

12-1-1961

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Ralph E. Boyer

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Recommended Citation

Ralph E. Boyer, *Real Property Law*, 16 U. Miami L. Rev. 139 (1961)
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UNIVERSITY OF MIAMI LAW REVIEW

VOLUME XVI

WINTER, 1961

NUMBER 2

REAL PROPERTY LAW

RALPH E. BOYER*

PRE-VIEW

Judicial rather than legislative activity accounted for the principal developments in the real property field during the past two years.¹ Amidst the constantly flowing stream of judicial pronouncements and biennial outspurts of the legislature, the following phenomena occurred: the courts moved toward the proposition of applying against the state the principle of legal estoppel to the same extent as such estoppel is applied against an individual;² a mortgage executed to secure future advances was accorded priority over a homestead status attaching subsequent to the execution of the mortgage, but prior to the payment of the advances;³ a particular club membership device to accomplish discrimination in the use and occupancy of real estate was invalidated;⁴ the Mechanics' Lien Law was amended to overcome decisions⁵ and accord a lien to a sub-subcontractor;⁶ and a foreign antenuptial contract was held ineffective to bar a claim of dower to Florida real estate subsequently acquired when the contract did not comply with the Florida law relating to real property.⁷

Because of the large number of decisions and breadth of the subject matter, the material herein presented represents the writer's selection of

*Professor of Law, University of Miami.

1. This survey covers material in volumes 112 through 131 of the Southern Reporter, second series, applicable federal decisions during the period, and legislation enacted in 1961.

2. Trustees of the Internal Improvement Fund v. Lobeau, 127 So.2d 98 (Fla. 1961), *approving*, Lobeau v. Trustees of the Internal Improvement Fund, 118 So.2d 226 (Fla. App. 1960). See text accompanying note 51 *infra*.

3. Simpson v. Simpson, 123 So.2d 289 (Fla. App. 1960). See text accompanying note 91 *infra*.

4. Harris v. Sunset Islands Property Owners, Inc., 116 So.2d 622 (Fla. 1959). See text accompanying note 126 *infra*.

5. Richard Store Co. v. Florida Bridge & Iron, Inc., 77 So.2d 632 (Fla. 1954); Gory v. White, 129 So.2d 446 (Fla. App. 1961). See text accompanying note 189 *infra*.

6. Fla. Laws 1961, ch. 61-326, creating FLA. STAT. § 84.021 (1961).

7. Kyle v. Kyle, 128 So.2d 427 (Fla. App. 1961). See text accompanying note 74 *infra*.

what appears to him as the most noteworthy and significant developments. Reaffirmation of principles well established in Florida, particularly as they apply to commonly recurring fact situations, are generally excluded.

The style of this article follows that of previous survey articles,⁸ with the subject matter being divided into seven principal headings; to wit:

- I. Vendor and Purchaser
- II. Deeds — Description, Parties, Recording, Cancellation
- III. Estates, Dower, Homestead and Future Interests
- IV. Easements, Covenants, Water Law and Zoning
- V. Adverse Possession, Dedication, Tax Titles and Eminent Domain
- VI. Mechanics' Liens and Mortgages
- VII. Landlord and Tenant.

No special section is provided to discuss new legislation as that material is incorporated into the principal divisions listed above. Access to particular material is provided by the generous use of headings and subheadings.

I. VENDOR AND PURCHASER⁹

Statute of Frauds, or the Trusting Souls Who Do Not Demand a Writing

Although the Statute of Frauds has been a part of our legal heritage since 1677,¹⁰ it is still the focal point of frequent litigation,¹¹ particularly in regard to such matters as the sufficiency of the memorandum and the proper application of part performance. Recent litigation as to the memorandum asserted or reaffirmed the following propositions: if the suit is against the purchaser, a deed cannot constitute the memorandum since the deed is not signed by the grantee;¹² a deed which does not recite a promise to pay, or state anything concerning a balance due or the manner of payment, is insufficient as a memorandum;¹³ a telegram and connected instruments may, of course, constitute a memorandum, and the connecting link

8. See 8 MIAMI L.Q. 389 (1954); 10 MIAMI L.Q. 389 (1956); 12 U. MIAMI L. REV. 499 (1958); and 14 U. MIAMI L. REV. 638 (1960).

9. Matters of offer and acceptance, the sufficiency of the terms and conditions, and similar items applicable to contracts generally, are omitted in deference to the companion article on contracts. Questions concerning brokers' commissions are also excluded in favor of the contracts article.

10. 29 Charles II, c. 3.

11. The statute here involved is FLA. STAT. § 725.01 (1961), rendering unenforceable any contract to convey realty unless the contract, or a memorandum thereof, be in writing and signed by the party sought to be charged.

12. *Williams v. Faile*, 118 So.2d 599 (Fla. App. 1960).

13. *Ibid.*

between the telegram and the other documents may be a telephone conversation;¹⁴ and, that the telegram is not a signed copy is immaterial when the defendant admitted sending the telegram, since this admission recognizes the authority of the company to affix his signature.¹⁵

Some of the above mentioned propositions were involved in the interesting case of *Williams v. Faile*,¹⁶ an action by the vendor against the vendee, after delivery of the deed, for the balance of the purchase price. The contract was oral and there was no sufficient memorandum. The court stated that when the suit is for the balance of the purchase price, the action is at law on the oral contract, and part performance is immaterial. Thus, the vendor could not recover, a result hardly consistent with general concepts of right and wrong. The dissenting opinion¹⁷ cited contrary authority for the proposition that the completed conveyance creates a debt for the purchase price, and that the suit is not on the contract to sell, but on the debt.

The majority in the above case did not discuss the possibility of resorting to such other remedial devices or theories of action as the imposition of a constructive trust to prevent unjust enrichment, the creation of a vendor's or other equitable lien, or the grounding of a suit on an implied contract. If any theory of recovery was possible, and indeed, it would seem that one should be if the facts alleged could be proved,¹⁸ it would appear that the court should have transferred the case to the equity side of the court, or allowed an amendment consistent with a possible action on the legal side, since every complaint is considered to pray for general relief.¹⁹

An oral contract for a joint venture to engage in the purchase of real estate and to share the expenses and profits is not within the Statute of Frauds and hence need not be in writing.²⁰

Damages

No significant change in the law relating to liquidated damages and penalties is apparent, the courts recognizing the validity of the former and denying the validity of the latter,²¹ and, at the same time, generally following the rule that a vendee in default is not entitled to recover any sums

14. *Heffernan v. Keith*, 127 So.2d 903 (Fla. App. 1961).

15. *Ibid.*

16. 118 So.2d 599 (Fla. App. 1960).

17. *Id.* at 603.

18. One of the defenses was full payment. However, it may be noted that the jury had returned a verdict for the plaintiffs. It was held error for the trial court not to have granted a directed verdict for the defendants because of the lack of a writing.

19. FLA. R. CIV. P. 1.8(b).

20. *Blynn v. Hirsch*, 124 So.2d 314 (Fla. App. 1960).

21. See generally *Boyer, Survey of Real Property Law*, 10 MIAMI L.Q. 389, 390 (1954).

paid as part of the purchase price.²² This "no recovery" rule was held inapplicable to a suit by a defaulted vendee against an escrow agent for return of the deposit after the vendor had sold the land to another; the defendant escrow agent had failed to interplead the vendor so that no forfeiture could be asserted, and the contract did not call for any forfeiture.²³ In another case the liquidated damages provision was upheld when the amount was not so great as to shock the conscience of the court.²⁴

The Case of the Disguised Option

A liquidated damage provision was significant in helping the court reach the conclusion that the purported sales contract secured by the broker was only an option.²⁵ The case involved the right of a broker to a commission, and the court concluded that the instrument was an attempt to extend the brokerage agreement. The court stressed the fact that the liquidated damage provision called for automatic termination upon failure of the buyer to pay the additional sums, and then added that the instrument was permeated with provisions rendering it an option.

The total sales price of the realty in question was 270,000 dollars, the commission, 10 per cent or 27,000 dollars, and initially only 2,000 dollars was paid down. It should also be noted that the owner-vendor had refused to sign the instrument, and that the enforceability thereof if he had signed it was not in issue. Undoubtedly, the conclusion that the broker had not performed by producing a purchaser ready, willing, and able, is justified under the facts of the case. The emphasis, however, upon the liquidated damage provision calling for automatic forfeiture as rendering the contract an option could cause difficulty in other cases. Similar forfeiture provisions are rather common in contracts of sale.²⁶

Equitable Relief, Clean Hands and Similar Dogma

In actions for specific performance and other equitable remedies, usual equitable principles such as that of due diligence and clean hands²⁷ are

22. *Id.* at 390.

23. *Ossinsky v. Nance*, 118 So.2d 47 (Fla. App. 1960).

24. *O'Neill v. Broadview, Inc.*, 112 So.2d 280 (Fla. App. 1959).

25. *Orange City Hills, Inc. v. Florida Realty Bureau, Inc.*, 119 So.2d 43 (Fla. App. 1960), *cert. dismissed*, 125 So.2d 880 (Fla. 1960).

26. See *BOYER, FLORIDA REAL ESTATE TRANSACTIONS* § 4.07 (1959). In *Mannion v. Owen*, 121 So.2d 816 (Fla. App. 1960), where the contract provided for liquidated damages of only the initial deposit of \$4,000, and an acceleration clause gave the vendors an option to declare the whole sum due and to foreclose the contract, it was held that a default did not terminate all of the vendee's rights, but that it merely authorized foreclosure.

In *Stoneman v. Peninsula Land Co.*, 124 So.2d 760 (Fla. App. 1960), after the vendors notified the vendees that the contract was forfeited because of a substantial breach, but neither party sought aid of the courts for three years, it was held that the purchasers were deemed to have abandoned the contract and the vendors could treat it as forfeited.

27. "A court of equity should not decree specific performance unless the contract

applicable. Thus, one party is not allowed to speculate on the other's title,²⁸ and each must act promptly or he may be barred by laches,²⁹ and when two parties conspire to mislead or defraud a third party, the court of equity will not interfere to aid either one.³⁰ A suit by the vendors against the purchasers for specific performance and ancillary relief is in personam and transitory, hence the proper venue is not the county where the land lies, but the county where the parties reside when they both reside in the same county.³¹

II. DEEDS — DELIVERY, DESCRIPTION, RECORDING

Delivery, or the Case of the Do-It-Yourself Escrow

The problem of conditional delivery to a party to the transaction was involved in the case of *Paradise Beach Homes, Inc. v. South Atl. Lumber Co.*,³² concerning a note and mortgage. The majority of the court held that the note and mortgage were delivered on the condition that they were not to become effective until they were adjusted so that the amount of the note would reflect the true indebtedness, and that parol evidence could be admitted to prove a condition precedent for the purpose of showing that there was no binding contract. A concurring opinion³³ concluded that there was an unconditional delivery plus a contemporaneous oral agreement and it would have permitted parol evidence to show the contemporaneous oral agreement. The result is justified whatever one may conclude as to the reasoning used; perhaps it would be preferable to overrule the old rule that the escrow agent must be a third party and that a conditional delivery cannot be made to the grantee.³⁴

sought to be enforced is strictly equitable and free from trickery and deception on the part of the party seeking such performance." *Home v. Sewell*, 118 So.2d 643, 645 (Fla. App. 1960).

28. *Shirley v. Lake Butler Corp.*, 123 So.2d 267 (Fla. App. 1960). The novated contract provided that the vendors would furnish an abstract of title and that the closing would follow within sixty days. The vendors did not furnish the abstract, but notified the vendees that they were terminating the contract. More than a year later, the assignee of the vendees brought an action for specific performance. Land values had risen and the vendors had sold some of the land to others. The assignee was denied specific performance since he was barred by laches, but the case was remanded to determine if the plaintiff was entitled to a return of the \$40,000 deposit and rescission.

29. *Shirley v. Lake Butler Corp.*, *supra* note 28.

30. *Faber v. Landman*, 123 So.2d 405 (Fla. App. 1960). In this case a landowner had agreed to sell to the defendant if the land should be used for an inter-faith center. The defendant then agreed to sell the land to the plaintiff for other purposes, but later the defendant grieved over his conduct and sought to rescind this contract. In a compromise, the defendant conveyed one of the two lots to the plaintiff, and the plaintiff sought specific performance. In denying specific performance, the court said that it would aid neither party to a contract to defraud a third person.

31. *McMullen v. McMullen*, 122 So.2d 626 (Fla. App. 1960), noted in 15 U. MIAMI L. REV. 332 (1961).

32. 118 So.2d 825 (Fla. App. 1960).

33. *Id.* at 832; Wiggington, C. J., concurring specially.

34. This rule is discussed in BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 9.04[5] [d], at 154 (1959).

Who Loses When the Escrow Embezzles?

The case of *Cradock v. Cooper*³⁵ supports the general rule that defalcations of the escrow agent fall on the party who is entitled to the embezzled money or property. In this case a sum of money was deposited with a third person for the purpose of satisfying a claim against the sellers or to be given to them if the claim were satisfied. The claim was settled, but the depository had in the meantime embezzled the deposit. It was held that since the money was in no event to go to the buyers, but rather to go to the sellers or be used on their behalf, the depository was an agent of the sellers and the loss should fall on them.

