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REAL PROPERTY

RALPH E. BOYER*

INTRODUCTION

The enactment of legislation limiting the duration of reverter and forfeiture provisions in conveyances of real property to a period of twenty-one years,¹ the passage of a new and more detailed mortgage foreclosure procedure,² the enactment of a new curative act,³ and the amendment of dower,⁴ mechanics' lien,⁵ statutory easement,⁶ and eminent domain statutes⁷ highlighted legislative changes during the past two years. The determination of the effect of homicide on the estate by the entirety,⁸ the invalidation of the 1951 statute requiring a year's residence for eligibility for homestead real property tax exemption,⁹ and a plethora of decisions involving such matters as the Statute of Uses,¹⁰ Rule in Shelley's Case,¹¹ liquidated damage provisions in contracts for the sale of real property, dower, delivery of deeds, dedication, adverse possession, and many others, characterized judicial developments.¹² Quantitatively, of course, the judicial activity was the more pronounced.

The material for this particular survey is divided into six main topics:

- I. Vendor and Purchaser
- II. Deeds.
- III. Estates, Dower, Homestead, and Future Interests
- IV. Mortgages and Liens
- V. Special Titles
- VI. Rights in Land

Legislative changes are not discussed collectively as a separate topic but are integrated into the case discussion of the particular subject matter. Such legislative changes, however, where they occur, are indicated in the subheadings, as, for example, *Mortgages: Legislation*. Hope is expressed that the generous use of such headings and subheadings will provide an easy access to the subject matter.

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1. FLA. STAT. § 689.18 (1951).
2. Fla. Laws 1953, c. 28093, amendatory of FLA. STAT. § 102.02 (1951).
3. Fla. Laws 1953, c. 28208.
4. Fla. Laws 1953, c. 28222, amendatory of FLA. STAT. § 731.34 (1951).
5. Fla. Laws 1953, c. 28243, amendatory of FLA. STAT. § 84.05 (1951).
6. Fla. Laws 1953, c. 28070, amendatory of FLA. STAT. § 104.01 *et seq.* (1951).
7. Fla. Laws 1951, c. 26921, amendatory of FLA. STAT. §§ 74.01, 74.03, 74.09 and 74.15 (1949). Fla. Laws 1953, c. 28282, amendatory of FLA. STAT. 73.04 (1951).
8. Hogan v. Martin, 52 So.2d 806 (Fla. 1951); Ashwood v. Patterson, 49 So.2d 848 (Fla. 1951).
9. Sparkman v. State, 58 So.2d 431 (Fla. 1952).
10. McGriff v. McGill, 62 So.2d 28 (Fla. 1952).
11. National Turpentine and Pulpwood Corp. v. Mills, 57 So.2d 838 (Fla. 1952).
12. See *infra* under proper headings.

I. VENDOR AND PURCHASER

Suits for the enforcement of liquidated damage provisions, specific performance of oral contracts to convey and devise, and numerous litigations involving waiver, estoppel, rescission, and other aspects of contracts involving the sale of real estate were considered by the Supreme Court during the past two years.

Liquidated damages.—*Beatty v. Flannery*,¹³ the earliest of three cases involving a liquidated damage provision, strictly enforced the contract as written and denied any relief to the defaulting purchaser. This was a suit by a defaulting vendee against a real estate broker to recover the earnest money paid on account of the purchase price. The down payment was \$3,000.00 or ten percent of a total price of \$30,000.00. The court found that the vendee was bound to perform because the title was merchantable, and then asserted: "It is well settled that, even in the absence of such a forfeiture provision, a vendee in default is not entitled to recover from the vendor money paid in part performance of an executory contract."¹⁴ From this principle the court concluded that an express contract provision to the same effect would not change the monies into penalties and forfeitures so as to make the defendant allege and prove actual damages. The court recognized exceptions to this general rule in cases of fraud or fortuitous misfortunes suffered by the vendee which would give the vendor a benefit shocking to the court's conscience, but found no basis for applying an exception in this situation. The earlier case of *Pembroke v. Caudill*¹⁵ was distinguished on the basis that in that case the vendor was seeking to recover from the vendee the amount stipulated to be liquidated damages, whereas in the instant case the money so stipulated had already been paid to the non-defaulting vendor. That this permits the avoidance of the first rule by the application of the second is conceded, but that it changes the equities of the parties is not apparent.

The second case in the series, *Paradis v. Second Avenue Used Car Company*,¹⁶ reached an exactly contrary result on facts which were not noticeably distinguishable. Here the earnest money was \$4,000 with the total price being undisclosed. The action was by the purchaser for rescission with the vendors seeking to retain the down payment as liquidated damages according to the contract. The court, apparently concluding that there was no justifiable ground for rescission, allowed the vendee to get his money back, but without interest, saying that a provision for liquidated damages or a penalty is not conclusive but is a question of law

13. 49 So.2d 81 (Fla. 1950).

14. *Id.* at 82. The rights of a defaulting vendee were the subject of a recent note in 55 W. VA. L.Q. 291 (1953). See also Corbin, *Right of Defaulting Vendee to the Restitution of Installments Paid*, 40 YALE L.J. 1013 (1931).

15. 160 Fla. 948, 37 So.2d 538 (1948).

16. 61 So.2d 919 (Fla. 1952).

to be determined by the court. They cited the case of *Pembroke v. Caudill*¹⁷ which two years earlier was distinguished in the *Beatty*¹⁸ case, *supra*. It was stated that the burden was on the vendors to prove damages suffered for the breach of contract and that they could not justify the retention of the deposit on the literal terms of the contract without showing damages or some equity on their part.

The third case involving the liquidated damage question was *Haas v. Crisp Realty Company*.¹⁹ In this case some relief was granted to the defaulting purchaser but the court reverted to the rule of the *Beatty*²⁰ case. Here \$6,050.00 was paid toward a total price of \$15,500.00, the balance to be obtained from an F.H.A. mortgage. The purchasers were unable to qualify for the mortgage and the relationship between the parties rapidly deteriorated until the purchasers brought an action for rescission based on fraud. After concluding that the purchasers were not entitled to rescind, the court reversed the lower decision authorizing the retention of the entire down payment. It stated that under these facts the deposit must be construed as a penalty rather than valid liquidated damages. The size of the deposit plus the fact that it was fixed, not by contemplation of a just compensation for a breach but by reference to a maximum mortgage commitment, led to this conclusion.²¹ The court approved the rule of the *Beatty*²² case to the effect that a purchaser in default is not entitled to recover money paid his vendor but pondered whether the instant case merited application of the unjust enrichment exception to that rule.²³ If the purchasers' default was not wilful but only a result of her inability to qualify for the mortgage, the retention of this large amount by the vendor might well be shocking to the conscience of the court.

The tenor of these three cases suggest that a provision for the retention of payments as liquidated damages does not materially add to the rights of the vendor. The cases are in accord on the proposition that such a provision is not determinative but that the court, as a question of law, will decide whether the payments are liquidated damages or a penalty. This seems just and equitable and favorable to the vendee, but the essence of the rule is circumvented by the more vicious one that a vendee in default cannot recover from the vendor sums paid on account of the purchase price. This rule does all that the liquidated damage provision does and even more. It is only where the retention of these payments would so unjustly enrich the vendor that it would be shocking to the

17. See note 15 *supra*.

18. See note 13 *supra*.

19. 65 So.2d 765 (Fla. 1953).

20. *Beatty v. Flannery*, 49 So.2d 81 (Fla. 1950), note 15 *supra*.

21. *Haas v. Crisp Realty Co.*, 65 So.2d 765 (Fla. 1953).

22. See note 20 *supra*.

23. *Haas v. Crisp Realty Co.*, 65 So.2d 765, 768 (Fla. 1953).

court's conscience that the court will grant relief. Some consciences are not readily shocked. This rule was the basis of decision in the *Beatty*²⁴ and *Haas*²⁵ cases. It was apparently completely overlooked in the *Paradis*²⁶ case.

Under the circumstances it is difficult to reach any definitive conclusion concerning the right of a defaulting vendee to recover any or all of the payments made. In all probability, however, it seems safe to infer that the court would be willing to enforce a forfeiture of such an amount up to at least ten percent of the purchase price. Ten percent is more or less a customary down payment for Florida real estate transactions. As an abstract matter of justice, especially in considering the fact that many of the standard contract forms contain provisions not fully appreciated by uninformed purchasers, the question might well be asked whether the forfeiture of such a large sum might not be too great a burden thrust on unwary vendees as a result of an automatic adherence to an arbitrary rule of law. The rule requiring the aggrieved party to prove his damages more nearly approaches exact justice in each case.

Statute of Frauds.—A number of cases involving the specific performance of oral contracts to convey or devise real estate indicate the degree of part performance required by the Florida Supreme Court to remove the contract from the domain of the Statute of Frauds. *Cottages Miami Beach v. Wegman*²⁷ delineates the requirements with particularity. In this case a daughter moved from New York to Miami Beach and managed the property in reliance on her father's promise to vest one half of the title in her. The father failed to convey a half interest and she brought suit against his estate. Judgment for the plaintiff was sustained on the theory that part performance removed the contract from the Statute of Frauds. The court stated three rules concerning services and part performance:

- a. Services in reliance on an oral promise to convey are not sufficient to take the contract out of the Statute of Frauds if the services are capable of adequate pecuniary measurement.
- b. Services by promisee is ordinarily treated as equivalent to payment of consideration, and while this is not in itself sufficient part performance, the rendition of services together with possession is sufficient to take the contract out of the Statute of Frauds.
- c. Payment of part or all of the consideration plus taking possession will take the oral contract out of the Statute of Frauds.²⁸

Applying these standards to the case at bar, the court concluded that specific performance should be granted on the basis of rules (b) and

24. See note 20 *supra*.

25. See note 23 *supra*.

26. *Paradis v. Second Avenue Used Car Co.*, 61 So.2d 919 (Fla. 1952).

27. 57 So.2d 439 (Fla. 1951). Subsequent litigation reported in 59 So.2d 528 (Fla. 1952).

28. 57 So.2d 439, 441 (Fla. 1951).

(c), but that if rule (a) controlled, specific performance should still be granted because the services were incapable of pecuniary measurement owing to the special values decedent placed on his daughter's services, kinship, trust and confidence. Furthermore, the court concluded that denial of specific performance would be tantamount to a fraud on the plaintiff and extremely inequitable since she gave up her home and moved from a distant city and fully performed her part of the bargain.

Relief was denied in a somewhat similar case²⁹ for the specific performance of an oral contract to devise real estate in return for services. In this case the plaintiffs were not relatives, they were in possession only to the extent of occupancy rent-free with the decedent, they made no improvements at their expense, and they left decedent in her last illness ten weeks before her death. The court stated that to enforce a parol gift of land equity requires:

1. words showing an intent to give the land;
2. possession taken in reliance on the gift;
3. permanent and valuable improvements made by the donee.³⁰

Obviously, under these circumstances the plaintiffs would not be entitled to relief.

