To be considered in support of the decision is the misrepresentation or misleading of the plaintiff as to the state of title, and his promise to pay for the work coupled with reliance thereon to the plaintiff's disadvantage. Further, there was no adequate legal remedy, if indeed any remedy at all. In addition to the fact that there was no available remedy of mechanic's lien, there was not even a remedy on the contract, since the owner of the land did not contract for its improvement. It is possible that there could be an action for fraud or deceit, but under the circumstances, the imposition of a equitable lien seems most desirable.

Without attempting to state or summarize all of the law relating to equitable liens arising out of the improvement of real estate, a few observations may be made. First, if no remedy is available under the Mechanics' Lien Law, then, of course, that law can have no bearing on the imposition of such a lien, and such lien may be asserted if circumstances otherwise warrant.[149] Second, if the lienor does have a remedy under the Mechanics'

145. FLA. STAT. § 84.21 (1961), repealed. See *supra* note 134. The 1963 Act, FLA. STAT. § 84.221 (1963), no longer requires the filing of a notice of pendency in an action to foreclose a mechanic's lien, but rather, only the action to enforce must be "commenced" within one year from the filing of the claim of lien.

146. Hence he had nothing which he could subject to the imposition of a lien.

147. Mahaffey and his corporation were treated as one and the same. Since neither one made the contract for improving the realty, a mechanic's lien could not be imposed on the owner's land since a mechanic's lien is based on a contract for the improvement of realty.

148. *Supra* note 144, at 904. See also Gottesman v. Owen, 172 So.2d 257 (Fla. 3d Dist. 1965), wherein an equitable lien was allowed on the basis that the improver did not have knowledge of the true state of the title.

149. Ross v. Gerung, *supra* note 122.

Lien Law, he is not necessarily barred from obtaining an equitable lien.[150] However, none of the cases imposed an equitable lien on an innocent property owner who was not charged with notice of the possible claim. Also, the Mechanics' Lien Law is designed to protect land owners as well as lien claimants. Thus, it appears that an improving owner is not subject to the imposition of an equitable lien if the owner complies with the Lien Law in all respects, pays the contract price in accordance with that law, and does not commit fraud, misrepresentation or other inequitable conduct. Third, if the lienor makes no attempt to comply with the Lien Law, if the suit is brought within a period of time permitted by the act, and if the contracting owner has not paid,[151] then the claimant may be entitled to an equitable lien.[152] The claimant's position is stronger if the owner is insolvent,[153] or if there were fraud, misrepresentation or mistake as to the status of title,[154] but it does not appear that such circumstances are necessary in all cases.[155] Fourth, if the claimant once proceeds under the Lien Law and then loses his remedy by noncompliance with further provisions of the act, as, for example, by delaying enforcement beyond the statutory period, then the claimant is not entitled to an equitable lien.[156] Under these circumstances, the claimant had an adequate remedy at law and it was his own lack of diligence that prevented the enforcement of his lien.

b. Failure to Comply with other Statutory Lien Provisions

In *Dewing v. Davis*,[157] purchasers under an executory sales contract were allowed to possess a citrus grove pending completion of the transaction. The contract for sale was never consummated, and the plaintiff, who was hired by the purchasers to manage the grove, was not paid for his services. The defendant-owner denied liability, but an equitable lien was imposed on the land for the value of the plaintiff's services. The Second District Court of Appeals, affirming the decision of the lower court, stated:

> One who has performed services or furnished materials in improving real property is not limited remedially by the Mechanics' Lien Law . . . but may instead establish an equitable

150. O. H. Thomason Builders' Supplies, Inc. v. Goodwin, *supra* note 136 (dicta); cases cited *infra* note 152.

151. The owner had not paid in the cases cited *infra* note 152. A purchaser charged with notice of the improvement and possible lien is entitled to no superior equity. Tucker v. Prevatt Builders, Inc., *supra* note 139; Armstrong v. Blackadar, *supra* note 143. If the owner has made improper payments under the provisions of the lien law, it may be that his position would be the same as if he had not paid so far as equitable liens are concerned.

152. Palmer v. Edwards, *supra* note 114; Lewinson v. Shaw, *supra* note 121.

153. *Ibid.*

154. Phelps v. T. O. Mahaffey, Inc., *supra* note 144.

155. Armstrong v. Blackadar, *supra* note 143.

156. Kimbrell v. Fink, *supra* note 127; Blanton v. Young, *supra* note 131.

157. 117 So.2d 747 (Fla. 2d Dist. 1960).