Consideration, or the Cases of Renigging Grantees

Although consideration is not needed for the effectiveness of a deed,³⁶ a gift of real estate being permitted,³⁷ failure of consideration when consideration is expected constitutes grounds for cancellation of the deed at the request of the grantor. Thus, a grantee's promise to build a medical clinic in exchange for a conveyance was construed as a dependent covenant going to the entire consideration of the contract for the conveyance in *Mease v. Warm Mineral Springs, Inc.*,³⁸ and the deed was accordingly cancelled on failure to construct the clinic. Similarly, a deed given in consideration of support may be cancelled when the support is not forthcoming.³⁹

Land Description and Boundaries

The platting law was amended to provide that if dedication of a plat is to be made by a corporation, it may be signed by the president or a vice-president and the secretary or an assistant secretary with the authority of the board of directors.⁴⁰

When the sale of land is of a specific quantity, usually denominated as a sale by the acre, the total consideration depends upon the size of the tract, and adjustments for deficiencies and surpluses may be obtained, but when the sale is of a specific tract, usually denominated a sale in gross, no adjustments because of deficiency or surplus in the size of the tract are permitted, and the fact that the deed also contains a recital that the tract contains a designated number of acres "more or less" is immaterial.⁴¹

35. 123 So.2d 256 (Fla. App. 1960).

36. The role of consideration is discussed in BOYER, *FLORIDA REAL ESTATE TRANSACTIONS* § 11.01, at 179 (1959).

37. Gift cases are discussed in BOYER, *FLORIDA REAL ESTATE TRANSACTIONS* § 9.04[3], at 142 (1959), and cases cited therein. See also note 39 *infra*.

38. 128 So.2d 174 (Fla. App. 1961).

39. *Hunter v. Moore*, 131 So.2d 489 (Fla. App. 1961), indicating that the conveyance would be set aside if made in reliance on a fraudulent promise of support, but would not be set aside if the grantor-donor simply changed her mind. The deed was cancelled.

40. Fla. Laws 1961, ch. 61-193, amending FLA. STAT. § 177.06 (1959).

41. *Coble v. Agnew*, 128 So.2d 158 (Fla. App. 1961), concluding that it was a sale

Although title to the tract conveyed generally carries to the center of a monument having width, in the case of a dedicated strip for street purposes bordering an ocean, title to the abutting owner carries to the ordinary high water mark and not just to the center.⁴² This is obviously a sound rule and consistent with the policy of dividing dedicated streets after abandonment between opposite abutting owners so that no owner is left with a long narrow strip of land not conducive to sensible improvement or utilization.

*Accretion, Reliction, Avulsion and Erosion, Including Cases of
Migrating Lands*

The doctrine that slow and imperceptible changes wrought by the action of water results in boundary changes, and that sudden and perceptible changes wrought by this action does not result in boundary changes, is generally followed in Florida. These principles were applied in recent litigations involving such interesting phenomena as migrating lands. In *Siesta Properties, Inc. v. Hart*,⁴³ the court concluded that the changes were sudden and perceptible as a result of a hurricane, that most of the deposits on defendant's land came from plaintiff's land, but then added that the doctrine of avulsion does not authorize a landowner to enlarge his property lines to an extent necessary to take in new lands thus formed outside his original boundaries, or to claim title to these lands in their new location. In other words, a landowner cannot extend his boundaries to encompass areas not within the confines of his original boundaries in order to maintain title to his peripatetic soils.

The plaintiff's claim of migrating lands was rejected in *Forman v. Florida Land Holding Corp.*,⁴⁴ which held that riparian rights may be appurtenant to swamp or overflowed lands. The court concluded that the plaintiff's land was completely lost by erosion and that the defendant's was enlarged by accretion as a result of hurricanes, storms and tidal action over the years. A limitation on the rule of accretion was announced in the *Siesta Properties* case,⁴⁵ to the effect that for a landowner to claim title to accretions, the accretions must begin upon the land of the riparian owner and not elsewhere from which it may ultimately reach the claimant's parcel.

Disputed Boundaries

Occasions were presented during the biennium to reaffirm the proposition that in case of conflict between surveys, the original controls, and

in gross and denying any abatement of the purchase price. These general principles were also discussed in *Bridges v. Thomas*, 118 So.2d 549 (Fla. App. 1960), which denied reformation to the grantor, who sought to reduce the quantity of the land conveyed, because the deed described a specific tract and there was no reference to quantity.

42. *Murrell v. United States*, 269 F.2d 458 (5th Cir. 1959).

43. 122 So.2d 218 (Fla. App. 1960).

44. 121 So.2d 784 (Fla. 1960).

45. *Siesta Properties, Inc., v. Hart*, 122 So.2d 218 (Fla. App. 1960).

that the object of subsequent surveys is to locate the lines of the first, not to correct them.⁴⁶ Resolution of boundary disputes by acquiescence and parol agreement also received judicial attention,⁴⁷ and in applying principles of adverse possession to boundary disputes, one appellate court rejected the contention that fencing in the disputed strip with the owned land would constitute adverse possession under color of title,⁴⁸ while another appellate court reached the opposite conclusion.⁴⁹

Conflicting claims as to the boundaries of land embraced within a Spanish grant, which arose under federal treaty and law, were held not a federal question giving rise to federal jurisdiction.⁵⁰

*Estoppel Against State; Sovereignty Lands, or the State Can Also
Make a Mistake and Be Held to It*

The Supreme Court of Florida has done much in *Trustees of the Internal Improvement Fund v. Lobeau*⁵¹ to remove the reluctance with which the courts have generally applied, or rather declined to apply, the principle of estoppel against the state. The case was a suit to enjoin the Trustees of the Internal Improvement Fund from selling land which they had previously conveyed to the plaintiff by a Murphy tax deed.⁵² The Murphy deed was void because the land involved was submerged sovereignty land, hence not subject to taxation. The case was similar, therefore, to two recent cases⁵³ which had refused to apply an estoppel against the state under analogous circumstances. In upholding an estoppel, the court simply stated that the circumstances were not sufficient to negate a legal estoppel.⁵⁴

In arriving at its conclusion, however, the court in the *Lobeau*⁵⁵ case

46. *International Paper Co. v. Bridges*, 279 F.2d 536 (5th Cir. 1960) (inherent in the decision); *Froscher v. Fuchs*, 130 So.2d 300 (Fla. App. 1961); *St. Joe Paper Co. v. Gulf Mosquito Control Dist.*, 125 So.2d 895 (Fla. App. 1961); *Calder v. Hillsboro Land Co.*, 122 So.2d 445 (Fla. App. 1960).

47. *International Paper Co. v. Bridges*, 279 F.2d 536 (5th Cir. 1960); *Lubrano v. Macauley*, 125 So.2d 911 (Fla. App. 1961).

48. *Blackburn v. Florida West Coast Land & Dev. Co.*, 109 So.2d 413 (Fla. App. 1959), *cert. denied*, 114 So.2d 3 (Fla. 1959).

Adverse possession was held established in *Lubrano v. Macauley*, 125 So.2d 911 (Fla. App. 1961); *Leighton v. Johns*, 116 So.2d 436 (Fla. App. 1959), *cert. denied*, 122 So.2d 405 (Fla. 1960).

49. *Kiser v. Howard*, 133 So.2d 746 (Fla. App. 1961).

50. *Huckins v. Duval County*, 286 F.2d 46 (5th Cir. 1960), *cert. denied*, 366 U.S. 945 (1961).

51. 127 So.2d 98 (Fla. 1961), *discharging cert. and approving*, *Lobeau v. Trustees of the Internal Improvement Fund*, 118 So.2d 226 (Fla. App. 1960).

52. As to Murphy deeds generally, see BOYER, *FLORIDA REAL ESTATE TRANSACTIONS* § 31.04 (1959).

53. *Ruyle v. Dolly*, 110 So.2d 467 (Fla. App. 1959); *Adams v. Crews*, 105 So.2d 584 (Fla. App. 1958), both discussed in Boyer, *Survey of Real Property Law*, 14 U. MIAMI L. REV. 638, 668 (1960).

54. *Trustees of the Internal Improvement Fund v. Lobeau*, 127 So.2d 98 (Fla. 1961).

55. *Ibid.*

pointed out the difference between legal and equitable estoppel, the latter depending upon conduct, the former upon recitals in documents, and dealt with the contention that whenever legal estoppel was applied against the state, equitable estoppel was also present. It recognized that the court had previously stated that for an estoppel to apply against the state, special and exceptional circumstances had to be shown, but noted sadly that the court had never defined what constituted such exceptional and special circumstances. Declining still to define such circumstances, or better, to overrule or "recede from" previous lugubrious statements, the majority chose simply to apply a legal estoppel.

The short concurring opinion of Justice Drew⁵⁶ is clearer and broader in its application. It struck at the core of the matter by saying that in this day and age when the state is engaged in almost every type of business activity, the argument that legal estoppel should not apply against the state is unsound. It boldly stated that, except in those instances where its application would affect the sovereign power of the state in its purely governmental functions, the doctrine of estoppel should apply against the state to the same extent as it applies against individuals. It seems unfortunate that the majority did not adopt this clear, concise, and policy-wise viewpoint.

Recording, or the Case of the Bank Which Looked and Waited

The application of the well known principle that possession constitutes notice under the Florida notice type recording statute⁵⁷ was applied in the factually interesting case of *Lee County Bank v. Metropolitan Life Ins. Co.*⁵⁸ The purchasers entered into an executory sales contract for land which was being improved by the builder-seller. After the contract was entered into, but not recorded, the builder-seller negotiated with the bank for the execution of a mortgage. The bank carefully inspected the premises and found that they were unoccupied. Three days later the purchasers went into occupancy, and on the following day, without reinspecting the premises, the bank accepted the seller's mortgage. The purchasers later, with the aid of a mortgage from an insurance company, paid the seller in full. It was held, quite properly in accordance with the doctrine that possession constitutes notice, or puts subsequent purchasers or mortgagees on inquiry, that the original purchasers, and their mortgagee also, took free and clear of the mortgage executed by the seller to the bank.

The Case of the Patient Creditor

The recording act protects subsequent purchasers and mortgagees; hence to come within its protection, one must be both subsequent and a

56. *Id.* at 104.

57. FLA. STAT. § 695.01 (1961).

58. 126 So.2d 589 (Fla. App. 1961).

purchaser, that is, pay value. Although in Florida it has been held that a pre-existing debt for either a mortgage or deed is not value within the meaning of the recording act,⁵⁹ that rule has been held inapplicable, and properly so it would seem, when the creditor extends the time of payment or forbears from bringing suit for a *definite period of time* in exchange for a mortgage.⁶⁰ Such a mortgagee is a purchaser for value within the protection of the recording provisions.

III. ESTATES, DOWER, HOMESTEAD AND FUTURE INTERESTS

Actuarial Problems Incident to Split Ownership, or Pity the Poor Remainderman

Only a few of the problems relative to the apportionment of benefits and burdens incident to split ownership⁶¹ have been reported in the decisions of the Florida courts. A recent case⁶² involved a homestead and dealt with the relative obligations of the widow and remaindermen in regard to mortgage interest and principal payments. The case followed the usual rule that if a mortgage or other incumbrance is outstanding when the life estate is created, the life tenant may be required to pay the interest as it falls due, such obligation being considered somewhat of a *quid pro quo* for the rents and profits to which the life tenant is entitled. The life tenant, however, is not required to pay the principal in whole or in part unless the testator or grantor has expressed in the creating instrument an intention to that effect.⁶³ Thus, the life tenant, under homestead status also, is normally required to pay only interest payments in the absence of any personal liability on her part.⁶⁴

*Entireties Problems*⁶⁵

Entireties property continues to be a fruitful source of litigation. Although the interest of either tenant is obviously not devisable, a joint and mutual will entered into pursuant to a contract by entireties tenants is enforceable by the ultimate beneficiary after the death of both parties,⁶⁶

59. *Gabel v. Drewrys, Ltd.*, 68 So.2d 372 (Fla. 1953); *Zachary Vencer Co. v. Engelken*, 136 Fla. 89, 186 So. 813 (1938).

60. *Manufacturer & Traders Trust Co. v. First Nat'l Bank*, 113 So.2d 869 (Fla. App. 1959).

61. The problem is discussed generally in 5 POWELL, *REAL PROPERTY* ¶ 668 (1956).

62. *Furlong v. Coral Gables Fed. Sav. & Loan Ass'n.*, 121 So.2d 797 (Fla. App.), *cert. denied*, 125 So.2d 874 (Fla. 1960).

63. These general principles were also enunciated in *Williams v. Williams*, 120 So.2d 202 (Fla. App. 1960).

64. *Furlong v. Coral Gables Fed. Sav. & Loan Ass'n.*, 121 So.2d 797 (Fla. App.), *cert. denied*, 125 So.2d 874 (Fla. 1960).