It is to be noted that the court treated this as a parol gift of land and not as a parol contract to convey. Of course, the agreement was to devise or to convey by will, but it is not apparent that this makes it a gift since the devisees had to earn the property or pay consideration in the form of services. Had the court treated it as a contract of purchase rather than gift, however, the result would still be the same. Applying the standards of *Cottages Miami Beach*,³¹ it is apparent that the services of the plaintiffs were not so peculiarly beneficial to the decedent as to be incapable of pecuniary measurement, the plaintiffs did not take possession and dominion of the premises, and they ceased rendering services when decedent needed them most. Hence, specific performance should be denied in either case.

*Burton v. Keaton*³² involved an oral contract to devise real estate in return for services, and the court, quite correctly it seems, applied the test of *Cottages Miami Beach*³³ rather than the tests for a parol gift. The court stated that more stringent proof was required in cases involving oral contracts to devise than in oral contracts to convey because of the fact that one of the parties is now dead. However, specific performance was granted because of services rendered and possession taken in reliance on the oral agreement.

29. *Green v. Price*, 63 So.2d 337 (Fla. 1953).

30. *Id.* at 338.

31. 57 So.2d 439 (Fla. 1951).

32. 60 So.2d 770 (Fla. 1952).

33. See note 31 *supra*.

Installment land contract.—The relationship between the parties in an installment land contract received judicial exposition in *Savage v. Horner*³⁴ and *Carlton Estate v. Keller*.³⁵ In the *Savage* case the purchaser brought an action for rescission and the vendor moved for a dismissal on the grounds that there was an abandonment of the contract on the part of the vendee. After finding that there was no complete and utter abandonment, the court pointed out that it contained no forfeiture provision and that time was not declared to be of the essence. The vendor gave no notice to the vendee of any election in respect to his breach until after the vendee tendered the amount due under the contract. Under these facts it was held that the plaintiff vendee was entitled to rescission under the general rule that a vendee, although previously in default, may tender performance prior to a declared forfeiture.³⁶ The conclusion was bolstered by the fact that the vendors had treated the contract as still in existence by pledging it as collateral. There were no circumstances justifying dispensing with the necessity of giving the vendee notice of default and forfeiture.

In the *Carlton*³⁷ case the contract contained provision for forfeiture if any of three annual payments of \$1000 were not paid within 60 days of due date. None of these three payments were made, but the vendor did accept interest payments. A few months before the final payment was due the vendor procured the deed from the escrow agent, conveyed the land to another purchaser, and notified the original vendee to vacate. Under these circumstances it was held that the vendor had waived the strict performance of the contract requiring annual payments. He thus precluded himself from declaring a forfeiture without notice to the vendee and without offering the vendee a reasonable opportunity to make the delinquent payments. The court concluded that under the facts of the case a waiver of the vendor's rights were involved rather than an estoppel. The chancellor's decree, giving the vendee in possession twenty-one days to place herself in good standing, and stating that upon the completion of future payments she would be entitled to a warranty deed, was affirmed. It was stated that this net result can be sustained on principles of either waiver or estoppel in spite of technical differences. The court explained that after a waiver the vendor can either sue on the contract for the amounts due or bring an action to foreclose his lien. After an estoppel, the vendor can recover his rights by giving a proper notice to the vendee. In either case the vendee is protected.

Miscellaneous.—In a number of other decisions involving contracts for the sale of land it was held: that the existence of a forfeiture provision

34. 49 So.2d 329 (Fla. 1950).

35. 52 So.2d 131 (Fla. 1951).

36. *Savage v. Horner*, 49 So.2d 329, 331 (Fla. 1950).

37. *Carlton Estate v. Keller*, 52 So.2d 131 (Fla. 1951).

as liquidated damages does not deprive the contract of that degree of mutuality which is essential for specific performance;³⁸ that a contract must be signed by two witnesses but need not be acknowledged in order to entitle it to be specifically enforced;³⁹ that the insertion of a clause by the prospective vendee requiring the vendor to furnish an abstract of title constituted a counter-offer and not an acceptance;⁴⁰ that existence of an encroachment by a building on the land conveyed does not justify rescission after the deed was delivered because the question of marketability of title as an excuse for non-performance is significant only while the contract is executory;⁴¹ that a vendor cannot complain if he gets a more favorable offer than he is entitled to under the contract;⁴² that where a decree is based on conflicting evidence, it is conclusive on the appellate court in the absence of a showing that it was clearly wrong or that an inapplicable rule of law influenced the decision;⁴³ that it is error not to grant specific performance where a contract is found to exist and to have been partially performed;⁴⁴ and that specific performance should be decreed of a contract to cancel by will a note and mortgage.⁴⁵ Specific performance was quite properly denied in *South Investment Company v. Norton*⁴⁶ where the optionee under a lease was seven years in default. The court found that there was a complete abandonment of the agreement and not simply a waiver of strict performance or estoppel. A truthful statement of a present intention with regard to a future act does not form the basis for an estoppel.⁴⁷ Enforcement was likewise refused in *McCloskey v. Johnson*⁴⁸ after the vendor was unable to obtain the discharge of a federal tax lien, the court observing that it would be difficult to conceive of a blacker cloud on the title. *Jermak v. Fisher*⁴⁹ held that after a rescission action had been voluntarily dismissed it was error to continue the case in reference to the broker's claim for a commission since this was simply a legal action without basis for equitable relief. A contract provision concerning risk of loss was construed in *Triple E. Development Company v. Floridagold Citrus Corporation*,⁵⁰ and in *Bell v. Thompson*,⁵¹ the vendee's divorced second wife who completed the payments and received the deed was required to convey a one half interest to the first wife upon her reimbursing the second wife one half of the redemption price.

38. *Romines v. Nobles*, 55 So.2d 563 (Fla. 1951).

39. *Abercrombie v. Eidschun*, 66 So.2d 875 (Fla. 1953).

40. *Mehler v. Huston*, 57 So.2d 836 (Fla. 1952).

41. *Johnson v. Green*, 54 So.2d 44 (Fla. 1951).

42. *Stoffer v. Adams*, 54 So.2d 801 (Fla. 1951).

43. *Knowles v. Benson*, 61 So.2d 365 (Fla. 1953).

44. *Saeger v. Roberts*, 54 So.2d 157 (Fla. 1951).

45. *Ludwig v. Lansdowne*, 65 So.2d 747 (Fla. 1953).

46. 57 So.2d 1 (Fla. 1952).

47. *Ibid.*

48. 54 So.2d 517 (Fla. 1951).

49. 54 So.2d 243 (Fla. 1951).

50. 51 So.2d 435 (Fla. 1951).

51. 63 So.2d 491 (Fla. 1953).

A deed was declared a mortgage and the transaction usurious in *Burket v. Johnson*.⁵² In this case Johnson desired to purchase King's land for \$900, and Johnson, having only \$100, sought a loan from Burket who agreed to the transaction and accepted Johnson's \$100. Burket then purchased the land for \$900, the warranty deed designating his wife as grantee, and then entered into a contract to convey the land to Johnson for \$1325 payable \$15 per week with interest at ten per cent after maturity. At the completion of the payments Burket refused to convey unless he was paid interest, and Johnson brought suit. It was held that the transaction was a loan and that the plaintiff was entitled to a conveyance of the land plus a return of the entire loan, \$1225,⁵³ as the transaction violated the usury statute.⁵⁴

Fraud.—Two cases considered the problem of what constitutes sufficient fraud or misrepresentation by the seller to justify rescission on the part of the purchaser. Both cases denied relief to the purchaser when the defendant vendor gave an opportunity for inspection and investigation even though the assertions were not true. In both cases the action was brought after the sale had been consummated. In *Davis v. Dunn*⁵⁵ the sellers and their agent represented that the house was free from termites when in fact it was seriously infested. In *McDonald v. Rose*⁵⁶ the misrepresentations concerned the amount of income to be derived from an apartment house, the degree of occupancy, the designation of a muddy bayou as a beach, and certain mis-statements concerning the furniture in one of the apartments. The negotiations covered a period of approximately three months during which time the vendees made some inspections and could have made more. The basis for the decisions is that the purchaser is not justified in relying on the vendor's assertions when he is given an opportunity to investigate. On the other hand, however, in *Schwartz v. Nizolek*,⁵⁷ it was held that although equity would not relieve against a bad bargain (apparently there were not sufficient misrepresentations to permit rescission), still it would not specifically enforce the performance of a contract where to do so would be harsh and inequitable under all circumstances.

II. DEEDS, DELIVERY, VALIDITY, REFORMATION

Legislation.—Changes in the statutory law relating to deeds during the past two years consisted of the enactment of a new curative statute⁵⁸ and the amendment of two statutes⁵⁹ involving curative provisions and the

52. 61 So.2d 197 (Fla. 1952).

53. *Id.* at 198.

54. FLA. STAT. § 687.07 (1951).

55. 58 So.2d 539 (Fla. 1952).

56. 50 So.2d 878 (Fla. 1951).

57. 62 So.2d 704 (Fla. 1953).

58. Fla. Laws 1953, c. 28208.

formalities of acknowledgment. The new statute enacted by Chapter 28208, Laws of 1953, raises a presumption that persons are the same when similar names vary on instruments affecting title to the same parcel of real property. It is required that the instruments be on record for ten years and that there is some similarity between the names. The act specifically applies to instances where the variation may consist of the use of a full name on one instrument and the use of initials or shortened name on the other. Florida Statutes Section 694.08, curing defects in acknowledgment, witnessing or sealing, has been amended⁶⁰ so as to validate instruments issued in a representative or official capacity in which the word "as" was omitted before the title of the person executing the instrument. It is still required that the instrument be on record for seven years before the defect is cured. Florida Statutes Section 695.03, subsection 1, relating to the formalities of acknowledging instruments within the state, has been amended⁶¹ by permitting such acknowledgment before a judge of a small claims court. All such acknowledgments heretofore or hereafter made are validated.

Effectiveness of deeds.—Among a number of cases involving the effectiveness of deeds, *Robertson v. Robertson*⁶² seems particularly interesting. In this case the sister of an owner of real property forged a deed to herself and then placed two mortgages on the land to secure indebtedness of hers aggregating \$10,500. Part of the proceeds was used to pay off a \$2000 balance of an existing mortgage. After the fraud was discovered the owner of the land asserted that he would recognize the forged deed as his own and accepted a reconveyance by the forger, this deed reciting that it was subject to the two mortgages and that the grantee assumed and agreed to pay them. It was held by a four to three decision that he was entitled to a decree cancelling the mortgages, being obligated to make restitution only to the extent that the proceeds were used to pay his old mortgage.⁶³

Of course, the forged deed was in its inception a nullity and of no effect. Although ratification was not discussed there is a recognized line of authority which asserts that there can be no ratification of a forgery.⁶⁴ This is based on two principles—one, that the forger is not purporting to act on behalf of a principal, and the other, that it is against public policy to permit ratification of a criminal act because it tends to stifle prosecution.⁶⁵ The above arguments do not apply to estoppel, however, and, in a proper case, the former owner may be estopped to deny the

59. Fla. Laws 1951, c. 26957; Fla. Laws 1953, c. 28225.

60. Fla. Laws 1951, c. 26957.

61. Fla. Laws 1953, c. 28225.

62. 61 So.2d 499 (Fla. 1952).

63. *Ibid.*

64. MECHEM, OUTLINES OF AGENCY 147 (3d ed. 1952).

forgery. Various types of estoppel were considered and their application denied in the instant case.