> lien on the property. . . . The principle thus enunciated relating to the Mechanics' Lien Law logically may apply as well to section 85.04, Florida Statutes . . . so that persons who perform farm or grove labor are not restricted to the statutory lien remedy provided by the section, but may under proper circumstances proceed to establish an equitable lien.[158]

The lien was established "under a general consideration of right and justice."[159] Considerations influencing the decision were that the vendor had placed the vendee in possession; the vendor knew of the plaintiff's duties, and that the vendor had reaped the benefit of the plaintiff's services by receiving the escrowed proceeds from the sale of fruit.[160] The court concluded that since there were grounds for an equitable lien it was unnecessary to consider the plaintiff's right to a statutory lien under section 85.04 of the Florida Statutes.

In contrast to *Dewing v. Davis*, the companion case of *Dewing v. Nelson & Co.*,[161] held that a supplier of fertilizer could not establish an equitable lien for the value of fertilizer sold to the purchaser in possession of the grove. In that case the seller made no attempt to satisfy the requirements of a crop lien,[162] but instead sought a lien against the realty itself. The court pointed out that, unlike farm labor, fertilizer is not a product recognized by a protective statute affording a lien against the land. Thus, had the sale been made directly to the owner, the seller would not have been entitled to a lien, and accordingly, he was not entitled to a lien in the instant case.

In a case somewhat similar to the facts in *Nelson*, the Florida Supreme Court did allow an equitable lien on the owner's property for supplies furnished in *Industrial Supply Corp. v. Lee*.[163] The case cited *Jones v. Carpenter*,[164] and the analogy was valid. In *Jones* the landowner improved his homestead with stolen funds, whereas in *Industrial Supply* the purchaser of materials was guilty of fraud. The contracting party had control and supervision over considerable realty which he improved. However, he conveyed the legal titles in trust for the benefit of his children and certain corporations over which he had control. Thus, the seller of the articles was unaware of the true status of title, and the purchaser was insolvent at the time of suit. The court analogized the remedy to that of a constructive trust,[165] and imposed an equitable lien

158. *Id.* at 750.

159. *Id.* at 751. See *supra* text accompanying note 19.

160. The proceeds from the sale of fruit were placed in escrow pending the completion of the sale. When the sale did not materialize, the vendor obtained the proceeds which otherwise would have been credited to the vendee.

161. 117 So.2d 744 (Fla. 2d Dist. 1960).

162. See, *i.e.*, FLA. STATS. §§ 85.22, 700.01-700.03 (1965).

163. 48 So.2d 285 (Fla. 1950). See 4 U. FLA. L. REV. 267 (1951).

164. Discussed in text *supra* following note 29.

165. See *supra* text following note 5 for a comparison of the two remedies.

to prevent unjust enrichment. With the debtor insolvent, the legal remedy would obviously have been inadequate, and his family unjustly enriched, unless equity gave relief.

4. CITY–PROPERTY OWNERS

In *Town of Naples v. Naples Improvement Corp.*,[166] the municipality sought to establish an equitable lien on property belonging to the defendant-corporation. The claim of lien was predicated on the fact that the defendant's agent was president of the town council when the town agreed to grade and pave a street through property that the corporation was developing. It was alleged that not the town, but abutting owners, derived most of the benefit from the paved street.

In affirming the lower court's dismissal of the complaint, the Supreme Court noted several facts: the town had made no effort to obtain a statutory lien under charter provisions whereby abutting owners could be assessed for street improvements; the town accepted the improved street; the town had ample authority to improve the street; the town council had four other members in addition to the president, and, although the president had lived only nine days after the contract was awarded, there was no attempt by the town to disaffirm the contract. Then, referring to the *Jones* case,[167] the court pointed out that there was no written contract showing an intention to charge the property with a lien. It further found no justification for a lien under "general consideration of right and justice."[168] In support of this conclusion, the court observed: (a) the improvement was not on the defendant's property; (b) the city had authority under its charter; (c) the acceptance of the street and improvement were within the city's control and not that of the abutting property owners; and, (d) the city had in fact improved its own property.