65. The reader should also consult the survey article on family law for additional cases on entireties estates.

66. *Ugent v. Boehmke*, 123 So.2d 387 (Fla. App. 1960).

and the underlying contract between the tenants may be oral.⁶⁷ On divorce, of course, the parties become tenants in common,⁶⁸ and unless one of the parties has an equitable interest over and beyond his legal interest, a decree other than as tenants in common is improper.⁶⁹ Some additional cases are mentioned in the notes.⁷⁰

Fiduciary Obligations of Cotenants, or the Case of the Unbrotherly Brother

Possession of one cotenant is normally not adverse to the others unless the claim is clearly and unequivocally brought home to them. This principle was applied in the case of a son who went into possession of the father's homestead before the death of the father. It was held that possession by the son of a portion of the homestead begun before the father's death was not adverse to his cotenants in remainder after the father's death,⁷¹ in the absence of clear notice of this adverse claim. In another case,⁷² the common law rule was followed that an occupying cotenant in exclusive possession is not liable, in the absence of an agreement, to account to the other cotenants for reasonable rental value or profits.

Dower, or Some Widows Get More

Two dower cases involving conflict of laws principles ended success-

67. *Weiss v. Storm*, 126 So.2d 295 (Fla. App. 1961).

68. FLA. STAT. § 689.15 (1961); *Fletcher v. Fletcher*, 128 So.2d 434, 435 (Fla. App. 1961), using the terminology "joint tenants, in which relation they are equally interested"; *Bergh v. Bergh*, 127 So.2d 481 (Fla. App. 1961); *Bailey v. Bailey*, 126 So.2d 165 (Fla. App. 1961); *Banfi v. Banfi*, 123 So.2d 52 (Fla. App. 1960); *Jones v. Jones*, 121 So.2d 811 (Fla. App. 1960); *Latta v. Latta*, 121 So.2d 42 (Fla. App. 1960).

69. *Latta v. Latta*, 121 So.2d 42 (Fla. App. 1960).

70. Where the husband borrowed money on a promissory note executed by him alone and promising to pay it out of the proceeds of entireties property, the lender is entitled to no relief against the property or against a purchase money mortgage executed therefor to both the husband and wife, since neither husband nor wife acting alone can encumber entireties property. *Yafanaro v. Ninos*, 123 So.2d 286 (Fla. App. 1960).

A husband stockholder made an oral promise to convey entireties property to the corporation at the time his wife was living separate and apart from him. The corporation then purportedly executed a mortgage on the land and a business building was erected. It was held that the mortgagee was not entitled to an equitable lien, and that the wife who knew nothing of the transaction was not bound by her husband's promise. *Penzi v. David*, 122 So.2d 635 (Fla. App. 1960).

In *Gerson v. Broward County Title Co.*, 116 So.2d 455 (Fla. App. 1959), after the sale of entireties property, the abstract company delivered to the husband a check payable to the husband and wife, the vendors. The husband then forged his wife's name to the check and absconded. It was held that the abstract company was not liable to the wife even if there was a fiduciary relationship, that either party (*H* or *W*) presumptively has the power to act for both as to entireties property so long as the marriage subsists, and that the husband may accept payment in discharge of a note held by the entireties, provided that there is no specific agreement between the husband and wife for division of the property. The court also indicated that liability might attach if there was an agreement and it was known to the payor.

Property interest held as tenants by the entireties cannot prima facie be reached to satisfy the original debt or obligation of either party. *Kornberg v. Krupka*, 118 So.2d 790 (Fla. App. 1960).

71. *Vaughn v. Vaughn*, 119 So.2d 391 (Fla. App. 1960).

72. *Taylor v. Taylor*, 119 So.2d 811 (Fla. App. 1960), *earlier report*, 97 So.2d 323 (Fla. App. 1957).

fully for the dower claimant in accordance with generally recognized principles. In the one,⁷³ a Florida resident died owning an interest in two partnerships doing business in two other states both of which had adopted the Uniform Partnership Act. Since under that act a partner's interest is regarded as personalty, and since the situs of personalty is generally considered to be the domicile of the decedent, the widow was held entitled to dower in her husband's partnership interests under Florida law.

In the other case,⁷⁴ the widow had previously entered into an antenuptial contract in Canada. The contract had complied with the formalities required by Canadian law, but it lacked the two witnesses required to bar dower in realty under Florida law.⁷⁵ Hence, the contract was ineffective to bar the dower claim to Florida real estate which was acquired by the husband subsequent to the execution of the contract.⁷⁶ The law of the situs, or the place where the realty is located, generally governs transactions affecting land. Although the result is legally sustainable, one might well ask, should this be so? Should one party be allowed to repudiate his contract validly and fairly made simply because the other party fortuitously happens to invest in property in another jurisdiction which requires more formalities in the manner of execution? In another case⁷⁷ involving an antenuptial contract, it was held that noncompliance with a condition precedent contained in the contract rendered the agreement unenforceable against the widow.

And Some Widows Get Less

*Coleman v. Davis*⁷⁸ involved a conveyance without the wife's joinder by a married man to another woman with whom he apparently lived in an unorthodox relationship.⁷⁹ The court refused to impose a constructive trust in favor of the widow,⁸⁰ but since the land had been conveyed without her joinder, she was entitled to dower. The extent of the interest, however, was limited to the real estate as it existed at the time of alienation, and did not extend to any improvements erected by the grantee or her successors.⁸¹

73. *In re Binkow's Estate*, 120 So.2d 15 (Fla. App. 1960). See Comment, 16 U. MIAMI L. REV. 92 (1961).

74. *Kyle v. Kyle*, 128 So.2d 427 (Fla. App. 1961).

75. *Zimmerman v. Diedrich*, 97 So.2d 120 (Fla. 1957); *Petersen v. Brotman*, 100 So.2d 821 (Fla. App. 1958).

76. *Kyle v. Kyle*, 128 So.2d 427 (Fla. App. 1961).

77. *Cohen v. Rothman*, 127 So.2d 143 (Fla. App. 1961).

78. 120 So.2d 56 (Fla. App. 1960); an earlier decision in this case, 106 So.2d 81 (Fla. App. 1958), is noted in Boyer, *Survey of Real Property Law*, 14 U. MIAMI L. REV. 638, 657 (1960).

79. This matter is indicated in the earlier report, *Coleman v. Davis*, 106 So.2d 81 (Fla. App. 1958).

80. *Ibid.*

81. *Coleman v. Davis*, 120 So.2d 56 (Fla. App. 1960). The court stated that this was the majority rule, and it refused to follow an English decision granting dower in the

Although it is popularly said to be within the province of the female of the species to change her mind, this was not permitted in *Youngelson v. Youngelson's Estate*.⁸² In this case, the widow entered into a settlement agreement with the executor and heirs of the husband after his death, and then changed her mind and applied for dower within the period allowed for filing the election. It was held that she was barred of both dower and homestead rights, the court stating that these agreements are presumptively valid and can be set aside only on a showing of fraud or overreaching. Some additional dower cases are found in the notes.⁸³

Husband's Joinder in the Wife's Deed, or the Case of the Valid Void Deed

Is a deed by a married woman who is not a free dealer⁸⁴ really void as it is generally stated,⁸⁵ or is it only maybe void? Consider the case of *Hill v. Lummus*.⁸⁶ O made a gratuitous conveyance to M, a married woman, to defeat creditors. Then M conveyed without the joinder of her husband to A, a party designated by O. Later M, joined by her husband, conveyed the same land to B on the representation that the land would go to O's estate. It was held that O and her administrator were estopped from claiming that the property belonged to the estate on the ground that the conveyance to M was invalid as a fraudulent conveyance, and although the deed to A was void because of the husband's nonjoinder, title was nevertheless quieted in A (the grantee of the "void" deed), and the deed to B was cancelled.

If comments are in order, one might first question the wisdom of the statute and the decisions rendering void the deed of a married woman whose husband does not join in its execution. Why not give him an interest similar to that of the wife's dower and put the parties on an equal

property as it existed at the husband's death. It stated that the common law was not restricted to that declared by the courts of England, but included also that declared by the courts of the United States.

82. 114 So.2d 642 (Fla. App. 1959).

83. The county judge's court has jurisdiction over dower, and the decision of the county judge as to the allowance of dower is not subject to collateral attack by suit for declaratory relief. *Stahl v. Wilson*, 121 So.2d 662 (Fla. App.), cert. denied, 125 So.2d 873 (Fla. 1960).

That no guardian for an incompetent widow was appointed until after nine months following publication of the first notice to creditors does not toll the running of the statute pertaining to the filing of the election, and such election cannot be filed after the guardian is appointed. *In re Aron's Estate*, 118 So.2d 546 (Fla. App. 1960).

Whether the United States would have priority over the dower interest of the widow under federal statute, REV. STAT. § 3466 (1875) 31 U.S.C. § 191 (1958), according priority to the United States government when the estate of the decedent has insufficient assets to pay all debts, was held not properly before the court in *United States v. Dahlberg*, 115 So.2d 86 (Fla. App. 1959). Since the record on appeal did not show that there were insufficient assets to pay all claims at the time the order of payment to the widow was made, the appellate court would not consider the question and the order of payment was affirmed.

84. Statutes relative to free dealership are FLA. STAT. §§ 62.38-46 (1961).

85. FLA. STAT. §§ 693.01, 708.04, 708.08 (1961); *Phillips v. Lowenstein*, 91 Fla. 89, 107 So. 350 (1926); *Wilkins v. Lewis*, 78 Fla. 78, 82 So. 762 (1919).

86. 123 So.2d 365 (Fla. App. 1960).

basis, thus upholding the deed subject to the unreleased interest of the spouse?⁸⁷ Or perhaps better yet, why not abolish all inchoate dower and similar interests and permit either husband or wife freely to alienate his separate property?⁸⁸ Admittedly, changes such as these require legislative action and may meet opposition.

A second commentary, recognizing existing conveyancing requirements and husband and wife interests, might be based on the underlying policy implicit in the outcome of the above litigation.⁸⁹ Obviously, fraudulent conveyances to defeat creditors are to be prevented or discouraged. O and her administrator are punished in the above case by not letting the estate get the land back, hence, to this extent others may be discouraged from attempting these undesirable activities. It must be noted, however, that the prophylactic effect of the decision will largely be wasted on O who has now gone to her reward and, presumably, will not be making any more conveyances anyway. Further, the result is that A obtains a windfall, and as a result of a void deed. It would seem that the policy prohibiting fraudulent conveyances seeks to protect creditors and is not simply a policy of preventing these conveyances in the abstract. The end result in the above case affords no protection to creditors; it simply gives the land to A. Of course, all the creditors may have been paid, or they may now be barred by the statute of limitations,⁹⁰ but the opinion does not indicate that this is so. In any event, if there are creditors, it would appear that the better policy would be to put the land back in the estate of the original owner, and this could be easily done by declaring all the deeds void since it does not appear that any of the grantees were bona fide purchasers.

87. Under the present statutory scheme in Florida, a deed by a married man without his wife's joinder passes title subject to her dower interest, which is a potential one-third interest in fee simple and which will become consummate only if she survives her husband and files an election to take dower within the time allotted. The husband has no similar interest in the wife's realty, but her deed without his joinder is "void" unless she is a free dealer.

88. The suggestion here is the abolishment only of inchoate interests. Either or both of the spouses could and should be given an interest in the property owned by the other spouse at the time of his death. Present Florida law permits a husband without his wife's joinder to freely transfer personal property owned by him, but the wife may claim dower (equivalent to a statutory share of one-third) in that personalty owned by him at the time of his death. Under present Florida law, the wife may completely disinherit the husband, but he cannot disinherit her. *Herzog v. Trust Co.*, 67 Fla. 54, 64 So. 426 (1914). Inchoate dower and the corresponding interest of the husband have been abolished in New York with each spouse being given a forced statutory share in the interest of the property owned by the other at the time of death. See N. Y. REAL PROP. LAW §§ 189, 190; N. Y. DECED. EST. LAW § 18.

89. *Hill v. Lummus*, 123 So.2d 365 (Fla. App. 1960).

90. There is the possibility also that the statute of limitations would be tolled by the fraudulent conveyance so that the creditors would not be barred. Further, if there are in fact no unpaid creditors, do not the heirs or devisees of decedent have a claim equally as meritorious as that of A?

*Homestead, Including the Tale of How Mother and Son
Outwitted the Bride*

*Simpson v. Simpson*⁹¹ was a case of first impression involving the priority of a mortgage executed to secure future advances and a homestead status established after the execution of the mortgage, but before the advances were made. At the time *W* married *H* and moved into his home, thus establishing a homestead, there was a recorded mortgage against the land to secure future advances. The mortgagee was the mother of *H*, and there was an obligation on her part to make the advances on the demand of *H*. The payments were subsequently made. *W*, of course, had not joined in the execution of either the note or mortgage.

After the death of *H*, the mortgagee mother brought an action to enforce the mortgage, and *W* defended on the basis of no valid lien at the time when the homestead status attached. If this were correct, the mortgage, of course, would be invalid since it was not jointly executed by both husband and wife.⁹²

The mortgagee prevailed, the court holding that the mortgage was a valid lien against the homestead.⁹³ The statute⁹⁴ authorizing mortgages for future advances was cited. The court also applied the general rule that a mortgage for future advances becomes an effective lien from the time of its execution, or as to subsequent purchasers and incumbrancers, from the time of its recordation, rather than from the time the advance is made, when the making of the advances is obligatory upon and not merely optional with the mortgagee.⁹⁵

Thus, when the money was subsequently advanced, the consideration related back to the time of recording the mortgage, and it became a valid lien against the homestead. Whether the result would have been different if the advances were optional rather than obligatory, or whether the optional characteristic of future advances would make a difference in other than homestead cases, was not expressly determined.