It was held in this case that the owner of the land was not estopped by the recitals in the deed to the effect that it was given subject to the existing mortgages because he was not claiming through this deed.⁶⁵ He was claiming under his former title. It is only where a person claims title under a deed that he is estopped by the recitals therein. It was also held that equitable estoppel in *pais* was inapplicable because there was no detrimental change of position in reliance on the owner's conduct.⁶⁷ The court thought that there was no change of position in reliance on the owner's misconduct since the mortgages were given before he attempted to recognize the forged deed or accept the deed back to him.

The court considered the rule that a grantee in a deed containing an assumption clause incurs a contractual liability for the debt and becomes the primary obligor. This rule, however, was held inapplicable if there were no valid consideration or if there were a failure of consideration.⁶⁸ The majority held that the fact that the deed cleared the record title was not a sufficient consideration to support the contractual liability of assuming the mortgages. It was also held that the prior suits to foreclose the mortgages were different causes of action and not *res adjudicata*.

The dissenting opinions thought that the mortgages should be protected on principles of contractual liability and estoppel.⁶⁹ One opinion found ample consideration for the contractual liability of the grantee under the assumption clause. It was pointed out that the owner was getting his title cleared, that his old mortgage had been satisfied, and some benefit was probably being received by his sister. The other opinion would have found an estoppel but did not explain the objections of the majority; namely, that he was not claiming through this deed and that there was no change of position by the mortgagees in reliance on his misconduct. Obviously, the case is a difficult one and either result can be rationalized. It is believed that the decision makes no fundamental changes in existing law and that it will not, to any great extent, increase the hazard of the title examiner. However, grantees and mortgagees claiming through deeds that are subsequently discovered to have been forged must take notice that they cannot rely on any subsequent purported ratification or adoption. They will have to insist on a new and genuine deed from the owner to the grantee of the forged deed.

Cancellation, fraud.—It was held in *Sand v. Hike*⁷⁰ that equity could grant relief even in the absence of fraud, misrepresentation, undue influence,

65. TIFFANY, AGENCY 132-135 (2d ed. 1924).

66. 61 So.2d 499, 503 (Fla. 1952).

67. *Id.* at 504.

68. *Id.* at 503.

69. *Id.* at 504-505.

70. 56 So.2d 462 (Fla. 1952).

violation of confidence, or other inequitable conduct if the grantor of the deeds was mistaken as to the legal effect of the instruments signed. This was justified in the particular case because it was obvious that the grantor, unable to speak English and unable to converse with the attorney who prepared the instruments, had no intent to convey the land. Hence, the deeds would be ineffective for lack of delivery. The court added, however, that there was also ample ground to find fraudulent inducement in the non-disclosure of material facts by the grantee who was aware of the nature of the transaction, and also that there was a breach of the fiduciary relationship between the grantee son and the grantor mother.⁷¹ *Brass v. Reed*⁷² held that assertions of fraud by one of the grantees against another did not constitute a cloud on his title so as to enable him to bring a quiet title suit when the asserting grantee admitted that she received only the interest that the deed purported to convey to her.

Delivery.—Some basic principles involving the effectiveness of deeds were involved in the cases of *Mayer v. Mayer*.⁷³ It was indicated, and correctly so, that an interlineation after a deed had been delivered for the purpose of changing the estate of the grantee would be null and void unless the deed were re-executed at that time.⁷⁴ In fact, even a re-execution would seem to be without effect unless the land had been previously conveyed back to the grantor. The deed must take effect presently on delivery and cannot subsequently be changed.

The court then raised the question of conditional delivery and remanded the case. On retrial it was concluded that there was no delivery and this finding of the chancellor was affirmed.⁷⁵ The result may be desirable but the application of the theory of conditional delivery seems somewhat strained. The deed was given by a wife to her husband before he became her husband and while he was married to another person. It was after his marriage to the grantor that the interlineation by adding his new wife's name as a grantee for the purpose of making them tenants by the entireties took place. The theory of the decision was that the deed was delivered conditioned upon the grantor being named as one of the grantees in such manner as to create an estate by the entireties. The condition having failed, the grantor, subsequent wife, remained the absolute owner.

71. *Ibid.* In *Selley v. Buses*, 66 So.2d 745 (Fla. 1952), a suit for the cancellation of a deed because of undue influence, it was held that the chancellor's decree should be sustained if there was evidence to support the decision. *Taylor v. Cory*, 53 So.2d 280 (Fla. 1951), concerning the cancellation of deeds for fraudulent representations, was decided on the admissibility of parol evidence.

72. 64 So.2d 646 (Fla. 1953).

73. 61 So.2d 489 (Fla. 1952); 54 So.2d 105 (Fla. 1951).

74. 54 So.2d 105, 107 (Fla. 1951).

75. 61 So.2d 489 (Fla. 1952). In *Bould v. Coc*, 63 So.2d 273 (Fla. 1953), a deed was also cancelled on the basis of no delivery. In *Trowbridge v. Guaranty Trust Company*, 53 So.2d 102 (Fla. 1951), an attempted cancellation of a mortgage was ineffective for lack of delivery.

In view of the facts that the grantor and grantee were not husband and wife, that the grantee was the husband of another person, and that the grantor was not listed as co-grantee, it does not seem logical that the parties intended to create an estate by the entireties at that time. If they did intend to create such an estate at such a future date as it would be legally possible to do so, it would seem that the rule prohibiting a grantee from acting as escrow agent⁷⁶ would have to be circumvented to sustain the result. This rule prohibiting delivery of a deed to a grantee to become effective on condition might be avoided by distinguishing between a condition precedent and a condition subsequent,⁷⁷ by limiting the rule so as not to prevent one of several grantees from being an escrow agent,⁷⁸ or by an outright repudiation of the unsatisfactory rule.⁷⁹ This rule was not discussed and the case does not seem too satisfactory.

Another case involving an interlineation of a deed already executed, as well as the Statute of Uses, was *McGrieff v. McGill*.⁸⁰ Land was conveyed to "S. D. McGill as trustee for S. D. McGill II." Later, S. D. McGill, the trustee, inserted the words "with full power to sell or mortgage" after his name and re-recorded the deed. After the death of S. D. McGill, a deed to McGrieff was recorded and S. D. McGill II brought a suit to quiet title. It was correctly held that title should be quieted in S. D. McGill II. Since the deed when delivered provided for a dry trust which was executed under the Statute of Uses, McGill II acquired both legal and equitable title. Hence, the subsequent alteration by the feoffee to uses was of no effect and McGrieff took nothing from the deed to him.

Recording.—Several cases involved the construction of the recording act and the bona fide purchase concept. In accord with well established principles it was held that a divorce decree constituted constructive notice of the son's interest in real property, and a subsequent mortgagee from the father and former owner did not obtain a lien on the premises.⁸¹ Furthermore, the possession by the son with his mother for seven years constituted implied actual notice of the son's interest.⁸² Similarly, the existence of a narrow road across the premises charged the purchaser with notice under the theory of implied actual notice⁸³ of the extent of the town's interest, even though the proceedings by which the county had

76. 7 THOMPSON, REAL PROPERTY 665 (1940). For a summary of the law relating to delivery of deeds in escrow, see Comment, 8 MIAMI L.Q. 75 (1953).

77. BUBBY, REAL PROPERTY 400 (1943).

78. *London Freehold and Leasehold Property Co. v. Suffield*, 2 Ch. 608, 621 (1897).

79. *Lerner Shops of North Carolina, Inc. v. Rosenthal*, 225 N.C. 316, 34 S.E.2d 206 (1945); 4 TIFFANY, REAL PROPERTY 229 (3d ed. 1939).

80. 62 So.2d 28 (Fla. 1952).

81. *First Federal Savings and Loan Ass'n v. Fisher*, 66 So.2d 496 (Fla. 1952). The effect of the Florida recording act is discussed in a Comment, 6 MIAMI L.Q. 595 (1952).

82. *Ibid.*

83. *Zancha v. Town of Medley*, 66 So.2d 238 (Fla. 1953).

previously acquired the right were not recorded. The purchaser was put on inquiry and should have ascertained the extent of the public's interests.

Covenants for title, miscellaneous.—The construction of covenants for title was required in *Deeb v. Kestner*.⁸⁴ It was therein held that the existence of a public highway and appurtenant drainage ditch was impliedly excepted from the covenants in a statutory warranty deed. The case did not specifically discuss which covenants were involved but the decision is in line with a previous Florida holding⁸⁵ and a well recognized line of authority⁸⁶ that visible easements are impliedly excepted from the covenant against encumbrances. The decision is also in accord with the general American view that such a covenant is a present covenant and breached immediately if at all.⁸⁷ Mandamus was granted to compel the county to issue a deed for land after it was advertised for sale and bid in at public auction.⁸⁸ Quite correctly it was held that an attempted dedication after such proceeding occurred too late as the land had already been sold. As in other cases where masterships are employed, the decision of a master in a suit to reform a deed will be sustained if there is ample testimony to support his conclusions.⁸⁹

The rights of an heir and a judgment creditor purchaser at execution consummated after the death of the debtor were determined in *Beitler v. Turner*.⁹⁰ It was decided that an execution issued in the name of deceased who died after entry of a final judgment but before the entry of a final execution was valid. The sheriff's deed, consequent upon such execution, was also valid and the purchaser was entitled to the land. The result was reached primarily upon the authority of Section 45.16 Florida Statutes, which provides that the death of either party after a verdict will not render subsequent litigation void. The court supported the decision under both the old⁹¹ and the new rules⁹² authorizing an attorney to have a writ of scire facias issued upon a judgment.

The determinative factor in deciding the title to certain public lands was the statute governing legislative procedure providing that each act contain in its title an indication of its content. In *Bird Key Corp. v. Sarasota*,⁹³ it was held that the part of the statute setting up the city government of Sarasota which gave the city title to certain lands was

84. 59 So.2d 514 (Fla. 1952). The Florida law on this subject is discussed in a Comment, 7 *MIAMI L.Q.* 378 (1953).

85. *Van Ness v. Royal Phosphate Co.*, 60 Fla. 284, 53 So. 381 (1910).

86. RAWLE, *THE LAW OF COVENANTS FOR TITLE* 117 (3d ed. 1860); 4 *TIFFANY, REAL PROPERTY* 143-144 (3d ed. 1939).

87. 3 *AMERICAN LAW OF PROPERTY* 462 (1952).

88. *State ex rel Wadkins v. Owens*, 62 So.2d 403 (Fla. 1953).

89. *Hopping v. Lovejoy*, 53 So.2d 704 (Fla. 1951).

90. 61 So.2d 167 (Fla. 1952).

91. FLA. STAT. c. 657 (1951), Common Law Rule 50, Author's Comment (1944).

92. FLA. STAT. c. 657 (1951), Common Law Rule 50 (1944).

93. 54 So.2d 245 (Fla. 1951).

unconstitutional because it violated this statute. Since the title of the act only indicated that it contained provisions for a city government and indicated no intent to divest the state of its title to certain lands, the title to the lands remained in the state.