5. CO-OBLIGORS

A co-obligor who pays more than his share of the common debt may accede to the lien of a secured creditor. Thus, in *Meckler v. Weiss*,[169] when a co-tenant paid a jointly executed mortgage note and then sold his one-half interest in the property to a third party, it was held that the paying party was entitled to an equitable lien against the original co-tenant's undivided one-half interest. The basis of the lien was subrogation —the claimant being subrogated to the rights of the mortgagee as against the defendant. The court stated "that equitable liens are based upon the doctrine of estoppel and 'arise in cases of expenditures by one joint owner

166. 147 Fla. 94, 2 So.2d 383 (1941).
167. Jones v. Carpenter, *supra* note 138.
168. See *supra* text accompanying note 19.
169. 80 So.2d 608 (Fla. 1955).

on real or other property . . . .' "[170] The extent of his lien was explained: ". . . but his right of recovery by means of subrogation is limited to contribution if between them neither had a prior duty of performance."[171]

6. HUSBAND–WIFE

In *Tivas v. Tivas*,[172] a divorced husband sought the return of funds and papers given to an attorney to effectuate a property settlement. The wife counter-claimed for an equitable lien on the funds because the husband's property was out of Florida, and she also sought security for the payment of alimony which was awarded by the court. The supreme court, noting that a decree of permanent alimony does not create a specific lien on either the husband's real estate or personalty, held that just because the husband's other property is out of the state does not constitute grounds to grant an equitable lien on the property held by the attorney. An equitable lien in favor of a divorced wife, however, may be allowed for her contribution in the improvement of the property or the construction of a house.[173]

A wife has been awarded an equitable lien on property held in the husband's name when the property was to be subjected to execution for a judgment debt arising out of the husband's negligence.[174] The lien was limited to the value of money contributed by her toward the purchase of the property, plus interest from the date of the acquisition. The result is justified since she is thereby recovering only her money plus interest; the execution creditor cannot claim any superior equity from the fact that legal title was in the husband's name since the claim was based on negligent conduct. The remedy of the wife in such a case appears to be a substitute for a resulting trust,[175] but that remedy was apparently not appropriate since the wife had only furnished some, and not all of the money. Apparently a definitely ascertained percentage of the various purchase prices could not be traced to the wife, the evidence only revealing a designated amount of money.

Property owned by husband and wife, as tenants by the entireties, cannot generally be subjected to an equitable lien when the husband alone purports to create a lien without the wife's acquiescence.[176]

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170. *Ibid.*

171. *Id.* at 609.

172. 142 Fla. 703, 196 So. 175 (1940).

173. Davis v. Davis, 98 So.2d 777 (Fla. 1957).

174. Foster v. Thornton, 131 Fla. 277, 179 So. 882 (1938).

175. For a labored discussion of resulting trusts, see the two opinions of Mitchell v. Grapes, 146 So.2d 591 (3d Dist. 1962), *quashed*, 159 So.2d 465 (Fla. 1964) (discussed in Boyer & Ross, *Survey of Real Property Law*, 18 U. MIAMI L. REV. 799, 813 (1964); Klein, *Trusts and Succession*, 20 U. MIAMI L. REV. 796 (1966)).

176. Yafanaro v. Ninos, 123 So.2d 286 (Fla. 2d Dist. 1960). See, however, FLA. STAT. § 84.121 (1965), as to mechanics' liens.

B. *Advancement of Funds*

1. JOINT PURCHASERS

The principle of *Foster v. Thornton*[177] may be applied in any situation where the purchase money is supplied by one party and title taken in the name of another. It applies to joint purchasers where the title is taken in the name of only one of the parties. Thus, in *Phelps v. Higgins*,[178] the plaintiff advanced thirty-five hundred dollars, and later contributed another six hundred dollars, toward the purchase of the property. The defendants took title in their own names and refused to convey any interest to the plaintiff. When plaintiff sought an equitable lien, the lower court transferred the cause to the law side of the court. The Second District Court of Appeal in reversing, stated:

> Although . . . the remedy which is most generally invoked by the defrauded person especially where the land against which a claim is being asserted was purchased and not merely improved, with the misappropriated funds, is by asserting a constructive trust against the property . . . other courts have held, wherever an equitable lien has been asserted against property purchased or improved with fraudulently acquired funds, that one whose money has been misappropriated may recover it back by impressing an equitable lien, to the extent of the funds wrongfully used upon land which the tortfeasor has purchased or improved therewith.[179]

Although the court mentioned only constructive trust as an alternative remedy, it would appear that the equitable lien could serve just as well as an alternative remedy to a purchase money resulting trust, the resulting trust seeming more appropriate.[180] Insofar as the gist of the remedy is prevention of unjust enrichment,[181] however, the constructive trust may be applicable in all or most cases.

2. PAYMENT OF TAX LIEN

Under appropriate circumstances, as previously indicated,[182] a person paying an obligation of another may be subrogated to the prior held lien of the creditor. This remedy was considered but held inappropriate in *National Title Co. v. Laramore*.[183] In this case the defendant purchased property at a sheriff's sale subject to a tax lien.[184] Subsequently,

177. *Supra* note 174.