As a general proposition, the writer is in accord with the rule recognizing the validity of mortgages for future advances, and even sees nothing wrong with the apparent policy of the Florida statute which in terms⁹⁶ makes no distinction between obligatory and voluntary advances. Subsequent purchasers and incumbrancers are charged with notice of the potential or

91. 123 So.2d 289 (Fla. App. 1960), *earlier report*, 113 So.2d 766 (Fla. App. 1959).

92. FLA. CONST. art. X, § 4.

93. *Simpson v. Simpson*, 123 So.2d 289 (Fla. App. 1960).

94. FLA. STAT. § 697.04 (1959). This statute was amended in 1961, FLA. LAWS 1961, ch. 61-135, to extend the time during which future advances may be secured from ten years to twenty years.

95. See Annot., 5 A.L.R. 398, 399 (1920); 59 C.J.S. *Mortgages* § 230(a)(2) (1949).

96. See FLA. STAT. § 697.04 (1961).

inchoate lien as a result of the recorded mortgage and should react accordingly.

Nevertheless, it is believed that a serious constitutional question was involved in the instant litigation, and that the court did not sufficiently dispose of this phase of the widow's case. Basically, a mortgage is security for a debt; it is the ancillary appendage of a dual transaction; it has no independent status.⁹⁷ Without a debt or other obligation to secure there can be no mortgage.

Thus, until the advances are made, there is no debt, and consequently no mortgage or lien. In the instant case, therefore, there was no debt, hence no valid mortgage, at the time homestead status attached. The constitution requires that both husband and wife, when that relationship exists, join in the execution of a conveyance or incumbrance of the homestead.⁹⁸ Since the wife did not join in the execution of this mortgage, it was obviously void except for the fiction of the relation back. The use of the fiction may be desirable, particularly if it is realized that the same type of argument may be utilized to favor subsequent purchasers and mortgagees in other than homestead cases. The fact is simply noted that a fiction, supported by legislative policy as embodied in the statute recognizing mortgages for future advances, is used to circumvent a constitutional mandate and a strong policy of protecting homestead rights. It is suggested that the court might have directed a frontal attack against these conflicting policies.

Homestead, Routine Applications

Among the many controversies continually arising relative to the Florida homestead law, the following more or less routine applications of established principles are recorded: in the case of duplexes or dwelling units in a multiple family building, the various owners are collectively entitled to only one exemption for tax purposes;⁹⁹ if the premises are rented for only part of the year, the fact that the owners do not actually live on the premises on the first of the year does not deprive them of the right to the tax exemption;¹⁰⁰ the requirement that the homestead be "owned" by the head of the family is not construed too strictly, the requirement having been satisfied in one case when the homestead was originally held by a personal corporation which was later dissolved for nonpayment of taxes, the court concluding that the man in question had a homestead all the

97. See generally BOYER, FLORIDA REAL ESTATE TRANSACTIONS §§ 32.01, .08 (1959).

98. FLA. CONST. art. X, § 4.

99. *Gautier v. State*, 127 So.2d 683 (Fla. App. 1961); earlier case to the same effect, *Overstreet v. Tubin*, 53 So.2d 913 (Fla. 1951).

100. *Poppel v. Padrick*, 117 So.2d 435 (Fla. App. 1959). The reader is also referred to 1959 legislation, (FLA. STAT. § 192.141 (1959)), which provides that rental of

time;¹⁰¹ headship and ownership must be joined in one individual for homestead status to attach, homestead law not applying where one other than the head of the family owns the land, or where the owner of the land has no one dependent on him;¹⁰² and finally, gratuitous conveyances to avoid the normal rules relative to the descent of homesteads are generally declared void.¹⁰³

Options

An option to repurchase in the form of a right of first refusal, to last for a period of twelve years, was held valid in *Blair v. Kingsley*.¹⁰⁴ Options in gross¹⁰⁵ are subject to the Rule Against Perpetuities, but otherwise are generally held valid.¹⁰⁶ Since the particular option was well within the period of the rule, it was obviously valid from the perpetuities viewpoint.

Direct restraints on alienation of fees simple are generally held void regardless of the period of the restraint.¹⁰⁷ Options generally do not fall within the prohibition of this rule because in form they do not prevent alienation. On the contrary, the optionee can coerce alienation, but alienation to others is undoubtedly somewhat hampered.¹⁰⁸ Realistically, however, pre-emptive options appear designed more to prevent alienation¹⁰⁹ than to promote it. Nevertheless, this purpose usually seems to be overlooked, and as long as the restriction is cast in the form of an option, it is upheld provided the Rule Against Perpetuities is not violated.¹¹⁰

An additional feature in the *Blair*¹¹¹ case made the similarity to a restraint on alienation even more marked. The optionee was given a one year period in which to exercise his option. Although the adverse effect of this feature on saleability was urged on the court, it did not expressly discuss the reasonableness of this provision or the possibility of its operating

an entire dwelling results in the loss of homestead taxation exemption subject to certain exceptions and limitations.

101. *Manda v. Sinclair*, 278 F.2d 629 (5th Cir. 1960).

102. *Abermathy v. Gruppo*, 119 So.2d 398 (Fla. App. 1960).

103. *Reed v. Fain*, 122 So.2d 322 (Fla. App. 1960). In *Quinn v. Miles*, 124 So.2d 883 (Fla. App. 1960), it was held that the first wife from whom the decedent had never been divorced was entitled to a life estate in the homestead rather than the "third wife" with whom he was living at the time of his death.

Where there are no lineal descendants at the time of death, the homestead vests absolutely in the surviving spouse. *Freeman v. Holland*, 122 So.2d 791 (Fla. App. 1960).

104. 128 So.2d 889 (Fla. App. 1961).

105. By an option in gross is meant an option unconnected with a lease.

106. 5 POWELL, REAL PROPERTY ¶ 771, at 601 (1956).

107. BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 22.08 (1959).

108. 5 POWELL, REAL PROPERTY ¶ 771 (1956).

109. See, for example, 6 POWELL, REAL PROPERTY, ¶ 842, at 12 (1958). See also 6 AMERICAN LAW OF PROPERTY §§ 26.64-67 (1952), for a more complete discussion of different types of pre-emption agreements and their relationship to restraints on alienation.

110. 5 POWELL, REAL PROPERTY ¶ 771 (1956); 6 AMERICAN LAW OF PROPERTY § 24.56 (1952); *Blair v. Kingsley*, 128 So.2d 889 (Fla. App. 1961).

111. *Blair v. Kingsley*, *supra* note 110.

as a direct restraint on alienation. It would seem that during the period of discretion on the part of the optionee, alienation is effectively restrained, and that the court might well conclude that an option, particularly a pre-emptive option, which allows the optionee too long a time to exercise his discretion, is invalid as constituting a direct restraint on alienation.

Construction of Instruments

Several instruments necessitated judicial construction of the type of interest retained or created. A limitation following a life estate "to A, B and C or their survivors or survivor" was held to impose a condition of survivorship, and hence the parties acquired contingent rather than vested remainders, the condition being that they survive the life tenant.¹¹² Other constructions included the following: a recital in a deed which declares what use is contemplated does not affect the passing of the fee effected by other parts of the deed, hence in the particular case, a fee was conveyed and not simply an easement;¹¹³ an ambiguous "exception" of a designated area, "same being reserved for a right of way," was held to reserve only an easement rather than to have excepted the fee;¹¹⁴ and a reservation of an easement by one state instrumentality in favor of another was held effective,¹¹⁵ the rule that an easement cannot be reserved in favor of a third party being inapplicable.

IV. EASEMENTS, COVENANTS, WATER LAW AND ZONING

A Marriage of Convenience: Easements and Dedication

Purchasers taking land in reliance on a plat acquire a private easement by implication in the streets and other public lands depicted thereon.¹¹⁶ Recording a plat constitutes merely an offer to dedicate the streets and other public lands delineated on the plat, and until acceptance the offer can be revoked.¹¹⁷ The reconciliation of these principles caused a bit of

112. *Lawyer v. Munro*, 118 So.2d 654 (Fla. App. 1960).

113. *Robb v. Atlantic Coast Line R.R.*, 117 So.2d 534 (Fla. App. 1960).

114. *Lynch v. Welan Inv. Co.*, 126 So.2d 148 (Fla. App. 1961).

115. *Dade County v. Little*, 115 So.2d 19 (Fla. App. 1959).

116. See *BOYER, FLORIDA REAL ESTATE TRANSACTIONS* § 23.03[3][d] (1959). See also cases cited in notes 120 and 121 *infra*.

In *Dinkins v. Julian*, 122 So.2d 620 (Fla. App. 1960), not involving acquisition of easements arising from a conveyance in reference to a plat, the court reaffirmed the principle that unity of title is necessary for the implication of easements, and denied an easement to purchasers who relied on the continued existence of a county road so that they would have corner lots. The developers later acquired land on the other side of the road and planned to have it closed. Although it is undoubtedly correct that the purchasers were not entitled to an easement by implication, it would seem that the developers should be estopped from terminating the easement or roadway after they had induced others to purchase in reliance on its continuance.

117. See *BOYER, FLORIDA REAL ESTATE TRANSACTIONS* §§ 23.03[3][d], 30.04, 30.05 [1] (1959). See also cases cited in notes 120 and 121 *infra*.

difficulty in two cases¹¹⁸ where the dedicator attempted a revocation and was thwarted in both instances. Perhaps the net result is summarized in the court's observation that there appears to be a "blending of public right resulting from an offer of dedication with private rights growing out of implied covenant, implied grant, or estoppel of the dedicator."¹¹⁹

In *Weber v. City of Hollywood*,¹²⁰ a summary judgment was awarded against both the city claiming a street dedication and against the landowner claiming that the offer of dedication had been revoked before acceptance. Since the city did not appeal the summary judgment against it, the court, considering and affirming only the judgment against the landowner, indicated that the dedication was complete and that the city had paramount rights. Both parties had resorted to self-help — the land owner by digging a ditch and the city by closing it — and the suit involved claims for damages by each party against the other for having taken this action. The court concluded that neither the purported dedicator nor his successor could unilaterally revoke the offer to dedicate.

In *Cross v. City of Miami*,¹²¹ it was held that an attempt by a subdivider to revoke a dedication of a strip of land lying between a street and the waters of a bay by conveying ownership to purchasers of the land on the opposite side of the street was ineffective. The case moves with facility from a consideration of easement principles to those of dedication, and the result seems equally sustainable on the principle that there was a complete dedication because the offer had been accepted before the attempted revocation, and on the proposition that because of the acquisition of private rights of easement acquired by purchasers relying on plats, the dedicator could not revoke.

The apparent blending of dedication and easement principles in the above two cases may result in obliterating, or at least eroding, well defined and theoretical distinctions between the two concepts, but the court may believe that pragmatically this is the best approach to problems of this nature.

Validity of Statutory Easements of Necessity

A district court of appeal in *Stein v. Darby*¹²² upheld the constitutionality of the statute granting an easement for certain purposes to landlocked realty, and then certified the case to the supreme court for determination of a jurisdictional question as a matter of great public interest. In arriving at its conclusion, the district court examined the basis of the common-

118. *Cross v. City of Miami*, 121 So.2d 664 (Fla. App. 1960); *Weber v. City of Hollywood*, 120 So.2d 826 (Fla. App. 1960).

119. *Weber v. City of Hollywood*, *supra* note 118, at 829.

120. 120 So.2d 826 (Fla. App. 1960).

121. 121 So.2d 664 (Fla. App. 1960).

122. 126 So.2d 313 (Fla. App. 1961), *earlier decision*, 114 So.2d 368 (Fla. App. 1959). The statutes involved are FLA. STAT. §§ 704.01-.04 (1961).

law easement of necessity, and concluded that in reality these easements are based on public policy, and that assertions of implication from an inferred intent of the parties is simply rationalization. The statute was said to serve the same public policy of making land available for development by providing a means of access.

The earlier case of *South Dade Farms, Inc. v. B. & L. Farms Co.*¹²³ was differentiated in *Stein v. Darby* by stating that the suggestion there was to the effect that the statute as then written was invalid as a deprivation of private property without due process of law, and that the method of providing compensation in the present statute cured that defect.

Other cases involving the statutory easement held that one claiming this easement cannot be restricted to a trail across a slough which becomes impassable for three months when, by shifting the roadway a few feet to higher ground, a proper means of access would be obtained,¹²⁴ and that in appropriating a right of way, the chancellor should first delineate the route, and then the question of compensation should be presented to a jury.¹²⁵

Covenants — Racial Discrimination Through Club Membership

A club membership device to secure racial or religious discrimination in land occupancy was invalidated by the Supreme Court of Florida in *Harris v. Sunset Islands Property Owners, Inc.*¹²⁶

In this case Mr. Harris, a member of the Jewish faith, purchased a lot in a subdivision restricted so as to prohibit the sale, lease or occupancy by others than members of a designated property owners association. By-laws of the association restricted membership to caucasian gentiles. After Mr. Harris' purchase and before litigation, the by-laws were amended to delete reference to caucasian gentiles and to restrict membership to persons of good moral character. After this amendment, Mr. Harris applied for membership and was refused.