Land conveyed and disputed boundaries.—Disputes over the location of boundaries to land frequently involve many legal principles, such as adverse possession, construction of deeds, acquiescence, and proper remedies. In construing the deed to determine what land was conveyed it is a well established principle that the survey made at or shortly after the deed was executed will control.⁹⁴ Such boundaries as thus established become the true boundaries and subsequent parties are bound thereto irrespective of errors made. This principle was reaffirmed in *Akin v. Godwin*⁹⁵ wherein it seemed particularly applicable. The 1914 deeds conveyed the land "according to the Knowlton survey." The dispute arose because of a more recent survey which did not go back to the original field notes or boundary lines of the original survey. The court aptly pointed out that in making a re-survey, the question is not where an entirely accurate survey would locate the lines, but where the original survey did locate such lines. The object of a re-survey is to locate the lost lines or monuments, not to dispute the correctness of or to control the original survey. "Purchasers of town lots generally have the right to locate their lot lines according to the stakes as actually set by the platter of the lots, and no subsequent survey can unsettle such lines. In the event of a subsequent controversy the question becomes not whether the lots were located with absolute accuracy but whether the lots were purchased and possession taken in reliance upon them. If such was the case, the rule appears to be well established that they must govern notwithstanding any errors in locating them."⁹⁶ *Tyner v. McDonald*⁹⁷ approved the rule that where a plat shows specific frontage of each lot except for one, any deficiency in the width of the block will be reflected in the width of that lot.

The distinction between ejectment and suits to quiet title was explained in *Stark v. Frayer*.⁹⁸ Generally, equity will not take jurisdiction to settle boundary disputes unless there are some additional grounds for distinct equitable jurisdiction.⁹⁹ Quiet title is the proper remedy where the plaintiff is in possession and the adversary had previously asserted in a judicial proceeding an adverse claim. This is true even though the

94. 3 AMERICAN LAW OF PROPERTY 425-427 (1952). *Akin v. Godwin*, 49 So.2d 604 (Fla. 1951); *Cowgill v. Hopkins*, 52 So.2d 343 (Fla. 1951); *Hall v. Hanford*, 66 So.2d 474 (Fla. 1953).

95. 49 So.2d 604 (Fla. 1951).

96. *Id.* at 607 quoting from 8 AM. JUR. 787 (1937).

97. 63 So.2d 504 (Fla. 1953).

98. 67 So.2d 237 (Fla. 1953). See also the companion case of *Stark v. Marshall*, 67 So.2d 235 (Fla. 1953).

99. *Id.* at 239.

proceeding has terminated without a determination on the merits since such an assertion constitutes a cloud on title which a court of equity will either confirm or remove. A general assertion that a defendant is claiming an indefinitely described strip along the boundary line is not sufficient to show a cloud over which equity should take jurisdiction.¹⁰⁰ Facts must be alleged which give the claim apparent validity as well as those which show its invalidity.¹⁰¹

As will be pointed out below,¹⁰² title to the disputed portion can be established by adverse possession, but the party relying on such title must show that he complied with all the statutory requirements in effect while his title was being perfected, and that he intended to hold up to the boundary whether it was the true boundary or not.¹⁰³ The boundary may be settled by acquiescence in a line established after a dispute.¹⁰⁴ This boundary may be established even by parol and is considered to be outside the Statute of Frauds.¹⁰⁵ The boundary becomes the division line on the basis that such line is the true line and not because of adverse possession.¹⁰⁶ Before the doctrine is applicable, however, it must be established that there was a dispute, a settlement, and an acquiescence.¹⁰⁷ Acquiescence need not be for the statutory period,¹⁰⁸ but acquiescence in a parol-established boundary will not satisfy the requirements in the absence of a dispute.¹⁰⁹

III. ESTATES, DOWER, HOMESTEAD, AND FUTURE INTERESTS

Tenancy by entireties.—In the past two years the court had occasion to decide several problems concerning estates in land, among the most interesting of which was the effect of murder on the estate by the entireties.¹¹⁰ After reviewing the conflicting opinions in other jurisdictions the court decided to follow the rationale of the Missouri Courts¹¹¹ to the effect that

100. *Stark v. Frayer*, 67 So.2d 237 (Fla. 1953).

101. *Id.* at 239.

102. See *Adverse possession infra*.

103. *May v. Holley*, 59 So.2d 636 (Fla. 1952); *Watrous v. Morrison*, 33 Fla. 261, 14 So. 505 (1894).

104. *Euse v. Gibbs*, 49 So.2d 843 (Fla. 1951); *Watrous v. Morrison*, 33 Fla. 261, 14 So. 805 (1894).

105. *Watrous v. Morrison*, 33 Fla. 261, 14 So. 805 (1894). 2 *TIFFANY, REAL PROPERTY* 678 (3d ed. 1939).

106. *Euse v. Gibbs*, 49 So.2d 843 (Fla. 1951); *Watrous v. Morrison*, 33 Fla. 261, 14 So. 805 (1894).

107. *Shaw v. Williams*, 50 So.2d 125 (Fla. 1950).

108. *Watrous v. Morrison*, 33 Fla. 261, 14 So. 805 (1894). The court apparently confused the doctrines of acquiescence and adverse possession in *Shaw v. Williams*, *ibid.*, in as much as there was considerable discussion of acquiescence for the statutory period. That some states require acquiescence for the statutory period, see 2 *TIFFANY, REAL PROPERTY* 684 (3d ed. 1939).

109. *McRae Land and Lumber Co. v. Ziegler*, 65 So.2d 876 (Fla. 1953).

110. *Hogan v. Martin*, 52 So.2d 806 (Fla. 1951); *Ashwood v. Patterson*, 49 So.2d 848 (Fla. 1951).

111. *Grove v. Holland*, 357 Mo. 874, 211 S.W.2d 464 (1948); *Barnett v. Conley*,

violent homicide by one spouse terminates the tenancy in much the same way as a divorce, and renders the parties tenants in common.¹¹² This intermediate position of the Florida Court has the advantage of neither allowing the wrongdoer to profit from his wrongful act nor to completely deprive him of property which was rightfully his.

Three suits involved the title to land, purportedly conveyed to create a tenancy by the entireties, where the grantees were parties to a bigamous marriage. In the first case of *Malisk v. Dion*¹¹³ an undivorced man and the woman with whom he lived as husband and wife acquired land in both their names as husband and wife. It was held that they were tenants in common and that on the husband's death his one-half interest descended to his real wife. His illegitimate son could not inherit because there was no written acknowledgment of parentage.

In the later case of *Alexander v. Colston*¹¹⁴ a contrary result was reached on principles of estoppel. In this case the man deceived his second "wife" by going through a ceremonial marriage, while apparently in the previous case any second marriage had to be based on common law. After the death of the husband a dispute arose between his second "wife" and his rightful heirs emanating from the valid marriage. It was held that as to the land purportedly conveyed to the parties as estates by the entireties, the second "wife" should be deemed the absolute owner on principles of estoppel. The deceased perpetrator of the fraud would be estopped to deny the validity of the second marriage, and his heirs, taking through him, would likewise be estopped. As to a parcel of land conveyed to the husband alone, his rightful heirs, according to the first and only valid marriage, prevailed.

In the third case¹¹⁵ involving bigamous marriages, the land in dispute had been owned by the second "wife" and then conveyed to create an estate by the entireties after the spouse entered into the bigamous marriage. Later, at her death he assumed ownership as survivor. He subsequently went through another marriage ceremony, attempted to create a new tenancy by the entireties with his new "wife" whom he later divorced, the decree providing that the parties should be tenants in common. Later the daughters of the original owner of the land, his wife in the first bigamous marriage, brought suit to void the conveyance by their mother and all subsequent conveyances in order that they might be declared owners. This suit was compromised with the daughters settling for a one-half interest. The net result of the compromise was that the heirs of the

224 Mo. App. 913, 27 S.W.2d 757 (1930).

112. *Hogan v. Martin*, 52 So.2d 806 (Fla. 1951); *Ashwood v. Patterson*, 49 So.2d 848 (Fla. 1951). See Comment, 7 *MIAMI L.Q.* 524.

113. 62 So.2d 4 (Fla. 1952).

114. 66 So.2d 673 (Fla. 1953).

115. *Nottingham v. Denison*, 63 So.2d 269 (Fla. 1953).

original grantor received half and the other half was divided between the "husband" and his divorced third "wife," the after acquired title of the husband inuring to him and her as tenants by the entirety and the divorce decree making them tenants in common.¹¹⁶

In other cases involving estates by the entirety it was held: that a divorce ipso facto makes the parties tenants in common and that it is error to require them to mutually quit claim interests in portions of the land to each other;¹¹⁷ that so long as the parties are not divorced both are entitled to possession;¹¹⁸ and that such an estate is not subject to execution for the debts of the husband.¹¹⁹

Co-tenancy.—Two cases involving bank accounts held that the particular contract created a joint tenancy with right of survivorship.¹²⁰ These cases seem to evidence less hostility toward such estates than an earlier one¹²¹ which found no such survivorship estate. Similarly, it was held by the construction of partnership articles that a joint tenancy with right of survivorship was created.¹²² The interesting feature of this case is that the partnership articles were executed at a time when the law of Florida prohibited such an estate. However, the court concluded that, by continuing to operate under the articles subsequent to the amendment of Section 689.15 in 1941, the parties ratified the agreement and thereby created a valid joint tenancy with right of survivorship.¹²³

The rights of cotenants in partition actions received judicial clarification in several instances. Partition suits are initiated by a bill in chancery¹²⁴ and the equity court in the exercise of its jurisdiction to grant complete relief can settle the equities between the parties.¹²⁵ In *Potter v. Garrett*¹²⁶ it was held that a daughter who had expended money during the lifetime of the parents for the preservation of the homestead was entitled to contribution out of her sister's portion of the land. The sister, however, was held entitled to a credit of one half the reasonable rental value of the premises during the period it was occupied by the other after the death of the last parent. No mention was made of either the general common law rule that a cotenant in possession is not liable to account¹²⁷ or the rule that a cotenant expending money on improvements cannot compel

116. *Ibid.*

117. *Boles v. Boles*, 59 So.2d 871 (Fla. 1952).

118. *Junk v. Junk*, 65 So.2d 729 (Fla. 1953).

119. *Vaughn v. Mandis*, 53 So.2d 704 (Fla. 1951).

120. *In re Brandle's Estate*, 65 So.2d 27 (Fla. 1953); *Crawford v. McGraw*, 61 So.2d 484 (Fla. 1952).

121. *Crossman v. Naphtali*, 33 So.2d 726 (Fla. 1948).

122. *Hirsch v. Bartels*, 49 So.2d 531 (Fla. 1950).

123. *Ibid.*

124. *Grable v. Nuney*, 66 So.2d 675 (Fla. 1953); FLA. STAT. § 66.01 (1944).

125. *Burney v. Dedge*, 56 So.2d 715 (Fla. 1952).

126. 52 So.2d 115 (Fla. 1951).

127. 2 TIFFANY, REAL PROPERTY 262 (3d ed. 1939).

a contribution in the absence of an express agreement.¹²⁸ The instant case, however, is much more equitable.