178. Phelps v. Higgins, 120 So.2d 633 (Fla. 2d Dist. 1960).

179. *Id.* at 636.

180. See the citations in note 175 *supra;* 4 POWELL, REAL PROPERTY ¶ 590 (1954), and text following note 180 for a discussion.

181. See *supra* text following note 6.

182. See *supra* text following notes 11 and 169.

183. 130 Fla. 487, 178 So. 165 (1938). See generally, 1 JONES, LIENS § 73 (3d ed. 1914).

184. They had purchased the land subject both to the judgment and tax lien.

the previous owners of the property voluntarily paid the amount of the tax lien and conveyed whatever interest they might have to the plaintiff. The plaintiff then sought an equitable lien for the amount of the tax lien. The lien was denied. The plaintiff could be subrogated only to whatever rights the previous owner had. Since the previous owner was a tax debtor, not a lienor, the fact that he paid the obligation did not give him a right to a lien against the property.[185]

3. BENEFIT TO ADVANCER UNREALIZED

Money advanced for the improvement of realty in anticipation of expected benefits may be a predicate for the imposition of an equitable lien when the expected benefits fail to materialize. *LaMar v. Lechlider*,[186] previously discussed,[187] is illustrative. The lack of an adequate legal remedy (because of the insolvency of the defendants) plus their otherwise unjust enrichment, warranted the imposition of an equitable lien on homestead property, although there was an absence of flagrant fraud.

In *Johnson v. Craig*,[188] the plaintiff and the defendant (who anticipated marriage after he obtained a divorce from his absent wife) cooperated in the purchase and development of a parcel of real estate. The title to the land was taken in the defendant's name. Her contribution was money, while that of the plaintiff was labor and services of himself and friends. After seven years, with no marriage having occurred, the couple parted friendships and the plaintiff sought to establish a resulting trust for one-half the value of the realty. The Florida Supreme Court held that no resulting trust arose, but that if the plaintiff did not make a gift to the defendant, he might establish an equitable lien for the fair and reasonable value of the services contributed by himself and friends.

A purchase money resulting trust did not arise because the purchase money was not paid by the plaintiff with title taken in the defendant's name under circumstances rebutting the inference of a gift. In fact, the purchase price was paid by her, not the plaintiff. Further, in two instances of obtaining mortgage financing, the plaintiff signed that he had no interest in the property. Thus, there would be lacking the circumstances giving rise to a purchase money resulting trust. If the services rendered by himself and friends were held to be a gift, then, of course, the plaintiff would be entitled to no relief. However, if no gift was intended, he might get relief by way of an equitable lien. It is to be noted that the case did not establish an equitable lien, nor did it contain any discussion of the necessity of showing insolvency of the defendant or otherwise indicating the inadequacy of a legal remedy.

185. See *supra* text following note 11 for a brief resumé of subrogation.
186. 135 Fla. 703, 185 So. 833 (1939).
187. See text following note 49.
188. 158 Fla. 254, 28 So.2d 696 (1947).

Union Trust Co. v. Wittman[189] is another case where the contributor to the improvement of real estate failed to realize the anticipated benefit. The motivating factor was an adult, incompetent son. The parents were of old age and felt that they should secure someone to care for the son after their demise. They had a very close friend who suggested that if the plaintiff would build an addition on her house she would care for the plaintiff's son. The addition was built, but after completion the son would not move onto the premises because allegedly it was unfit for occupancy. Before his death,[190] the plaintiff father instituted a suit to impress an equitable lien on the defendant's home, alleging that the defendant refused to give any form of evidence of indebtedness or security *in rem*. On appeal, the second district reversed an order of dismissal saying that the complaint had sufficient equity to withstand a motion to dismiss. Any equitable lien that would be established would appear to be based on a "general consideration of right and justice," or the prevention of "unjust enrichment."[191]

4. ORAL PROMISE OF SECURITY

An oral promise of security may give rise to an equitable lien. The analogy or alternative is an equitable mortgage.[192] In *Hullum v. Bre-Lew Corp.*,[193] the plaintiffs, husband and wife, advanced sums to the wife's father who was constructing a motel. These monies were given for the purpose of discharging a prior incumbrance. The father orally promised the plaintiffs that they would have the same security as the prior discharged creditors. However, the father conveyed the property to a newly formed corporation of which he was the president. The corporation thereupon granted a mortgage on the property to a third person, and granted another mortgage to a corporate officer who assigned to a corporate employee.