It was held that the change in by-laws could have no effect on this litigation, since Mr. Harris purchased his land when the by-laws precluded membership by one of his faith. Further, the by-laws had to be construed in connection with the recorded restrictions. Thus, the combined effect of the dual restrictions was a discrimination within the doctrine of *Shelley v. Kraemer*¹²⁷ and the many cases adhering to it, and thus was unenforceable.¹²⁸

123. 62 So.2d 350 (Fla. 1952). The case is discussed in Boyer, *Survey of Real Property Law*, 8 MIAMI L.Q. 389, 423 (1954), and in BOYER, *FLORIDA REAL ESTATE TRANSACTIONS* § 23.03[3][e], at 521 (1959).

124. *Bradshaw v. Prasek*, 114 So.2d 821 (Fla. App. 1959).

125. *Surrency v. Indian River County*, 116 So.2d 782 (Fla. App. 1959).

126. 116 So.2d 622 (Fla. 1959).

127. 334 U.S. 1 (1948).

128. *Harris v. Sunset Islands Property Owners, Inc.*, 116 So.2d 622 (Fla. 1959).

The court cautiously limited its holding to the facts of the case, namely, a recorded restriction limiting occupancy to membership of an association, and concurrent by-laws of the association limiting membership to particular racial or ethnic groups. No opinion was expressed as to the validity of the provisions under the amended by-laws. Thus, the enforceability of provisions restricting land occupancy to members of a designated association without reference to race or religion, the membership in the association being limited to persons of good moral character, good fellowship, or congeniality, was not determined. It may be suggested, however, that when proof of a prohibited discriminatory practice is presented, the court will not be powerless to disregard form over substance.

Before leaving the *Harris* case, it might also be suggested that the prohibition against the sale or leasing to anybody other than club members is undoubtedly an illegal restraint on alienation and void.¹²⁹ A restriction on occupancy or use is generally regarded as valid so long as it does not contravene some aspect of public policy such as that enunciated in *Shelley v. Kraemer*.¹³⁰ Rather than casting the restriction in the form of a restraint on alienation, an option to purchase should be accorded the association or club in the event the particular owner desires to sell. Such an option, if properly drawn, will probably be upheld.¹³¹

Additional cases involving covenants may be found in the notes.¹³²

Water Law and Submerged Land

The Supreme Court of the United States has held that the Submerged Lands Act granted to the State of Florida a three marine-league belt of submerged land under the Gulf of Mexico seaward from its coastline.¹³³ The coastline was defined, for the purposes of the decision, as the line of ordinary low water along that portion of the coast which is in direct contact with the open sea, and the line marking the seaward limit of inland waters.¹³⁴

Within the state of Florida, the application of the principle of legal estoppel to sales by the Trustees of the Internal Improvement Fund of submerged sovereignty land was a significant development which has already

129. BOYER, *FLORIDA REAL ESTATE TRANSACTIONS* § 22.08 (1959).

130. 334 U.S. 1 (1948).

131. See *Blair v. Kingsley*, 128 So.2d 889 (Fla. App. 1961).

132. Where forfeiture or other provisions for termination or reverter are not expressed, the courts will likely construe expressions of intended use as covenants rather than as limitations on the fee. *Robb v. Atlantic Coast Line R.R.*, 117 So.2d 534 (Fla. App. 1960).

The operation of a motel was held to be a commercial enterprise violative of a restrictive covenant in *Malcolm v. Smith*, 112 So.2d 395 (Fla. App. 1959).

A covenant against the sale of alcoholic beverages was upheld in *Hevia v. Palm Terrace Fruit Co.*, 119 So.2d 795 (Fla. App. 1960).

133. *United States v. Florida*, 363 U.S. 121 (1960).

134. *United States v. Louisiana*, 364 U.S. 502 (1960).

been discussed.¹³⁵ The Florida Supreme Court has adopted the civil law rule as being applicable to the use of non-navigable lakes by abutting owners. This rule provides that "the whole lake . . . [can] be used by any owner of a part of the bottom subject, of course, to the rights of those in like situation."¹³⁶ Other appellate decisions have reached conclusions consistent with established principles.¹³⁷

Zoning

Zoning controversies continue to be a fruitful source of litigation, but the legal principles are generally well established, and most of the disputes ultimately rest on factual determinations. Of special significance was the supreme court decision in *Board of Comm'rs v. Tallahassee Bank & Trust Co.*,¹³⁸ which upheld the appellate court's decision¹³⁹ that an ordinance was invalid because it classified the property in question as residential, not because of its suitability for this purpose, but in order to lessen the compensation which would have to be paid on a later condemnation for park purposes by the state.

The court found no conflict with a prior case,¹⁴⁰ because it said the ordinance there was fairly debatable whereas in the instant case it was not. There was also said to be more urgency presented in the factual situation of the earlier case which involved the preservation to the public in Miami Beach of some access to the ocean, light and air, than in creating a Capitol Park in Tallahassee. In addition, the "Texas Rule" in arriving at market value in condemnation cases was specifically approved. This permits a consideration of all the uses to which the property is reasonably adaptable and for which it either is or probably will become available within the reasonably foreseeable future. Thus, where an invalid ordinance unreasonably restricts the use of the land, in a condemnation suit evidence of the value if the land were zoned more realistically may be introduced.¹⁴¹

Among the more or less routine dispositions of zoning controversies

135. See text accompanying note 51 *supra*.

136. *Duval v. Thomas*, 114 So.2d 791, 793 (Fla. 1959), *approving* *Duval v. Thomas*, 107 So.2d 148 (Fla. App. 1958). The case is discussed in a note, 14 U. MIAMI L. REV. 689 (1960).

137. *Florio v. State*, 119 So.2d 305 (Fla. App. 1960), held that water skiing activities as then carried on constituted a nuisance, but predicated the decision on a doctrine of equalitarian rights.

The owner of landlocked lakes was granted an injunction against the discharge of sewage effluent into the lakes on the basis of a continuing trespass and nuisance in *North Dade Water Co. v. Adken Land Co.*, 130 So.2d 894 (Fla. App. 1961).

138. 116 So.2d 762 (Fla. 1959).

139. *Board of Comm'rs v. Tallahassee Bank & Trust Co.*, 108 So.2d 74 (Fla. App. 1958).

140. *City of Miami Beach v. Hogan*, 63 So.2d 493 (Fla.), *cert. denied*, 346 U.S. 819 (1953), holding that the court will not invalidate an otherwise valid ordinance for the purpose of increasing the amount that a city will have to pay in pending condemnation proceedings.

141. *Board of Comm'rs v. Tallahassee Bank & Trust Co.*, 116 So.2d 762 (Fla. 1959).

were the following: an ordinance was held not invalid for vagueness or uncertainty because it used the word "building" without defining it;¹⁴² a "Royal Castle" type of hamburger dispensary was adjudged a "restaurant" within the terms of an ordinance permitting restaurants;¹⁴³ the controversial Miami Beach "hot plate" ordinance was held unreasonable and void;¹⁴⁴ an ordinance granting a "variance" in favor of two lots after a contrary determination by a Zoning and Planning Board was invalidated as "spot" zoning;¹⁴⁵ and that "a line must be drawn somewhere" was held no justification for zoning a particular parcel for single family residences when the land was unsuited for such purposes.¹⁴⁶ Additional cases are found in the notes.¹⁴⁷

V. ADVERSE POSSESSION, DEDICATION, TAX TITLES AND EMINENT DOMAIN

Adverse Possession and Statutes of Limitation

Section 95.25 of the Florida Statutes, providing that cooperative fire protection between the owner and the board of forestry constitutes adverse

142. *Union Trust Co. v. Lucas*, 125 So.2d 582 (Fla. App. 1960).

143. *City of Miami Beach v. Royal Castle System, Inc.*, 126 So.2d 595 (Fla. App. 1961).

144. *Fox v. Bancroft Hotel Associates*, 128 So.2d 771 (Fla. App. 1961). The ordinance prohibited use of cooking devices in single family units containing less than 400 square feet and was aimed at business competition in the tourist industry rather than promoting the safety, health or welfare of the occupants.

145. *Friedland v. City of Hollywood*, 130 So.2d 306 (Fla. App. 1961). An amendatory ordinance was also invalidated as spot zoning in *Cole v. Oka*, 131 So.2d 757 (Fla. App. 1961), *earlier report*, 107 So.2d 45 (Fla. App. 1958).

146. *City of Miami Beach v. Hessick*, 117 So.2d 763 (Fla. App.), *cert. denied*, 122 So.2d 407 (Fla. 1960). But it is not sufficient to have an ordinance nullified by showing that the property in question is located on the border of another district. The line must be drawn somewhere. *Town of Surfside v. Skyline Terrace Corp.*, 120 So.2d 20 (Fla. App. 1960), *cert. denied*, 123 So.2d 675 (Fla. 1960).

147. Rezoning is a legislative matter, and the courts should not specify what uses should be permitted. *Wood v. Twin Lakes Mobile Homes Village, Inc.*, 123 So.2d 738 (Fla. App. 1960).

Where changes in the area are insufficient to justify a different conclusion, the principle of *res judicata* may be applied to zoning controversies. *City of Miami Beach v. Parking Facilities, Inc.*, 120 So.2d 209 (Fla. App. 1960), *cert. denied*, 125 So.2d 873 (Fla. 1960).

An ordinance limiting the size of signs in business districts and classifying them as at "point of sale" and "non point of sale," with different limitations applicable to each, was held invalid and discriminatory in *Sunad, Inc. v. City of Sarasota*, 122 So.2d 611 (Fla. 1960), *quashing* 114 So.2d 377 (Fla. App. 1959).

In *City of North Miami v. Benjamin*, 128 So.2d 753 (Fla. App. 1961), set-back provisions of an ordinance were held invalid where they would have permitted development of a strip only five feet wide of a lot 250 x 50 feet.

Economic gain to the owner of a single piece of property is not sufficient cause to justify an amendment to the ordinance reclassifying such property. *Cole v. Oka*, 131 So.2d 757 (Fla. App. 1961), *earlier report*, 107 So.2d 45 (Fla. App. 1958).

Whether property is so situated as to justify interference with ownership in order to preserve the aesthetics of the community depends on the testimony and evidence in the case. *City of Daytona Beach v. Abdo*, 118 So.2d 540 (Fla. 1960), *approving* 112 So.2d 398 (Fla. App. 1959).

The owner must first exhaust his administrative remedies where the ordinance is attacked only on the basis of its application to specific property. *Wood v. Twin Lakes Mobile Homes Village, Inc.*, 123 So.2d 738 (Fla. App. 1960).

possession, was repealed in 1961.¹⁴⁸ Otherwise, there was very little development in this field. *Florida Power Corp. v. McNeely*¹⁴⁹ reviewed much of the law on adverse possession and prescription in the process of which it reaffirmed the proposition that the seven-year period applies to adverse possession and that the twenty-year period applies to prescriptive easements, and stated that the rule prohibiting the alienation of land adversely possessed does not apply to land over which the adverse claimant is perfecting an easement only.¹⁵⁰

Adverse possession of the subsurface mineral estate coupled with estoppel were the principal issues in *Lykes Bros., Inc. v. McConnel*.¹⁵¹ In this case a mortgagee purchased land at a defective foreclosure, and later his heirs conveyed the land to a grantee, in which conveyance there was an express reservation of certain mineral rights. It was held that the grantee acquired title to the entire estate by adverse possession since there was no severance of the mineral estate prior to the defective foreclosure, but the grantee in turn was estopped from asserting any title to the mineral estate in derogation of the written deed under which he acquired possession. Thus, his possession inured to the benefit of his grantors. Cases involving disputed boundaries have been previously discussed.¹⁵² The rule¹⁵³ that adverse possession does not run against a remainderman was applied also to an expectancy under the homestead provisions,¹⁵⁴ and the same case held that the twenty-year statute of limitations was not a bar to have a void conveyance set aside, since laches, and not statutes of limitations, bars relief from stale claims in equitable actions.¹⁵⁵

The relationship between section 95.23 (a twenty-year statute of limitations), and section 92.08 of the Florida Statutes^{155a} (requiring copies of instruments recorded twenty years or more to be offered to the opposite party before being introduced in evidence) was explained in *Lefkowitz v. McQuagge*.¹⁵⁶ If the party is relying on section 95.23 to perfect a title recorded for twenty years or more, he need not comply with section 92.08.

148. Fla. Laws 1961, ch. 61-489.

149. 125 So.2d 311 (Fla. App. 1960).

150. Another proposition enunciated was that payment of taxes is not necessary for the acquisition of a prescriptive easement without color of title. *Florida Power Corp. v. McNeely*, 125 So.2d 311 (Fla. App. 1960).

151. 115 So.2d 606 (Fla. App. 1959).

152. See text accompanying notes 46-49 *supra*.

153. The rule is generally followed in Florida; see BOYER, *FLORIDA REAL ESTATE TRANSACTIONS* § 29.20 (1959). See also *Vaughn v. Vaughn*, 119 So.2d 391 (Fla. App. 1960), discussed in text accompanying note 71 *supra*, holding that adverse possession begun before death of the father was not adverse to the claimant's cotenants in remainder.

154. *Reed v. Fain*, 122 So.2d 322 (Fla. App. 1960).

155. *Ibid.* *Accord*, as to laches only being applicable to equitable actions: *Garrett v. Oak Hall Club*, 118 So.2d 633 (Fla. 1960), *earlier report*, 112 So.2d 603 (Fla. App. 1959).