A purchasing cotenant is entitled to set off his interest against the price bid,¹²⁹ and an outstanding tax title acquired by some cotenants inures to the benefit of all and simply constitutes as a matter of law the payment of taxes rather than establishing an independent chain of title to the exclusion of the others.¹³⁰ This is in accord with the general principle of fiduciary obligations between cotenants.¹³¹

Dower: Legislation.—Section 1 of Statute 731.34 defining the extent of the right of dower was amended by Chapter 28222 of the Laws of 1953. The amendment provides that if the deceased died intestate and left no lineal descendants but a widow claiming dower, then the property of the decedent not included in the widow's dower shall descend to her subject to the debts of the decedent except that the homestead shall descend with the exemption provided by the constitution. Section 731.35 governing the procedure for the election of dower was amended by Chapter 26948 of the Laws of 1951. This amendment provides that a guardian of a widow under disabilities may file an election to take dower on her behalf and vests in the county judge the discretion to grant or deny the election as the best interests of the widow may appear. The act also provides that if a widow should die without filing an election within the period, then it may be filed by any person who has a beneficial interest in the estate of such deceased widow. The election shall be granted or denied by the county judge as the best interest of the parties entitled to participate in the estate of the deceased widow may require.

Several cases involving dower were decided by the court during this period. In the first case¹³² the widow dissented from her husband's will and elected to take her statutory dower. She and the commissioners had agreed that she should take her entire one-third interest out of the personalty since it was inconvenient to divide the realty. It was held by a divided court that she could not do this since dower was a creature of statute and the statute had to be followed explicitly, that is, she must take one third of the realty and one third of the personalty.¹³³

In another case¹³⁴ a widow, long separated from her husband, elected to take a child's portion in lieu of dower and at the same time claim dower in lands which her husband had conveyed without her joining

128. 2 TIFFANY, REAL PROPERTY 283 (3d ed. 1939). Of course, here the money was expended before the land descended to the cotenants. Also a cotenant is entitled to contribution for reasonable expenditures necessary for the preservation of the property. 2 TIFFANY, REAL PROPERTY 278 (3rd ed. 1939).

129. Grable v. Nuney, 66 So.2d 675 (Fla. 1953).

130. McQueen v. Forsythe, 55 So.2d 545 (Fla. 1951).

131. 2 TIFFANY, REAL PROPERTY 287 (3d ed. 1939).

132. Ginsberg v. Ginsberg, 50 So.2d 539 (Fla. 1951).

133. *Ibid.*

134. Johnson v. Hayes, 52 So.2d 109 (Fla. 1951).

in the deed. The widow and the decedent's son entered into a compromise in regard to the property owned by the decedent at his death, and then, when his estate was settled, she filed her extraordinary petition for the assignment of dower in the lands that had previously been conveyed. Her petition was dismissed with prejudice and she then filed a suit in chancery seeking the identical result. It was held against the widow on three grounds: (1), the unappealed judgment of the county court which had jurisdiction was a final adjudication of the matter; (2), she was estopped by her conduct in delaying to assert her claim until after her husband's estate was closed so that no claim for breach of warranty could be filed against her late husband's estate; and (3), when she elected to take a child's part in lieu of dower, she thereby expressly estopped herself from claiming any dower either in the estate owned by the husband at his death or in the land he previously conveyed.¹³⁵

In another case¹³⁶ involving dower, the widow was allowed to claim dower in the entire sum realized from the sale of her husband's realty without allowance for a purchase money mortgage. This occurred, however, because evidence of the purchase money mortgage was not introduced in the trial court, hence there was no evidence properly before the court by which they could determine that error had been committed.

Miscellaneous.—In a case¹³⁷ wherein property was devised to executors, including the wife, "to be controlled, used, pledged, mortgaged or sold in any manner that in her careful judgment may seem to be to the best interest of herself and to the estate so long as she remains single," it was held that the wife had a valid fee simple determinable on her staying single with an absolute power of sale so that grantees of the executor would receive valid fee simple titles. The result giving grantees a clear title is undoubtedly correct as obviously the wife did have an absolute power of sale regardless of the exact nature of the estate—whether a life estate or fee simple determinable, and whether legal or equitable. The exercise of the power of sale would give the grantees good title. A conveyance to a grantee "for and during his natural life and at his death title to invest in his heirs" created a fee simple absolute¹³⁸ under the doctrine of the Rule in Shelley's case. Naturally, the deed had been executed prior to the abrogation of the rule in 1945.¹³⁹ In a case¹⁴⁰ involving the construction of a will, it was held that devises to three separate persons of three different houses by street and number only was valid even though all three houses

135. *Ibid.*

136. *In re Vidal's Estate, Yanes v. Vidal*, 67 So.2d 198 (Fla. 1953).

137. *Raulerson v. Saffold*, 61 So.2d 926 (Fla. 1952).

138. *Natural Turpentine and Pulpwood Corp. v. Mills*, 57 So.2d 838 (Fla. 1952).

139. FLA. STAT. § 689.17 (1953).

140. *Wright v. Sallet*, 66 So.2d 237 (Fla. 1953).

were on the same parcel of land. The three devisees took as tenants in common until division was perfected.

Homestead.—The troublesome problem of what constitutes a homestead required Supreme Court determination in several instances during the past two years. Two of these cases involving property of a decedent were particularly interesting. In *Wilson v. Florida National Bank and Trust Company*¹⁴¹ the dispute arose between a widow claiming dower and the daughter claiming the land under the statute providing for the descent of homesteads. The decedent had owned forty acres, five acres of which had been held jointly with his wife as tenants by the entirety, and the other thirty-five had been owned individually by him. The home was located on the five acre tract.

The dispute arose when the widow dissented from the will and elected statutory dower, asserting such right against the thirty-five acres. Of course, the title to the five acre tract vested in her as the surviving tenant of the entirety. It was held that the entire forty acre tract constituted the homestead of the deceased,¹⁴² and hence the thirty-five acre tract descended to the daughter as a lineal descendant subject to a life estate in favor of the widow. The court explained that all homesteads terminate at the death of the head of the family unless a new homestead is established thereafter. Hence, the fact that there was no building on the thirty-five acre tract was immaterial. The status of the land as homestead or not is determined at the time of death.

*Passmore v. Morrison*¹⁴³ likewise involved the devolution of realty and the determination of whether certain land constituted a homestead. In this case the owners of the land, Colonel and Mrs. Passmore, adopted a son when he was nine months old. The boy became a problem at the age of three and rapidly progressed in his deviations so that he frequently required detention in various juvenile schools of correction. Twice the Passmores had consented to the boy's adoption by his paternal grandmother but the proposed adoption never materialized. In 1951 Colonel Passmore died and three months later his wife passed away. The boy had not lived at home for two years prior to the death of his adoptive parents. The land had been owned by the Passmores as tenants by the entirety so that Mrs. Passmore became the absolute owner on the death of her husband. Under these facts it was held by a divided court that the land was not a homestead at the death of Mrs. Passmore.¹⁴⁴ Therefore, her devisee took to the exclusion of the adopted son.

The decision is readily sustainable but the concurring opinion of

141. 64 So.2d 309 (Fla. 1953).

142. *Ibid.*

143. 63 So.2d 297 (Fla. 1953).

144. *Id.* at 299.

Judge Drew¹⁴⁵ seems to be the clearer explanation. The death of the Colonel vested title in his widow as surviving tenant of the entireties and terminated his homestead as it necessarily does in every instance. Hence, the problem for determination became whether the property acquired the status of a homestead while it was owned individually by the widow. The majority felt that it did not. It has been held that to constitute a homestead there must be at least two persons who live together in the relation of one family, one of whom must be the head of the family.¹⁴⁶ In the instant case there does not seem to have been such a factual relationship during the time that Mrs. Passmore owned the land. The son had been absent for some time, apparently was deriving no support from the mother, and apparently was not bound to her by any mutual ties of filial love and affection.

It may be well to point out that neither the constitution nor the statutes specifically define a homestead for purposes of descent. The Florida Constitution provides for a homestead real property taxation exemption¹⁴⁷ and also for a homestead right of exemption from a forced sale by creditors.¹⁴⁸ These two concepts are quite distinct. Since the statute providing for the descent of homesteads¹⁴⁹ does not explain the term, resort must be had to the above mentioned categories to determine the nature of the homestead in property devolution cases. The taxation exemption provisions seem *sui generis* and clearly inapplicable. Thus, the creditor exemption criteria are controlling.

This exemption from execution has been defined as a personal right which may be waived and which does not attain the characteristics of an estate.¹⁵⁰ It is for the protection of the family and may be asserted by those beneficiaries at the death of the family head.¹⁵¹ Although the homestead exemption right is personal, the property over which it may be asserted seems to undergo a certain metamorphosis by which it acquires characteristics of individuality, this new spectre being denominated a status of homestead. Hence, without conscious awareness the emphasis shifts from a personal right which may be asserted against the clutching claws of creditors to a "thingified" concept which seems to take on an independent existence. Hence, deluded by the reality of this creature, one easily becomes mystified by its changing personality.¹⁵²

It is believed that realism and clarity of analysis would result if these

145. *Id.* at 300.

146. *Id.* at 299. REDFEARN, WILLS AND ADMINISTRATION OF ESTATE 393-394 (2d ed. 1946).

147. FLA. CONST. ART. X, § 7.

148. FLA. CONST. ART. X, § 1.

149. FLA. STAT. § 731.27 (1944).

150. REDFEARN, WILLS AND ADMINISTRATION OF ESTATE 391 (2d ed. 1946).

151. FLA. CONST. ART. X, § 2.

152. Crosby and Miller, *Our Legal Chameleon, The Florida Homestead Exemption*, 2 FLA. L. REV. 12 (1949).

problems involving the descent of homesteads were approached in this manner—could the decedent have claimed this particular realty exempt from the forced sale of his creditors? If he could, then the land is homestead and should descend accordingly. If he could not, then it is not homestead and its devolution should be the same as other property. Of course, this approach will not lessen the problem. It will still be necessary to determine what requirements must have existed in order for him to have been able to have an exemption. Thus, it will still be necessary to determine that this land constituted his home, that he with one or more persons lived there as a family, and that he in fact was head of the family. These and other factual tests of what constitute a homestead will still be needed. The advantage of the suggested approach will be a keener analysis and more intelligent understanding. Thus, being aware of the real nature of the homestead, there will be less probability that the conceptualistic creature will confuse and bewilder the analyst, less likelihood that it will take on a reality and existence to which it is not entitled.

Applying this approach to the above cases, it is clear that the thirty-five acre tract in the *Wilson*¹⁵³ case was a part of the homestead as the decedent undoubtedly could have claimed it exempt from his creditors' execution. The result in the *Passmore*¹⁵⁴ case can likewise be explained. According to the decision, Mrs. Passmore never became the head of a family while she owned the land since she lived alone, apparently recognized no obligation to support the wayward son, and received no familial love or respect from him. Hence, the land was not subject to the statute prescribing the descent of homesteads. A fortiori, she could not have claimed this land exempt from her creditors as the tests for a homestead in both instances are the same. If it should be decided that a decedent could have claimed an exemption, then the problem of descent would also be decided. If the land is homestead in one instance, then it is homestead in the other.