In a suit by the plaintiffs for an equitable lien, prior in dignity to the mortgage executed to the corporate officer, the defendant-mortgagee raised the defense of the Statute of Frauds, contending that an oral security agreement is unenforceable. The Florida Supreme Court reversed a dismissal and held the Statute of Frauds not a valid defense, as the equitable lien is not an estate or an interest in the property, nor is it a possessory right. The court further stated that, "Fundamental concepts of equity

189. 145 So.2d 540 (Fla. 2d Dist. 1962).

190. After the father's death, his administrator continued the action.

191. Cases cited were: Palmer v. Edwards, *supra* note 114; Tucker v. Prevatt Builders, *supra* note 139; and Jones v. Carpenter, *supra* note 138.

192. See generally, OSBORNE, MORTGAGES, §§ 24-25 (1951). The characterization of an equitable lien as not an interest in land may be a sufficient excuse for avoiding the Statute of Frauds, but once the lien is declared the property owner may lose his land if he does not otherwise satisfy the lien. See text to note 3. Perhaps specific performance would be a more forthright explanation.

193. 93 So.2d 727 (Fla. 1957).

would require that these defendants be required to do that which in equity and good conscience they should have done voluntarily."[194]

In a case involving personalty,[195] the Florida Supreme Court indicated that a bank would be entitled to an equitable lien on the proceeds of a note collected by a debtor under the presented circumstances. The debtor, an accommodation indorser, had induced the bank to forego enforcement of the note by his promise to pay the bank out of the proceeds of another note in which he owned an equity. The debtor had collected the funds and then refused to pay the bank.

In *Folsom v. Farmer's Bank*[196] the defendant had deposited with the bank a mortgage and note of another, as security for his own indebtedness. The defendant promised to execute a note and mortgage in the bank's favor on the property subject to the collateral mortgage, if the bank would allow him to foreclose on the pledged security. The bank agreed and gave the defendant custody of the note and mortgage. The defendant foreclosed on the mortgage and purchased the property at foreclosure. However, the defendant then conveyed the property to his daughter without consideration. It was held that the bank acquired an equitable lien on the property as soon as the defendant became the owner at the sale. In essence, the basis of the lien was the oral agreement to give security which could be regarded as an equitable pledge of the property at the time. An alternative explanation might be specific performance.

C. *Defective Mortgages*

It is well settled that a defectively executed legal mortgage will be given effect as an equitable mortgage.[197] Thus, in *Boyton v. Williams*,[198] the court allowed an equitable lien, which would appear equally efficacious,[199] when the legal mortgage was insufficiently executed.

IV. Conclusion

This paper was motivated by a desire to formulate a definition, description, or concise characterization of the equitable lien. It began with a complaint that the usual explanation of the lien was so general as to be of doubtful utility. It was hoped that a more meaningful characterization could be fabricated. Now that the cases have been examined, however, that goal seems as elusive as ever. The lien is a remedial device employable in a wide variety of situations to achieve an equitable result. If the phrase "general consideration of right and justice" does not appear

194. *Id.* at 730.
195. Treadwell v. Exchange Nat'l Bank, 127 Fla. 40, 172 So. 914 (1937).
196. 102 Fla. 899, 136 So. 524 (1931).
197. Osborne, supra note 192, at § 32.
198. Boynton v. Williams, 108 Fla. 368, 146 So. 663 (1933).
199. See text paragraph following note 38.

indicative of specific inclusions and exclusions, that is precisely what is intended. The chief utility of the equitable lien lies in its broad adaptability. By explaining the lien in broad generalities, the courts prevent a restrictive interpretation and preserve the lien for unforeseen circumstances and situations. The reader may get some help from past decisions, and in this regard it is hoped that this survey will be beneficial, but he should not regard the equitable lien as a rigidly defined device, incapable of further adaptation. On the other hand, it is not a remedy universally applicable for every imagined wrong.

Although summarization is risky, a few observations may be made. The equitable lien is a creature of equity, and thus general equitable principles are applicable. The adequacy or inadequacy of the legal remedy is important. In this regard, insolvency of the defendant, or other circumstances precluding the enforcement of a judgment against him, should be considered. Neglect to pursue a legal remedy otherwise available and already undertaken may preclude the imposition of an equitable lien. Fraud, misrepresentation, deception and mistake may be significant factors. The prevention of unjust enrichment may itself give rise to the imposition of such a lien. Likewise, the equitable lien may be employed as a substitute remedy for an equitable mortgage, specific performance of an agreement to give security, a resulting or constructive trust, subrogation, or similar remedy. In short, patterns have been established, and a knowledgeable familiarity with them will aid in the resolution of future equitable lien controversies, but the malleability of the remedy should be kept in mind.