155a. FLA. STAT. §§ 92.08, 95.23 (1961).

156. 122 So.2d 328 (Fla. App. 1960), *cert. denied*, 125 So.2d 875 (Fla. 1960).

Section 92.08 is designed for those situations where the recorded deed is offered to establish the truth of the recitals contained in those instruments.

Dedication

The principal development in this area, relating to a blending of dedication principles with those of easements, has been previously discussed.¹⁵⁷ One of those cases, however, is worthy of additional comment. *Cross v. City of Miami*¹⁵⁸ affirmed the chancellor's finding that certain portions of the disputed strip were owned by the city in fee. Thus, in the particular instance, dedication apparently resulted in the city acquiring a fee rather than an easement, but the result may be justified because the dedicatory language contained no reverter. On the principle of acceptance, the case is more questionable. It cited *Earle v. McCarty*¹⁵⁹ for the proposition that a dedication by deed is accepted when the instrument is accepted. In the instant case, however, the dedication was contained in the language of four plats which did not appear to be equivalent to a deed conveying the fee to the city. It is generally held in Florida that filing a plat constitutes merely an offer to dedicate.¹⁶⁰ Other cases held that conversion of a highway to a limited access facility does not constitute an abandonment of a dedication,¹⁶¹ and that a city has the power to lease a portion of a dedicated park for use as a little league baseball field.¹⁶²

Tax Titles

The few cases involving tax titles reaffirmed or pertained to such established principles as: a tax deed issued for land not subject to taxation is void;¹⁶³ a faulty description in the assessment and tax certificate renders the resulting tax title void;¹⁶⁴ and in a quiet title proceeding a summary judgment is not proper when it appears that an answer might be filed presenting a lawful issue which could affect the sufficiency or validity of the tax deed.¹⁶⁵ The statute stating that a tax deed "shall be prima facie evidence of the regularity of all proceedings"¹⁶⁶ aided the court in upholding a tax deed in *Lewis v. Carlisle*.¹⁶⁷ In this case the taxes were assessed in

157. See text accompanying notes 116-21 *supra*.

158. 121 So.2d 664 (Fla. App. 1960).

159. 70 So.2d 314 (Fla. 1954).

160. See note 117 *supra*.

161. Florida State Turnpike Authority v. Anhoco Corp., 107 So.2d 51 (Fla. App. 1958), *modified*, 116 So.2d 8 (Fla. 1959), 117 So.2d 15, 16 (Fla. App. 1959); connected case, Anhoco Corp. v. Dade County, 127 So.2d 464 (Fla. App. 1961).

162. Florida Little Major League Ass'n. v. Gulfport Lion's Little League, Inc., 127 So.2d 707 (Fla. App. 1961).

163. Trustees of the Internal Improvement Fund v. Lobeau, 127 So.2d 98 (Fla. 1961), *approving* 118 So.2d 226 (Fla. App. 1960). The case, however, applied estoppel against the state. See text following note 51 *supra*.

164. Allison v. Rogero, 112 So.2d 578 (Fla. App. 1959), *cert. denied*, 115 So.2d 415 (Fla. 1959).

165. Lehew v. Larsen, 124 So.2d 872 (Fla. App. 1960).

166. FLA. STAT. § 194.24 (1961).

167. 118 So.2d 662 (Fla. App. 1960). The deed involved was apparently an

the name of "P. A. Robinson heirs," whereas title was actually vested in the heirs of Philip A. Robertson. The chancellor found that at least four of the Robertson heirs had notice of the sale before it took place. The chancellor's decree upholding the tax deed was affirmed, the court also citing the statute providing that "an erroneous statement of the name of the owner on the assessment roll shall not invalidate the assessment."¹⁶⁸

Eminent Domain: Permissible Exercise of Power

The exercise of the power of eminent domain for the accomplishment of an urban renewal project was upheld in *Grubstein v. Urban Renewal Agency*.¹⁶⁹ The court stated that the fact that the agency may sell or lease project area property to private interests after the land has been cleared does not render the condemnation one for a private rather than a public purpose. The earlier case of *Adams v. Housing Authority*¹⁷⁰ was distinguished by the majority of the court on the ground that only blighted areas were being cleared in that case, whereas slum areas were being cleared in the instant case. It was also stated that the fact that a few good houses or property in the district will be taken is immaterial since otherwise the whole purpose would be thwarted. In another case¹⁷¹ it was held that a condemnation proceeding ancillary to the construction of a limited access facility as a part of an inter-state highway program, prior to the time that funds had been allocated for construction and before detailed plans had been completed, did not constitute an abuse of discretion or disclose that no public purpose existed.

Procedure and Damages

Quite a few condemnation cases during the period of this survey involved questions of procedure and damages. In *Poe v. State Road Dept.*,¹⁷² it was held that the judgment in a prior condemnation action, wherein the landowner had claimed damages to his remaining land because of intermittent flooding, precluded any subsequent action to require condemnation or to recover damages based on the theory that the intermittent flooding constituted a taking of the land. It was held that damage to remaining land resulting from obstructing or diverting the flow of surface waters, but which did not amount to a permanent deprivation to the owner of the use of the remaining land, is a consequential damage and must be recovered, if at all, in the original condemnation proceedings. In another

administrative tax deed.

168. FLA. STAT. § 193.21 (1961), providing also for assessment by the assessors when no return is made by the taxpayer.

169. 115 So.2d 745 (Fla. 1959).

170. 60 So.2d 663 (Fla. 1952).

171. *State Road Dep't v. Southland, Inc.*, 117 So.2d 512 (Fla. App. 1960).

172. 127 So.2d 898 (Fla. App. 1961).

case¹⁷³ it was held, quite properly it would seem, that where the public had acquired a prescriptive easement for highway purposes over a designated strip of land, the fee owner thereafter was not entitled to any compensation so far as the surface use was concerned.

In two cases¹⁷⁴ it was held that the proper procedure for assessing damages, when two or more persons have outstanding interests in the condemned land, is for the jury to assess damages only for the total value of the land taken. After this amount is determined, it is then within the province of the court to apportion the award among the several interest holders. Thus, it is improper for the jury to assess separately the respective interests of the landlord, tenant, lienor or other person. The right to opening and closing arguments when the only question in issue is damages was determined in *Parker v. Armstrong*.¹⁷⁵ It was held that the condemnor has the duty to go forward with the evidence of the value of the property taken, and having this burden, is entitled to open and close. The court recognized that there is a conflict of authority in the jurisdictions,¹⁷⁶ but believed that it was following accepted practice in Florida.

In other cases, it was held that the landowner was not entitled to the "work product" (which pertains to the details of arriving at a valuation) of the condemnor;¹⁷⁷ that a trial judge was authorized to grant a new trial when he was shocked by the amount of the verdict which was less than the estimate of just compensation filed by the petitioner with his declaration of taking;¹⁷⁸ that the landowner is entitled to withdraw the amount deposited by the petitioner only up to the time of judgment and not thereafter even if he makes the withdrawal before appeal;¹⁷⁹ that in converting a regular highway to a limited access facility, the condemnor must pay for the loss of access since it is being destroyed and not regulated;¹⁸⁰ that damages are not recoverable for change in grade or other alteration in an existing street;¹⁸¹

173. *Tideway Corp. v. State Road Dep't*, 118 So.2d 595 (Fla. App. 1960).

174. *Parker v. Armstrong*, 125 So.2d 138 (Fla. App. 1960); *Rich v. Harper Neon Co.*, 124 So.2d 750 (Fla. App. 1960). See also Comment, 16 U. MIAMI L. REV. 102 (1961).

175. *Parker v. Armstrong*, *supra* note 174.

176. See *Parker v. Armstrong*, 125 So.2d 138, 139 (Fla. App. 1960), citing Annot., 73 A.L.R.2d 618 (1960), for authorities. For support of the contrary position, see Sawyer, *In Trial of Condemnation Cases, Land Owner Should Open and Close*, 34 FLA. B.J. 1061 (1960).

177. *State Road Dep't v. Cline*, 122 So.2d 827 (Fla. App. 1960); *State Road Dep't v. Shell*, 122 So.2d 215 (Fla. App. 1960).

178. *Bennett v. Jacksonville Expressway Authority*, 131 So.2d 740 (Fla. 1961), *quashing* 124 So.2d 307 (Fla. App. 1960).

179. *Woodrow Co. v. Dade County*, 126 So.2d 908 (Fla. App. 1961). The case also held, however, that the county was not entitled to dismiss under FLA. STAT. § 73.14 (1959), because that statute authorizes dismissal only when the owner takes the judgment amount *after* appeal, whereas in the instant case the landowner withdrew the additional funds *before* appeal but *after* judgment.

180. *Florida State Turnpike Authority v. Anhoco Corp.*, 116 So.2d 8 (Fla. 1959), *modifying* 107 So.2d 51 (Fla. App. 1958), *effectuated*, 117 So.2d 15, 16 (Fla. App. 1960). See also *Anhoco Corp. v. Dade County*, 127 So.2d 464 (Fla. App. 1961).

181. *Jacksonville Expressway Authority v. Milford*, 115 So.2d 778 (Fla. App. 1959).

that real estate taxes are a lien as of January 1 and are not pro-ratable;¹⁸² that the statute¹⁸³ allowing damages to an adjacent business is not applicable when the condemnation destroys the business by taking both the business and the land;¹⁸⁴ that a proposed use need not be taken into consideration in awarding damages when conversion to such use has not been sufficiently developed;¹⁸⁵ and in a number of cases small attorney fees were held not so inadequate as to shock the conscience of the court or to require a reversal.¹⁸⁶

VI. MECHANICS' LIENS AND MORTGAGES

Mechanics' Liens: An Assist to Materialmen and Sub-subcontractors

The 1961 legislature amended the Mechanics' Lien Law to provide that a materialman furnishing materials to a subcontractor, and a subcontractor performing services for a subcontractor, are entitled to a lien.¹⁸⁷ This legislation changes the results reached in two decisions,¹⁸⁸ the most recent occurring in 1961.

In 1954, *Richard Store Co. v. Florida Bridge & Iron, Inc.*¹⁸⁹ held that a sub-subcontractor was entitled to no special protection from the owner and was not entitled to a lien. It was pointed out that the owner can get a sworn statement from the contractor, and the contractor can pay the subcontractor, but that the contractor can hardly be responsible for the default of the subcontractor when the contractor fully performs his obligation to the subcontractor and is not in privity with the sub-subcontractor. Thus, denial of the lien was based on both statutory construction and the practicalities of the situation—the difficulty of both the owner and contractor in protecting against defaults of subcontractors and more remote parties participating in the construction. The theory of the *Richard* case was followed in *Gory v. White*,¹⁹⁰ which denied a lien to a supplier furnishing materials to a subcontractor.

182. *Ibid.*

183. FLA. STAT. § 73.10(4) (1961).

184. *Guarria v. State Road Dep't*, 117 So.2d 5 (Fla. App. 1960).

185. *Coral-Glade Co. v. Board of Public Instruction*, 122 So.2d 587 (Fla. App. 1960).

186. *State Road Dep't v. Cox*, 118 So.2d 668 (Fla. App. 1960); *Breitbart v. State Road Dep't*, 116 So.2d 458 (Fla. App. 1959); *Fekany v. State Road Dep't*, 115 So.2d 418 (Fla. App. 1959). Conversely, a verdict for \$1 damages and \$2000 attorney fees was upheld in *Anhoco Corp. v. Dade County*, 127 So.2d 464 (Fla. App. 1961); see also note 180 *supra*. The jury's assessment of damages was upheld and the trial judge's order reducing the amount was held error in *Blinkman v. Dade County*, 115 So.2d 23 (Fla. App. 1959).

187. Fla. Laws 1961, ch. 61-326, creating FLA. STAT. § 84.021 (1961).

188. *Richard Store Co. v. Florida Bridge & Iron, Inc.*, 77 So.2d 632 (Fla. 1954); *Gory v. White*, 129 So.2d 446 (Fla. App. 1961). In *DiCamillo v. Westinghouse Elec. Corp.*, 122 So.2d 499 (Fla. App. 1960), a sub-subcontractor was entitled to recover in a direct action on a contractor's bond under the rationale of a third party beneficiary contract.

189. 77 So.2d 632 (Fla. 1954).

190. 129 So.2d 446 (Fla. App. 1961).

Both of these cases are now changed, and remote parties may perfect a lien against the landowner.¹⁹¹ In enacting the new statute, the legislature was apparently unimpressed with the difficulties of protecting against the defaults of subcontractors. Perhaps, however, the position of the landowner is not substantially worse than before as long as the provisions relating to proper payment¹⁹² are not changed. Apparently, it is only when the owner has notice of pending or actual liens that subsequent payments to the contractor are not proper.¹⁹³ Nevertheless, it is believed that a second look at the underlying philosophy of the Mechanics' Lien Law is in order. Some responsibility as to the reliability of the parties with whom they contract might be imposed on suppliers of materials and other contractors, instead of putting all the risk on the landowner.¹⁹⁴

Proper Payment

The ascertainment of the contract price and the amount of payments properly made were some of the principal difficulties in *Broderick v. Overhead Door Co.*,¹⁹⁵ which applied the statutory rule¹⁹⁶ that the total amount of liens cannot exceed the contract price less the amounts properly paid. The determination of the contract price was difficult because of dispute as to the many extras furnished and the amount to be charged for them.¹⁹⁷ The owners had paid all of the original contract price although there was no sworn statement¹⁹⁸ furnished them as to unpaid lienors. Hence, the court had to ascertain both the new contract price and the amount improv-

191. Note 187 *supra* and accompanying text.

192. Total liens cannot exceed the contract price less the amounts "properly paid." FLA. STAT. § 84.02 (1961). See also *Broderick v. Overhead Door Co.*, 117 So.2d 240 (Fla. App. 1959).