Other cases concerned with this problem included *Hussa v. Hussa*¹⁵⁵ in which case it was concluded that certain land owned by decedent in Florida was not a homestead. It was his practice to spend only the winters in Florida. For many years prior to his death his wife was a bona fide resident of New York and never even lived in the same house with him during her visits. The son likewise never lived in Florida. In *Brady v. Brady*¹⁵⁶ it was concluded that a married son who lived with his father and actively managed the citrus grove was the head of the family. The father was not the family head since he had become a

153. *Wilson v. Florida National Bank and Trust Co.*, 64 So.2d 309 (Fla. 1953).

154. *Passmore v. Morrison*, 63 So.2d 297 (Fla. 1953).

155. 65 So.2d 759 (Fla. 1953).

156. 55 So.2d 907 (Fla. 1951).

member of his son's family, and, therefore, the father's land was not subject to the homestead provisions. The question of whether the homestead was abandoned was the focal point in *Beck v. Wylie*¹⁵⁷ when it was established that a frequently married daughter had left the home prior to her mother's death. The case was remanded to determine the issue of abandonment. *Jones v. Neibergall*¹⁵⁸ illustrates that an heir to the homestead may be estopped to assert the homestead character of the property. In this case a daughter participated in the distribution and settlement of her mother's estate in accordance with provisions of the will. After her brother had spent large sums on the land allotted him, she asserted the homestead character of the land and attempted to take one-third of it. Naturally, she was estopped unless she should make full restitution which she apparently could not do.

Homestead tax exemption: Legislation.—The giving of false information in regard to homestead real property tax exemption is made a misdemeanor by Chapter 28105 of the Laws of 1953. This act amended Florida Statutes Section 192.16 by adding Section three which provides that the person giving such false information may be punished by a fine of not more than \$500 or by six months imprisonment in the county jail or both. Perhaps the most significant development in this area was the invalidation in *Sparkman v. State*¹⁵⁹ of the 1951 statute¹⁶⁰ requiring a year's residence in Florida in order to qualify for the homestead tax exemption. Since the constitutional provision¹⁶¹ only requires that the owner of the realty own and occupy it as his principal residence on January 1 of the year in question, the statute requiring additional residence was unconstitutional. In another interesting tax case it was held in *Overstreet v. Turbin*¹⁶² that a multiple dwelling unit, owned by different families and each making it their homestead, was but a single unit and entitled to only one \$5000.00 exemption.

Future interests: Legislation.—The most significant development in the field of Future Interests was the enactment of Florida Statutes Section 689.18 in 1951¹⁶³ limiting the effectiveness of reverter and forfeiture provisions in private conveyances to a duration of twenty-one years. The terms reverter and forfeiture provisions obviously mean possibilities of reverter and rights of re-entry for condition broken. The statute is specifically made retroactive as well as prospective in its application so that such provisions already in existence as well as subsequently created ones are affected by the statute. The statute also provides for the enforcement

157. 60 So.2d 190 (Fla. 1952).

158. 53 So.2d 918 (Fla. 1951).

159. 58 So.2d 431 (Fla. 1952).

160. FLA. STAT. § 192.121 (1951).

161. FLA. CONST. Art. X, § 7.

162. 53 So.2d 913 (Fla. 1951).

163. Fla. Laws 1951, c. 26927.

of these restrictions by a bill in equity. The act is aimed specifically at reverter rights created as an incident to the imposition of use restrictions in conveyances between individuals. Specifically exempted from the operation of the statute are similar interests retained by the grantor as a result of conveyances to "any governmental, educational, literary, scientific, religious, public utility, public transportation or non-profit corporation or association."¹⁶⁴ The constitutionality of the statute has not been adjudicated.¹⁶⁵

Two cases during this period involved application of the Rule against Perpetuities. Florida follows the common law rule. In *Adams v. Vidal*¹⁶⁶ it was asserted that although Florida followed the early common law rule that "die without issue" presumptively means an indefinite failure of issue, a contrary construction will be given if such an intent is expressed. Hence, a trust for designated individuals until a particular one became twenty-one with gift over in case each or all died leaving no widow, children, or descendants of children, was construed as meaning a definite failure of issue so that the estate must necessarily vest within lives in being.¹⁶⁷ Hence, the Rule against Perpetuities was not violated. In *Cartinhour v. Houser*,¹⁶⁸ the court approved the rule favoring a construction vesting estates at the earliest possible moment. Thus, it was held that a devise in trust for a sister for life, with gift over of the income to a niece and nephew for not less than ten years before final disposition, was held valid. The estate vested in the beneficiaries at the death of the testatrix but the possession was postponed at the discretion of the trustee. Both decisions are sound.

IV. MORTGAGES AND LIENS

Mortgages: Legislation.—A statutory procedure for the foreclosure of mortgages was enacted by Chapter 28093 of the Laws of 1953 amending Florida Statutes Section 702.02. The old statute simply provided that in a foreclosure action the original or a copy of the mortgage shall be attached to the complaint and made a part thereof. The new act requires that and also the attachment of the note. Instruments thus attached to the bill constitute averment of their contents to the same effect as if fully set forth in the body of the complaint. Section two¹⁶⁹ provides that the clerk, rather than a special master, may sell the land at public sale after the final foreclosure decree, such sale to take place not less than ten nor more than thirty days after the decree. Terms and conditions of the sale shall be

164. Fla. Laws 1951, c. 26927, § 5.

165. The constitutional aspects are discussed in Stephenson, *Constitutional Inviolability of Possibilities of Reverter and Rights of Entry in Florida*, 6 MIAMI L.Q. 162 (1952).

166. 60 So.2d 545 (Fla. 1952).

167. *Ibid.*

168. 66 So.2d 686 (Fla. 1953).

169. Fla. Laws 1953, c. 28093, § 2.

published once only, at least seven days prior to the sale. Section three¹⁷⁰ provides that the clerk shall make out a certificate of sale in accordance with the statutory form provided. If no objections are made for a period of ten days the clerk shall prepare a certificate of title in accordance with the statutory form provided. Upon filing of this certificate the sale is confirmed and title passes fully and completely to the purchaser named in the certificate. Section four¹⁷¹ contains provisions for the disbursement of proceeds from the sale and asserts that any objections to proposed disbursements shall have no effect of clouding the title to the property. Section five¹⁷² asserts that the value of the property shall be conclusively presumed to be the amount bid at the sale and unless objection is filed within ten days the value fixed shall have the same effect as though the court had decreed the value. No such objection shall operate as a cloud on the title. The enactment of such a statutory scheme is desirable in the interests of certainty and security even though there may be some dissatisfaction in particular provisions.

In a number of decisions involving mortgages it was held: that a holder of a note electing to exercise his option to declare all remaining payments due and payable must notify the mortgagor of his election in some effective manner before tender of payment;¹⁷³ that denial of a motion to set aside a foreclosure decree based on her attorney's lack of authority to enter into certain stipulations was res judicata in a subsequent chancery suit to vacate the decree;¹⁷⁴ that parol evidence under the circumstances of a particular case should not be admitted to show a contemporaneous parol agreement as to interest;¹⁷⁵ that a purchase money mortgagee vendor in possession for more than twenty years as a quit claim grantee from the mortgagors could maintain a quiet title action since she was in possession as owner and not as mortgagee;¹⁷⁶ and that under the facts of the particular case¹⁷⁷ the mortgagee had violated the civil usury statutes and so should forfeit double the interest reserved. In *Highland's Home Builders v. Marine Bank and Trust Company*¹⁷⁸ a vendor was not allowed to defeat a mortgagee's rights by terminating an option contract because the purchase price was tendered a day or two too late. In this case the value of improvements financed by the mortgagee greatly exceeded the contract price of the land. A decree issued foreclosing the mortgage and giving the vendor a prior lien to the extent of the purchase price. Apparently, because of unconscionable consequences otherwise

170. *Id.* at § 3.

171. *Id.* at § 4.

172. *Id.* at § 5.

173. *River Holding Co. v. Nickel*, 62 So.2d 702 (Fla. 1952).

174. *Warriner v. Fink*, 62 So.2d 913 (Fla. 1953).

175. *Schwartz v. Zaconick*, 67 So.2d 200 (Fla. 1953).

176. *Baldwin Co. v. Mason*, 52 So.2d 668 (Fla. 1951).

177. *Ayras v. Green*, 57 So.2d 30 (Fla. 1952).

178. 61 So.2d 505 (Fla. 1952).

resulting, the option contract became an enforceable sale and purchase agreement.

*Mechanics' liens.*¹⁷⁹ *Legislation.*—Subsection eleven of Section 84.05 of the Mechanics' Lien Law of Florida was amended by Chapter 28243 of the Laws of 1953. This section relates to payments of owners to contractors. The amendment provides that in the case of a contract of \$3,000.00 or over, the owner may require the contractor to furnish bond in an amount of at least twice the contract price conditioned on payment of labor, subcontractors, and materialmen. The new provisions also provide for methods of payment for labor, materialmen and subcontractors in the event of failure of the contractor to give bond, failure of completion of the job, and failure of the owner to make payments.

Considerable litigation over mechanics' liens reached the Supreme Court during the past two years in the disposition of which it was held that: flying crop dusters are entitled to a lien for services performed;¹⁸⁰ that persons who stake out the land into building lots, clear and burn the brush, cut out and lay roads, and perform other work in developing the land are entitled to a lien;¹⁸¹ that a mechanics' lien may not be asserted against realty held by a municipality in trust for the perpetual benefit of the public as a museum of hobbies;¹⁸² that a mechanics' lien is superior to a federal tax lien;¹⁸³ that a contractor is entitled to a lien even though he did not obtain a municipal license to engage in business;¹⁸⁴ that a contractor was not precluded from establishing an equitable lien simply because he had a remedy under the mechanics' lien law;¹⁸⁵ that it was not error to deny a motion to set aside a lien on the basis of non-compliance with the corporation tax law when this non-compliance was not raised in the trial of the cause on the merits and compliance was proved at the hearing on the motion;¹⁸⁶ and that a judgment in favor of a lien will be affirmed where there is sufficient evidence to support it.¹⁸⁷

In *Foley Lumber Company v. Koester*¹⁸⁸ the court pointed out the different procedures applicable to the assertion of a lien where a claimant is dealing directly with the owner and where he is dealing with a general contractor employed by the owner. If a subcontractor is dealing with a general contractor he must serve a cautionary notice on the owner to

179. See Comment, 6 MIAMI L.Q. 246 (1952).

180. *Georgia Crate and Basket Co. v. Gardner*, 58 So.2d 545 (Fla. 1952).

181. *O'Harra v. Frazier*, 54 So.2d 689 (Fla. 1951).

182. *Augustine v. Brooks*, 55 So.2d 96 (Fla. 1951).

183. *United States v. Griffin-Moore Lumber Co.*, 62 So.2d 589 (Fla. 1953).

184. *Wood v. Black*, 60 So.2d 15 (Fla. 1952).

185. *Palmer v. Edwards*, 51 So.2d 495 (Fla. 1951).

186. *Broadway Builders, Inc. v. Arnold Construction Co.*, 59 So.2d 26 (Fla. 1952).

187. *Moncrief v. Hall*, 63 So.2d 640 (Fla. 1953).

188. 61 So.2d 634 (Fla. 1952).

perfect his lien, otherwise the owner may continue to make payment to the general contractor; if payment is properly made, it is then too late for a subcontractor to claim a lien. Also, liens of the subcontractor are effective only as to the unpaid balance and to any payments not properly made. On the other hand, if the subcontractor deals directly with the owner he need not file a cautionary notice as the owner is primarily liable and the materialman has a lien for the full value of the work done, and may enforce it at any time within twelve months after the completion of the work.¹⁸⁹

Two cases¹⁹⁰ involved the question of the propriety of the final payment to the general contractor and the ability of subcontractors to claim liens without serving the cautionary notice on the owner of the realty. Both of these cases held that the final payment to the general contractor without obtaining from him an affidavit that all potential lienors were paid was not a proper payment under the Mechanics' Lien Law. The court therefore concluded that such unpaid subcontractors could perfect liens against the owner even without having previously served a cautionary notice on him, but that such liens would be limited to the total amount of the final payment.¹⁹¹ The court expressly overruled¹⁹² the earlier case of *Southern Paint Manufacturing Company v. Crump*¹⁹³ insofar as it held that such final payment in good faith without the affidavit was a payment properly made.

In *Bensam Corporation v. Fenton*¹⁹⁴ the supplier to a subcontractor was granted a lien after the court found that the general contractor had made an independent contract with the supplier to pay him and not just a guaranty contract unenforceable because not in writing. Hence, when the owner paid the final payment after receiving a cautionary notice, the final payment was not properly made and the materialman had his lien. In *Landrum v. Marion Builders*¹⁹⁵ the contractor abandoned the work and the owner, after supervising its completion, brought an action to determine the rights of the two parties and several subcontractors. It was held that two payments made to the general contractor prior to the time they were due and payable under the terms of the contract were proper, and allowance of credit for them should be made to the owner, that waiver of liens conditioned on obtaining a loan would be avoided and the liens revived when the loan failed to materialize, and that a materialman

189. *Ibid.*

190. *Shaw v. Del-Mar Cabinet Co.*, 63 So.2d 264 (Fla. 1953); *Curtis v. McCardel*, 63 So.2d 60 (Fla. 1953).

191. *Ibid.*

192. *Shaw v. Del-Mar Cabinet Co.*, 63 So.2d 264, 268 (Fla. 1953).

193. 132 Fla. 799, 182 So. 291 (1938).

194. 63 So.2d 278 (Fla. 1953).

195. 53 So.2d 769 (Fla. 1951).

was entitled to a lien for the entire amount when the materials were delivered on the credit of the owner and not that of the general contractor.¹⁹⁶

A mechanics' lien must be based on a contract either express or implied. It was accordingly held in *Lee v. Sas*¹⁹⁷ that a vendor purchase money mortgagee reacquired the land free from the claims of an overseer who had made a contract with the purchaser while he was in possession. Lienors must assert separate liens against each lot in a group building project and cannot file a single claim covering several lots and buildings.¹⁹⁸ A mechanics' lien when perfected relates back to the visible commencement of the work and will take precedence over a mortgage executed subsequent to the beginning of the work but prior to filing the claim for lien.¹⁹⁹ In order for one claimant to get priority over others he must file a cautionary notice in accordance with statutory provisions before the commencement of the work or before the completion of the work and within thirty days from its beginning. A notice served more than thirty days after the beginning of the work but while it is still going on is not sufficient under the statute.²⁰⁰ It was held in *Branch v. McGlynn*²⁰¹ that a contractor could perfect his lien against property held by the entireties although he dealt only with the husband and did not file his claim within 90 days and did not serve a cautionary notice on the wife. The court considered the argument that the husband was the statutory agent of the wife²⁰² but found in favor of the lienor simply on grounds of the Mechanics' Lien Law. Apparently each tenant by the entireties is seized of the whole for lien purposes as a result of liberally construing the Mechanics' Lien Law.

V. SPECIAL TITLES

Tax titles.—A few cases involving tax deeds occupied the attention of the court during this period. *Halseth v. Cleveland Trust Company*²⁰³ allowed the former owner to have the tax deed cancelled when it appeared that the deed had been issued because of a mistake, general laxness, and confusion of the taxing officials. The owner had made a bona fide effort to pay the taxes and had been diligent but failed only because of the taxing officers. Hence, on reimbursement of the tax deed grantee, the owner recovered his land. In another suit²⁰⁴ it was held that a belated attempt to redeem tax certificates was ineffective because the title to the land had previously vested in the trustees of the Internal Improvement

196. *Ibid.*

197. 53 So.2d 114 (Fla. 1951).

198. *Steel Supply Corp. v. Carpenter*, 66 So.2d 476 (Fla. 1953); *Maule Industries v. Trugman*, 59 So.2d 27 (Fla. 1952).

199. *Reading v. Blakeman*, 66 So.2d 682 (Fla. 1953).

200. *Sheffield-Buggs Steel Products, Inc. v. Ace Concrete Service Co.*, 63 So.2d 924 (Fla. 1953).

201. 65 So.2d 32 (Fla. 1953).

202. FLA. STAT. § 84.12 (1943).

203. 49 So.2d 91 (Fla. 1950).

204. *Buscher v. Mangan*, 59 So.2d 745 (Fla. 1952).

Fund.²⁰⁵ The clerk's participation in the tardy attempt to redeem by accepting the money and marking the certificate redeemed was without effect.

*Aldred v. Romano*²⁰⁶ involved a contest between two parties who were attempting to purchase outstanding tax certificates and obtain a deed. Romano had deposited a sum of money with the county clerk to redeem all outstanding certificates, then actually purchased outstanding city tax certificates and filed a foreclosure suit. After the suit was filed Romano learned that Aldred had redeemed state and county certificates and had them assigned to him. For some reason the land in dispute was not incorporated in Romano's bill to foreclose the certificates and was not in the *lis pendens* or final decree. While this foreclosure suit was in progress Aldred acquired a quit claim deed from the former owner. Under these circumstances it was held that Aldred became the owner of this particular land. He acquired title by virtue of the quit claim deed; such tax certificates as he then held merged with the legal title, and such as he did not have, he could have, as owner, redeemed within the period fixed by law. The Master's deed in the foreclosure suit to Romano conveyed no title because there was no basis in the suit for such transfer.

A former vendee was successful in asserting a title based on tax deeds as against the adverse contention of a merger title effective only to constitute payment of taxes.²⁰⁷ The plaintiff was an assignee of a land contract who in turn assigned her rights. After the hurricane in 1926 her assignee abandoned the contract and the plaintiff again went into possession after purchasing a tax deed in 1932. The defendant derived his title through the former owner by a deed in 1938 but he did not assert his claim until 1949. Under these facts title was quieted in the plaintiff, the court holding that the original contract was abandoned and had been terminated by its own terms when plaintiff entered under the tax deed in 1932. Hence, she could assert her tax title. Her possession charged the defendant with knowledge of her title when he purchased; any fraud practiced on the former owner was personal to him, and furthermore, defendant was barred both by the four year statute of limitations applicable to tax deeds²⁰⁸ and the twenty year general statute of limitations²⁰⁹ as well as laches.

Adverse possession.—The doctrine of adverse possession was subjected to judicial scrutiny in a number of situations during this period. The old

205. This resulted from the operation of Fla. Laws 1931, c. 14717.

206. 58 So.2d 436 (Fla. 1952).

207. Putzer v. Homeridge Properties, 57 So.2d 848 (Fla. 1952).

208. FLA. STAT. § 196.06 (1943). In Deas v. Turner, 56 So.2d 337 (Fla. 1952) the statute was applied in favor of a tax deed grantee.

209. FLA. STAT. § 95.11 (1943).

rule that a deed to land given by the purported title holder covering land which is in the adverse possession of another is void as against such adverse claimant was reaffirmed.²¹⁰ The deed, however, is void only as against the adverse claimant and is perfectly valid between the parties. This rule prevents the grantee of such a deed from bringing an ejectment action in his own name against the adverse possessor. The proper remedy in such a case is for the grantor to bring the suit in the name of the grantee. The justification for the continuance of such feudalistic technicalities might well be questioned. Since the grantee is the one most vitally interested in recovering the land, and since causes of actions are generally assignable, it seems quite incongruous that he should be unable to sue in his own name. Any recovery will inure to the grantee. It would seem that the real-party-in-interest statute²¹¹ should have obviated the necessity of continuing this technical circuitry.

Quite in accord with established authority it was reaffirmed that the possession of a cotenant was not adverse to the rights of the other tenants, that the payment of taxes by such cotenant in possession was likewise not the assertion of a sufficient adverse claim, and that a quitclaim deed conveying the interest of a cotenant does not constitute color of title to the whole estate.²¹² The principle was reaffirmed that in an ejectment action the better title determines the right to possession, and auxiliary thereto, it was held that where plaintiff's deed was faulty by not referring to the plat book and page number his title was not so defective as to deprive him of the right of testing his title against a defendant relying on adverse possession without color of title.²¹³ Of course, in these cases as in others, it is error to set aside a verdict of the jury where there is sufficient evidence to support it.²¹⁴

The doctrine of adverse possession in relation to disputed boundaries continues to assume significant proportions in this type of litigation. Thus, a claimant to a disputed strip of land may prevail on the basis of adverse possession. To do this in Florida, however, he must intend to claim up to the boundary as his own, regardless of whether it's the true boundary or not, otherwise his holding will not be adverse.²¹⁵ Likewise, he must conform to the other statutory requirements such as the payment of taxes if such is the case.²¹⁶ Normally, a vendor's possession after a

210. *Alford v. Sinclair*, 55 So.2d 727 (Fla. 1951); *May v. Holley*, 59 So.2d 636 (Fla. 1952).

211. FLA. STAT. § 45.01 (1943); *Cook v. Rochford*, 60 So.2d 531 (Fla. 1952).

212. *Crowder v. Miami Beach First National Bank*, 50 So.2d 174 (Fla. 1951).

213. *Booker v. Saunders Realty Co.*, 53 So.2d 912 (Fla. 1951).

214. *May v. Holley*, 59 So.2d 636 (Fla. 1952); *Euse v. Gibbs*, 49 So.2d 843 (Fla. 1951); *Shaw v. Williams*, 50 So.2d 125 (Fla. 1950); *Watrous v. Morrison*, 33 Fla. 261, 14 So. 805 (1894).

215. *Tyner v. McDonald*, 63 So.2d 504 (Fla. 1953); *Indian Rocks Beach South Shore v. Ewell*, 59 So.2d 647 (Fla. 1952).

216. *May v. Holley*, 59 So.2d 636 (Fla. 1952).

conveyance is not adverse to that of the vendee.²¹⁷ Although ejectment usually should be used to determine the title and right to possession of realty, if the plaintiff's exact remedy is unknown because of lack of knowledge as to when the defendant's possession became adverse, or if he was occupying under a purported agreement of boundary acquiescence, then he may resort to declaratory judgment procedure.²¹⁸ A private right of easement in lands to which the offer of dedication has been revoked can be barred by adverse possession. Compliance with the statutes in effect while title is being perfected is necessary for the acquisition of an adverse title.