193. FLA. STAT. § 84.05 (1961) defines proper payment. FLA. STAT. § 84.04 (1961) provides for the lienor filing notice of a pending lien on the owner, and also provides (§ 84.04(3)) that the contractor shall provide the owner with a sworn statement concerning the status of payments to lienors before the final payment is due. This section relating to the sworn statement applies only to lienors directly employed by or contracting directly with the contractor. This section was not changed by the 1961 legislation. See also notes 195-99 *infra* as to proper payments.

The case of *Ludwig & Kibbey Enterprises, Inc. v. Cox Steel & Supply, Inc.*, 119 So.2d 58 (Fla. App. 1960), involved progress payments and the waiver of receipt vouchers required by the contract.

194. Materialmen generally are more cognizant of the law and in a better position to protect themselves than the unsuspecting homeowner who often finds that he has paid a contractor for repairs or alterations in full, and then has to pay again for all the materials used. See Krasny, *The Florida Mechanics' Lien Act: Interpretation and Analysis of Selected Provisions*, 14 U. MIAMI L. REV. 73, 93-98 (1959), for policy discussion and a suggested reform.

195. 117 So.2d 240 (Fla. App. 1959).

196. FLA. STAT. § 84.02 (1961).

197. That the written contract provides against alteration except by an instrument in writing does not preclude evidence of an oral modification for extras and equipment rental where there is no question but that the parties had accepted and acted on such modification. *Larnel Builders, Inc. v. Nicholas*, 123 So.2d 284 (Fla. App. 1960).

198. The contractor is not entitled to a lien while in default as to the sworn statement. *Mermell v. McKinley*, 126 So.2d 902 (Fla. App. 1961). See also note 193 *supra*. See, however, note 213 *infra*.

erly paid in order to ascertain the allowable amount of liens. In disposing of the litigation, the court also reasserted established principles relative to liens of contractors. For example, the contractor is entitled to no lien in excess of the contract price as it is finally calculated, and the contractor, since he deals directly with the owner, may perfect and prosecute his lien at any time within a year after final payment is due.¹⁹⁹

Lien Against Lessor: Conditional Sales

By statute²⁰⁰ the lessor's interest is subject to mechanics' liens when improvements are made in accordance with a contract between the lessor and lessee. Hence, a provision in a lease to the effect that no lien shall be superior to the lessor's interest is contrary to the statutory policy and is ineffective.²⁰¹ Further, as long as construction takes place on the land, there is an improvement within the meaning of the Mechanics' Lien Law, and it is immaterial whether or not the construction is advantageous to the land.²⁰²

The above proposition as to the relative advantage of the "improvement" was injected in a case involving the installation of a prefabricated diner type of restaurant.²⁰³ The diner was sold on a conditional sales contract, title remaining in the seller until he was fully paid. The court found that the lienor had knowledge of the retained title contract, had acquiesced therein, and hence held that he had no lien against the diner.²⁰⁴ The lienor was entitled to a lien against the lessor, however, for the installation of the cement block auxiliary building, walk-in ice box, and other "improvements."

Partial Release

The validity of a partial release of lien was apparently established by the case of *Ideal Roofing & Sheet Metal Works, Inc. v. Katzentine*.²⁰⁵ Prior to this decision there were two cases²⁰⁶ which caused some concern in this regard, but in both cases the language of the release itself indicated

199. *Broderick v. Overhead Door Co.*, 117 So.2d 240 (Fla. App. 1959). When the contract is made directly with the owner, or through his agent, neither the cautionary notice nor the record lien notice is necessary as a prerequisite to enforce the lien. *Buckingham Properties, Inc. v. E. R. Anderson & Co.*, 125 So.2d 756 (Fla. App. 1961).

200. FLA. STAT. § 84.03(2) (1961). The subjection of the lessor's interest to a mechanics' lien has been the subject of frequent litigation. See the cases discussed in Boyer, Ankus and Friedman, *Survey of Real Property Law*, 12 U. MIAMI L. REV. 499, 524 (1958), and Boyer, *Real Property Law*, 14 U. MIAMI L. REV. 638, 677 (1960).

201. *Ideal Roofing & Sheet Metal Works, Inc. v. Katzentine*, 127 So.2d 116 (Fla. App. 1961).

202. *E. & E. Elec. Co. v. Gold Coast 72nd St. Diner, Inc.*, 116 So.2d 660 (Fla. App. 1959).

203. *Ibid.*

204. *Ibid.*

205. 127 So.2d 116 (Fla. App. 1961).

206. *Jowein, Inc. v. Sudy Realty Corp.*, 73 So.2d 227 (Fla. 1954); *Westinghouse Elec. Supply Co. v. Levin*, 115 So.2d 423 (Fla. App. 1959).

a general release, and hence the lienor was denied his lien when he later asserted it. In *Ideal Roofing*²⁰⁷ it was pointed out that the fact that the word "Partial" was inserted in the caption of the instrument before the words "Release of Lien" was not controlling, and that the instruments in the other cases were construed as general releases. It should be noted, however, that the contents of the release were not before the court in *Ideal Roofing*, the case having arisen on a motion to dismiss. The case does suggest, however, that if the body of the instrument clearly indicates an intent to release a lien only for work done or materials furnished up to the time of release, it will be given effect accordingly and not as a general release.

Miscellaneous

Other cases involving mechanics' liens held: when an agent of the owner contracts for the work, there is direct privity between the lienor and owner so that it is not necessary to file either a cautionary or a record lien notice in order to enforce a lien;²⁰⁸ that an agent who contracts in his own name nevertheless obligates the owner and subjects his realty to a lien, because an undisclosed principal may be held liable for the acts of his agent;²⁰⁹ that an equitable interest, when the legal title is held in trust, may be subject to a mechanics' lien since the word "owner" includes an owner in equity as well as in law;²¹⁰ that an owner is not entitled to bond premium costs involved in transferring the lien to security even if the owner is ultimately successful;²¹¹ that an assignee of a lien may maintain the suit although the claim of lien was filed by the assignor;²¹² and that although a contractor does not supply a sworn statement, if he proves that subcontractors, materialmen and laborers have in fact been paid, he may have a lien against the owner.²¹³

Mortgages: Future Advances

An important case²¹⁴ of first impression, involving the validity of a mortgage executed to secure future advances over a homestead status subsequently attaching, has already been discussed.²¹⁵ Similarly, the amendment to the statute²¹⁶ concerning future advances has also been noted.²¹⁷

207. 127 So.2d 116 (Fla. App. 1961).

208. *Buckingham Properties, Inc. v. E. R. Anderson & Co.*, 125 So.2d 756 (Fla. App. 1961). See also note 199 *supra*.

209. *Armstrong v. Blackadar*, 118 So.2d 854 (Fla. App. 1960).

210. *Amatrudi v. Blake*, 117 So.2d 416 (Fla. App. 1960).

211. *In re Carol Florida Corp.*, 118 So.2d 837 (Fla. App. 1960).

212. *Westinghouse Elec. Corp. v. Carol Florida Corp.*, 122 So.2d 795 (Fla. App. 1960).

213. *Belcher v. Russell*, 128 So.2d 623 (Fla. App. 1961). See also note 198 *supra* as to the sworn statement.

214. *Simpson v. Simpson*, 123 So.2d 289 (Fla. App. 1960).

215. See "The Tale of How Mother and Son Outwitted the Bride," in text accompanying note 91 *supra*.

216. FLA. STAT. § 697.04 (1961).

217. Note 94 *supra*.

Priorities, or Who's on First

The case of *National Title Ins. Co. v. Mercury Builders, Inc.*²¹⁸ involved the priority of a purchase money mortgage, mechanics' liens, and a construction mortgage, with the order of precedence being determined in the sequence stated. In this case the fee owner conveyed to a purchaser and took back a purchase money mortgage. The deed and mortgage were recorded a week later, with the construction mortgage following three days thereafter. Apparently visible construction work began prior to the recording of any of these instruments, thus giving rise to the claim of priority by the mechanics' lienors.²¹⁹

Although there was reference to a subordination agreement in the option to purchase and the purchase money mortgage, it was concluded that there was insufficient evidence to establish that the vendor had in fact subordinated his purchase money mortgage to the construction mortgage. Hence, the purchase money mortgage obtained priority over the later construction mortgage.

The purchase money mortgage was also held superior to the mechanics' liens. This was based on the general principle that a purchase money mortgage, executed simultaneously with the conveyance, takes precedence over liens arising through the mortgagor, although the latter be prior in point of time. As applied to mechanics' liens, this doctrine was limited to those instances where the lien was acquired at the instance of the purchaser prior to the execution of the mortgage and without the acquiescence of the vendor. It was also found that the lienors could not have been misled by the delay in recording the deed and purchase money mortgage since until then the recorded fee title was in the vendor-mortgagee.²²⁰

Other priority cases involved the principle that possession inconsistent with record title constitutes inquiry notice,²²¹ and that forbearance for a definite period from proceeding to collect a note for a pre-existing indebtedness is sufficient consideration for the execution of a mortgage to entitle the lender to the protection of the recording act.²²²

Junior Lienor: Rights When Omitted From Foreclosure

The rights of a junior incumbrancer who is omitted in foreclosure

218. 124 So.2d 132 (Fla. App. 1960).

219. Mechanics' liens when perfected take effect as of the visible commencement of operations except where there has been an interruption and subsequent resumption of construction. FLA. STAT. § 84.03 (1961).

220. *National Title Ins. Corp. v. Mercury Builders, Inc.*, 124 So.2d 132 (Fla. App. 1960).

221. *Lee County Bank v. Metropolitan Life Ins. Co.*, 126 So.2d 589 (Fla. App. 1961). See "The Case of the Bank Which Looked and Waited," in text accompanying note 57 *supra*.

222. *Manufacturers & Traders Trust Co. v. First Nat'l Bank*, 113 So.2d 869 (Fla. App. 1959).

proceedings were briefly delineated, but not too clearly, in the factually interesting case of *Marks Bros. Paving Co. v. Ouellet*.²²³ *ME*, the holder of a second and third mortgage, foreclosed without joining *L*, a mechanics' lienor whose lien was inferior to the second mortgage, but superior to the third. *ME* purchased at the foreclosure, but he did not go into occupancy.

Thereafter *L*, the omitted lienor, filed a foreclosure, obtained a certificate of title and took possession. In this foreclosure *L* joined the record owner, but not *ME* as the holder of the third mortgage which was inferior to *L*'s lien.

Since the omission of a junior lienor in a foreclosure suit leaves that party in the same position as though no foreclosure had occurred,²²⁴ *L*'s lien was not affected by *ME*'s foreclosure, and *L* was properly exercising one of his remedies in bringing the foreclosure suit. The effect of *L*'s foreclosure was said to have divested *ME* of his title acquired through foreclosure, but not of his third mortgage lien, since *ME* was not joined as holder of an inferior lien. Inherent in the decision is the proposition that there was no merger of *ME*'s third mortgage with his second mortgage and title procured from the foreclosure.²²⁵

The opinion, however, went on to say that upon a full disclosure of the interests of all the parties, *ME*, as the original holder of the superior lien that had been foreclosed, should be entitled to prevail as between the two foreclosure sale purchasers. The court also held that *L* was under no duty to account for the rents and profits realized during his possession, since he took possession as a title holder and not as a mortgagee (or lienee) in possession.²²⁶ The case was remanded to allow or enforce redemption by junior incumbrancers not joined in the foreclosures.²²⁷

The Case of the Amorous Mortgagee

The interesting defense of merger resulting from the common law unity of husband and wife was rejected in the case of *Pinkas v. Fiveash*.²²⁸ Subsequent to the execution of the mortgage, the mortgagor married the mortgagee. Afterwards the parties were divorced, the land was conveyed, and the mortgagee brought foreclosure proceedings.

In denying that the marriage of the mortgagor and mortgagee resulted

223. 124 So.2d 514 (Fla. App. 1960).

224. *Ibid*; BOYER, FLORIDA REAL ESTATE TRANSACTIONS §§ 32.20[3], (8) (1959).

225. On the doctrine of merger generally in mortgage transactions, see BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 32.19[4] (1959).

226. See generally 3 POWELL, REAL PROPERTY ¶ 454 (1952), for the concept and attendant obligations of a mortgagee in possession. A mortgagee in possession in Florida is not entitled to compensation for management of the estate in the absence of a special agreement for this charge. *Brooks v. Adams*, 115 So.2d 578 (Fla. App. 1959).

227. *Marks Bros. Paving Co. v. Ouellet*, 124 So.2d 514 (Fla. App. 1960).

228. 126 So.2d 910 (Fla. App. 1961).

in such a unity of the parties as to extinguish the mortgage, the court noted Florida constitutional²²⁹ and statutory²³⁰ provisions giving the wife a right to her separate property. These provisions were held to prevail over the common law theory that the husband and wife were one insofar as property is concerned. Thus, the mortgage was not satisfied by merger.²³¹

Acceleration, Default and Miscellaneous

Acceleration may be refused when there are substantial equities which make it unconscionable.²³² Thus, in *Leiberbaum v. Surfcomber Hotel Corp.*²³³ it was held that when the mortgagee could have secured payment by simple demand, and his conduct was such as to take advantage of an oversight in an effort to gain possession of the mortgaged premises, acceleration was refused. Likewise, waiver or estoppel may preclude the mortgagee from accelerating,²³⁴ and general equitable principles may be invoked to relieve a mortgagor from acceleration of the entire debt.²³⁵

In *Kling v. Gladstone*,²³⁶ the mortgage provided for annual payments of interest, but the principal was to be paid only out of half of the net proceeds from a citrus grove. It was held that the mortgagee was entitled to accelerate the mortgage on failure of the mortgagor to pay interest, but since there was no binding obligation to pay principal, or a showing of net proceeds, a decree was affirmed ordering the mortgagors to pay the defaulted interest within a stated period, or otherwise the entire sum should become due and the whole mortgage foreclosed.

Cases involving usury held that it is an affirmative defense and not a counterclaim,²³⁷ and that the pleading must state facts with such particularity as the circumstances permit, and that the intent to extract an unlawful rate of interest is an essential element.²³⁸ A transaction is not made usurious by the fact that the broker or intermediary charges the borrower a heavy commission when the intermediary has no connection with the lender.²³⁹ When the broker is the agent of the lender, however, then his commission, or portions of it returned to the lender (although under the guise of inspection fees), is added to the interest charge to determine usury.²⁴⁰ A delay in the disbursement of funds by the lender is not necessarily determinative

229. FLA. CONST. art. XI, § 1.

230. *I.e.*, FLA. STAT. §§ 708.02, .08, .09 (1959).

231. *Pinkas v. Fiveash*, 126 So.2d 910 (Fla. App. 1961).

232. *Leiberbaum v. Surfcomber Hotel Corp.*, 122 So.2d 28 (Fla. App. 1960).

233. *Ibid.*

234. *Harrell v. Lombard*, 122 So.2d 625 (Fla. App. 1960), the waiver or estoppel (not clearly differentiated), being based on correspondence and negotiations.

235. *Groner-Youngerman, Inc. v. Denison*, 117 So.2d 210 (Fla. App. 1959).

236. 125 So.2d 912 (Fla. App. 1961).

237. *American Nat'l Growers Corp. v. Harris*, 120 So.2d 212 (Fla. App. 1960).

238. *Ibid.*

239. *Cutri Enterprises, Inc. v. Pan Am. Bank*, 115 So.2d 592 (Fla. App. 1959).

240. *Williamson v. Clark*, 120 So.2d 637 (Fla. App. 1960).

of usury,²⁴¹ but this delay when coupled with other factors may be influential in a finding of usury.²⁴² When interest is intentionally exacted in excess of twenty-five per cent, both interest and principal are forfeited.²⁴³

The party complaining of a deficiency decree on appeal has the burden of showing a clear abuse of discretion,²⁴⁴ and that the land was sold at a substantial profit eight months later does not of itself show inadequacy of price.²⁴⁵ The proper method of service of process in a mortgage foreclosure, when one of the mortgagors was custodian of the other mortgagor who was incompetent, was delineated in *Brown v. Mitchell*.²⁴⁶ The statute governing service of process^{246a} was strictly construed and the court held service was not proper if summonses were not served severally on the incompetent and his custodian. In 1959 statute²⁴⁷ relating to balloon mortgages was amended in 1961 to prescribe further the legend to be printed or stamped on the face of the mortgage.²⁴⁸

VII. LANDLORD AND TENANT

The Writing Requirement: Parol Modifications

A Florida statute requires a lease to be in writing or else a statutory tenancy at will results.²⁴⁹ Similarly, a holding over without a written agreement results in a tenancy at sufferance only.²⁵⁰ These statutes, however, do not prevent the intervention of equitable or other principles to justify relief in particular cases. Thus, in *S. Lemel, Inc. v. 27th Ave. Farmers Mkt. Inc.*,²⁵¹ it was held that equity would enforce specifically an oral agreement for a new lease on the grounds of part performance. It was stated that holding over under an oral agreement for a new lease or renewal, when there is possession by the tenant plus the payment and acceptance of rent, and the terms of the agreed upon lease are definite, constitutes sufficient grounds for equity to specifically enforce the agreement. Improvements by the lessee under these circumstances are not necessary, although these improvements add to his balance of the equities.²⁵²

241. *Shaffran v. Holness*, 93 So.2d 94 (Fla. 1957), remanded and second appeal reported in 102 So.2d 35 (Fla. App. 1958).

242. *Williamson v. Clark*, 120 So.2d 637 (Fla. App. 1960).

243. *Ibid.*

244. *Tendler v. Gottlieb*, 126 So.2d 308 (Fla. App. 1961).

245. *Ibid.*

246. 119 So.2d 385 (Fla. 1960). See also the earlier report, 114 So.2d 178 (Fla. App. 1959), and the later one permitting an amended return, 128 So.2d 8 (Fla. App. 1961).

246a. FLA. STAT. § 47.25 (1961).

247. Fla. Laws 1959, ch. 59-356.

248. Fla. Laws 1961, ch. 61-472.

249. FLA. STAT. § 83.01 (1961).

250. FLA. STAT. § 83.04 (1961).

251. 126 So.2d 167 (Fla. App. 1961).

252. *Ibid.*

Similarly, specific performance of an option to renew may be granted although the original lease is not signed, when there is adequate proof that the parties agreed on all the essential terms.²⁵³ Specific performance was granted in this case although the action was brought by the lessee individually, whereas the lease had been taken in the name of one of her corporate entities. The court stated that when the parties had been unconcerned about the corporate identity of the lessee, this factor was immaterial.

Doctrines of waiver or estoppel may preclude a party from objecting to parol evidence as varying the terms of a written lease. Thus, in an action for rent,²⁵⁴ the tenants were estopped, although the lease had been defectively executed, when the tenants took possession of an apartment and then on request moved to another apartment on the same terms and conditions. Similarly, if a party makes no objection in the trial court as to the parol evidence, he cannot complain in an appellate court.²⁵⁵

Conditions of the Premises: Contractual Provisions

In order to recover for breach of a lease covenant, the complaining party must prove damages. Thus, when the plaintiffs relied on elimination of a door as breach of the covenant of quiet enjoyment, but could show no losses or damages sustained, a summary judgment for the landlord was affirmed.²⁵⁶ The same case reached the same result of no recovery, for breach of a covenant granting the exclusive right to sell beer in a shopping center, because there was no showing of losses or damages.²⁵⁷

In *Zero Food Storage, Inc. v. Henderson's Sea Food, Inc.*,²⁵⁸ the lease provided that the tenant should keep the interior, and that the lessor should keep the exterior, in good repair. It was held that the duty as to the septic tank, which was located outside, but connected with plumbing inside, fell on the lessor. When the lessor had made certain oral warranties as to the structural strength of the building, knowing them to be false, and the tenant was not likely to discover this weakness from a visual inspection, the lease was cancelled when the building was inadequate for the lessee's contemplated use.²⁵⁹

A holding over, except as to the duration of the term, is normally subject to all the terms and conditions of the original lease. This principle was

253. *Fontainebleau Hotel Corp. v. Crossman*, 286 F.2d 926 (5th Cir. 1961), *earlier report*, 273 F.2d 720 (5th Cir. 1959).

254. *Lipkin v. Bonita Garden Apartments, Inc.*, 122 So.2d 623 (Fla. App. 1960), *cert. denied*, 125 So.2d 878 (Fla. 1960).

255. *Frank v. Pioneer Metals, Inc.*, 121 So.2d 685 (Fla. App. 1960), *cert. denied*, 123 So.2d 676 (Fla. 1960).

256. *Duchaine v. Grosco Realty, Inc.*, 121 So.2d 679 (Fla. App. 1960).

257. *Ibid.*

258. 121 So.2d 462 (Fla. App. 1960), *appeal dismissed*, 125 So.2d 875 (Fla. 1960).

259. *Frank v. Pioneer Metals, Inc.*, 121 So.2d 685 (Fla. App. 1960), *cert. denied*, 123 So.2d 676 (Fla. 1960).

applied in *Wingert v. Prince*,²⁶⁰ in which there was a lengthy holdover and the tenant originally had the right to remove improvements erected by him. The land was condemned, and it was held that the tenant, in accordance with the terms of the original lease, was entitled to the value of the improvements.

Termination

For a leasehold to be terminated by merger, the fee and leasehold must be united in the same person, at the same time, and in the same right. Thus, when a trustee acquires both interests, but for different beneficiaries, there is no termination by merger.²⁶¹

Liquidated Damages; Acceleration

In *Platt v. Mannheimer*,²⁶² the majority of the court, following assertions in the first report of *Kanter v. Safran*,²⁶³ apparently²⁶⁴ allowed the landlord to recover past due rents, taxes and insurance, because of their ascertainable characteristics, in addition to the liquidated damages specified in the lease. The dissenting opinion²⁶⁵ thought that the *Kanter* case was not controlling as to rents and taxes since a penalty was involved in that case, whereas both parties agreed that in the instant case the clause under dispute was a valid liquidated damage provision. It is interesting to note that the liquidated damages in question consisted of an improvement erected by the lessee and that no additional security or deposit was involved.

*Willscott, Inc. v. Ullman*²⁶⁶ construed the acceleration clause in issue as accelerating only the next month's rent and not the entire balance to become due during the remainder of the term.

Remedies of the Landlord

In a distress proceeding, when the amount demanded is in good faith and within the court's jurisdiction, the court does not lose jurisdiction if it determines that a lesser amount is owing than its minimum jurisdictional requirement.²⁶⁷ The court under these circumstances is authorized to render judgment for the amount due.

260. 123 So.2d 277 (Fla. App. 1960).

261. *Whiteside v. Sherman*, 122 So.2d 799 (Fla. App. 1960).

262. 124 So.2d 503 (Fla. App. 1960).

263. 68 So.2d 553 (Fla. 1953); subsequent decisions are found in 82 So.2d 508 (Fla. 1955); 99 So.2d 706 (Fla. 1958).

264. The majority simply affirmed the case on the basis of *Kanter v. Safran*, 68 So.2d 553 (Fla. 1953). It is only from the dissenting opinion that one gets an inference of the issues and basis of decision.

265. *Platt v. Mannheimer*, 124 So.2d 503, 504 (Fla. App. 1960).

266. 117 So.2d 856 (Fla. App. 1960).

267. *Frank v. Pioneer Metals, Inc.*, 121 So.2d 685 (Fla. App. 1960), *cert. denied*,

Summary Eviction; Legislation

The two Florida statutes²⁶⁸ relating to summary eviction proceedings were amended to provide that the attorney for the landlord may execute a petition for the removal of a delinquent tenant.²⁶⁹ This statute is not likely to affect the quite technical, and probably nonsensical, result of *Kagan v. Blue Ocean Villas, Inc.*,²⁷⁰ because the legislation applies only to the filing of the petition and not to the prosecution of an appeal. In the *Kagan* case the appeal was dismissed because the *party appealing* did not make the good faith oath required by the statute, but instead, the affidavit was executed by his attorney. The result can be justified, of course, on the doctrine of strict construction, but how strict should one be?²⁷¹

Another rather technical construction of the statutes applicable to appeals is found in *Youngberg v. Chatlos*.²⁷² In this case it was determined that the time for appeal, when the suit is in the county court, runs from the entry of final judgment and is not stayed or tolled by a motion for new trial or motion to vacate. The time limit for appeal from this court is ten days,²⁷³ but it is only two days from the county judge's court.²⁷⁴ However, by statute, the time limit for appeal from the county judge's court may run from the denial of a motion for a new trial.²⁷⁵ The *Youngberg* case also held that appeal is the only method of obtaining review of an eviction proceeding from the county court; certiorari is not available.²⁷⁶

123 So.2d 676 (Fla. 1960); *Willscott, Inc. v. Ullman*, 117 So.2d 856 (Fla. App. 1960).

268. FLA. STAT. §§ 83.21, 28 (1961).

269. Fla. Laws 1961, ch. 61-318.

270. 118 So.2d 64 (Fla. App. 1960), *appeal dismissed*, 122 So.2d 405 (Fla. 1960).

271. See the argument of the dissenting judge in *Kagan v. Blue Ocean Villas, Inc.*, 118 So.2d 64, 66 (Fla. App. 1960), contending that the decision is an unreasonable abridgement of the constitutional *right* to appeal as provided in FLA. CONST. art. V, § 5(3).

272. 117 So.2d 861 (Fla. App. 1960).

273. FLA. STAT. § 83.38 (1961). This statute actually refers to review by writ of error, whereas the statute concerning review of the proceedings from the county judge's court refers to it as an appeal. See FLA. STAT. § 83.27 (1961).

274. FLA. STAT. § 83.27 (1961).

275. *Ibid.*

276. *Youngberg v. Chatlos*, 117 So.2d 861 (Fla. App. 1960).