The filing of a suit tolls the statute of limitations and a subsequent transfer of the case from the equity to the law side of the court does not affect this principle.²¹⁹ Such a transfer is simply a continuation of the original suit so that if the statute hadn't run at that time, it would not now be a defense to the action. Closely allied to the doctrine of adverse possession in relation to boundary disputes is the rule of acquiescence. Under the theory that title was established by acquiescence in a boundary line, that line determines the extent of ownership of the parties on the theory that such a line is the true line. Clearly, adverse possession is not applicable and the court correctly so held in *Euse v. Gibbs*.²²⁰ However in *Shaw v. Williams*²²¹ the court apparently confused the two doctrines because it discussed at length acquiescence in the line for the prescriptive period. If acquiescence in a line established after a dispute determines the true boundary, there should be no need to acquiesce for the period of the statute of limitations or for any other definite period.²²²

Writ of assistance.—The statutory remedy of writ of assistance to obtain possession was denied in *Drowdy v. Warfield*.²²³ It is interesting to note that this case was twice considered by the Supreme Court without the merits of the controversy ever being settled. The basis for the decision in the instant case was simply that the statute provides that the writ is an auxiliary remedy available for the enforcement of a decree when the other party refuses to comply. Since there had been no previous decree for the delivery of possession, there was nothing on which to base the writ.

Dedication: Legislation.—New legislation in the field of dedication consisted of the enactment of Chapter 28206 of the Laws of 1953,

217. *Ibid.* See note 98 *supra*. *Stark v. Frayer*, 67 So.2d 237 (Fla. 1953) discussing the availability of quiet title actions.

67 So.2d 237 (Fla. 1953) discussing the availability of quiet title actions.

218. *Meeman v. Roberson*, 60 So.2d 741 (Fla. 1952).

219. *Deas v. Burnham*, 65 So.2d 297 (Fla. 1953).

220. 49 So.2d 843 (Fla. 1951).

221. 50 So.2d 125 (Fla. 1950).

222. This is apparently the view of the Florida cases. *Euse v. Gibbs*, 49 So.2d 843 (Fla. 1951); *Watrous v. Morrison*, 33 Fla. 261, 14 So. 805 (1894). See note 108 *supra*, a line of authority does require acquiescence for the statutory period.

223. 49 So.2d 328 (Fla. 1950).

authorizing the abandonment of county parks. The authorization does not extend to state or federal parks. Anyone owning land abutting the park grounds may petition for the abandonment. Procedure to be followed is the same as provided in Florida Statutes Sections 343.36 to 343.40,²²⁴ regulating the manner of discontinuing county roads. All landowners in the subdivision in which the park is located shall be notified by mail twenty-eight days before a hearing. The park shall not be closed if objection is raised by twenty percent of the landowners, by owners of twenty percent of the land, by anyone owning a lot within 400 feet of the park, or by anyone owning a lot in the plat on which there is a building.²²⁵

Cases involving dedication during the past two years indicate no fundamental changes in the basic requirements for a valid dedication. There must be an offer and an acceptance and the court will require proof of both before there will be a complete dedication. Filing the plat, delineating streets and parks constitutes but an offer to dedicate which must be accepted either formally by resolution on behalf of the appropriate governing agency or by sufficient public use. In applying these basic concepts to particular fact situations it was held in one case²²⁶ that public acceptance by opening up and using the main thoroughfare in a platted subdivision constituted an acceptance of the offer to dedicate all the streets in the subdivision. This was the first Florida case to directly so hold although elsewhere there is considerable authority.²²⁷ It may evidence a more liberal attitude by the Florida Supreme Court toward finding a completed dedication, but in subsequent decisions so far the court has not reaffirmed the proposition. In *Board of Commissioners v. Sebring Realty Company*²²⁸ the court explicitly considered the effect of Florida Statutes Section 177.10, requiring the appropriate governing body to approve the plat before its filing, and concluded that the provision did not dispense with the necessity of a subsequent acceptance. Such an approval of the plat is simply a prerequisite to recording and does not take the place of or act as an acceptance of the offer to dedicate.

Private easements in dedicated lands.—The mere fact of the existence of a plat does not show a clear offer to dedicate, and in the absence of a valid completed dedication, the city cannot enforce the removal of obstructions.²²⁹ Likewise, the city under such circumstances cannot enforce private rights deriving from the sale of lots according to a plat where there was no acceptance of the offer to dedicate. That private parties may obtain easements and possibly other rights in land offered for

224. FLA. STAT. §§ 343.36-343.40 (1943).

225. Fla. Laws 1953, c. 28206.

226. *Indian Rocks Beach South Shore v. Ewell*, 59 So.2d 647 (Fla. 1952).

227. 16 Am. Jur. 387 (1938).

228. 63 So.2d 256 (Fla. 1953).

229. *Crystal River v. Williams*, 61 So.2d 382 (Fla. 1952).

dedication is clearly established. Thus, in *McCorquodal v. Keyton*²³⁰ the grantor sold lots in reference to a plat which indicated a parcel of land dedicated as a park to be used and enjoyed by the lot owners. Later, the grantor erected a refreshment stand in the park and subsequently sold the concession. The court upheld an injunction prohibiting the sale of any park land for the exclusive use of anyone. The owner of the fee of the park is barred from depriving his grantees of rights which he led them to believe they had. The purchasers acquired by implied covenant a private easement in the park, and use of the concession stand was an invasion of their rights.

That this private right of easement may be acquired even though there was no public acceptance of the offer to dedicate is illustrated in the case of *Powers v. Scobie*.²³¹ In this case, although there was apparently a partial acceptance of the offer to dedicate the street, the court found no acceptance of the offer to dedicate that portion of the street under litigation. Although there was considerable evidence of a public user, the court thought that it was not unequivocally shown that user was of the street as dedicated. Such a strict requirement of proof of acceptance here seems hardly in spirit with the earlier decision holding acceptance of the main road constituted acceptance of all of the proposed streets in the subdivision. The court did, however, in the instant case find a private right of easement over the street as delineated. In determining the extent of such an easement, it was asserted that the "broad or unity"²³² rule will be applied in relation to parks but that in relation to streets such a rule would be impracticable. It therefore adopted the "beneficial" or "complete enjoyment"²³³ rule which limits the grantee's private right of easement to streets and alleys shown on the plat to those as are reasonably and materially beneficial to the grantee and of which the deprivation would reduce the value of his lot. It accordingly held that the plaintiff would be protected by having the street redelineated and that the defendant would not be compelled to remove his house.²³⁴ These general principles were reaffirmed in *Brooks-Garrison Hotel Corp. v. Sara Investment Company*.²³⁵ *Mumaw v. Robertson*²³⁶ is likewise in accord with these general principles and in addition illustrates that a private right of easement may be lost by adverse possession and estoppel.

230. 63 So.2d 906 (Fla. 1953).

231. 60 So.2d 738 (Fla. 1952).

232. The rule is that a grantee to whom a conveyance is made by reference to a map or plat acquires a private right, frequently designated as an easement, to the use of all the streets and alleys delineated on such map or plat.

233. This rule limits the grantee's private right of user in streets and alleys shown on a map or plat by reference to which his conveyance was made to such streets and alleys as are reasonably or materially beneficial to the grantee and of which the deprivation would reduce the value of his lot. 7 A.L.R.2d 633 (1949).

234. *Powers v. Scobie*, 60 So.2d 738 (Fla. 1952).

235. 61 So.2d 913 (Fla. 1952).

236. 60 So.2d 741 (Fla. 1952).

Eminent domain and police power: Legislation.—The statutes providing for proceedings supplemental to condemnation were amended by Chapter 26921 of the Laws of 1951. Salient features of the amendment include: shifting the provision for eminent domain by housing authorities from Section 74.01 of the statutes to Section 74.15; changing Section 74.03 to permit the parties to be heard on questions of jurisdiction and on the sufficiency of the pleadings; making the appointment of appraisers mandatory instead of permissive; and changing Section 74.09 by removing the disability of appraisers to testify as witnesses when the suit is submitted to a jury to fix an award. Chapter 28282 of the Laws of 1953 amended Section 73.04 of the statutes relating to process in eminent domain proceedings by requiring the clerk to include in the notice the legal description of the real estate involved.

In a number of decisions involving the permissible limits of the exercise of eminent domain and the police power it was held that: (1) blighted areas could not be condemned for redevelopment when the area was to be used by private enterprise for light industry and commerce and not for low cost housing;²³⁷ (2) that a municipality can establish reasonable set-back lines under the police power and need not resort to eminent domain;²³⁸ (3) that the summary method of obtaining possession provided for in Florida Statutes Section 74.01 *et seq.* pending the completion of eminent domain proceedings is constitutional because it provides for more than ample protection to the property owner;²³⁹ and (4) that a carta blank extension by the legislature of private restrictive covenants was invalid as an unreasonable exercise of the police power and an impairment of the obligation of contracts.²⁴⁰

Other cases involving eminent domain proceedings held: that a landowner was entitled under the statute to reasonable attorney fees in a condemnation proceeding even though the county subsequently abandoned the proceedings;²⁴¹ that the condemnation of a fee simple title and the award of damages therefore precluded a subsequent suit for use and occupancy by the city prior to the condemnation because of the principle of *res judicata*;²⁴² that eminent domain proceedings are authorized for the acquisition of land to be used in the future and that the condemning body need not have on hand money, plans, and specifications for immediate construction;²⁴³ that the court need not grant a severance in the condemnation proceedings simply because the title to a portion of the land is in dispute, but that an award may be made and then held for

237. *Adams v. Housing Authority of Daytona Beach*, 69 So.2d 663 (Fla. 1952).

238. *Miami v. Romer*, 58 So.2d 849 (Fla. 1952).

239. *State Road Department v. Foreland*, 56 So.2d 901 (Fla. 1952).

240. *Griffin v. Sharpe*, 65 So.2d 751 (Fla. 1953).

241. *DeSoto County v. Highsmith*, 60 So.2d 915 (Fla. 1952).

242. *Miami v. Osborne*, 55 So.2d 120 (Fla. 1951).

243. *Carbor Company v. Miami*, 62 So.2d 897 (Fla. 1953).

distribution until the title is settled and proper apportionment made;²⁴⁴ that the jurisdiction of the trial court must be raised in that court;²⁴⁵ and that a trial court's verdict will be sustained where there is evidence to support it.²⁴⁶

VI. RIGHTS IN LAND

Easements: Legislation.—Chapter 28070, Laws of 1953, amended the provisions for a statutory easement²⁴⁷ of ingress and egress to land blocked areas. The amendment was probably occasioned by the decision in *South Dade Farms, Inc., v. B. & L. Farms*.²⁴⁸ The exact effect of the decision was a little obscure owing to the fact that the rationale of the opinion suggested the whole statute void as a taking of property from one private owner for the use of another, but the exact holding cautiously restricted the decision to a declaration that the application of the statute to the facts at bar would be contrary to the federal and state constitutions. In this case there were common law easements and a dedicated roadway available to the shut-off area, but such ways were impassable. Under such facts it would seem that the land was not really completely shut-off and that there would thus be no need for the assertion of a statutory easement.

It is well settled that a dominant easement holder may keep his way in repair and that the servient owner has no duty to keep it in repair for him.²⁴⁹ As to lands publicly dedicated, the interested party should get the proper public officials to maintain it in a usable condition. It is thus possible that the above case only held that the application of a statutory easement to these facts would be unconstitutional.

The validity of the statute was raised but not decided in an earlier case the same year. In that case, *Guess v. Agar*,²⁵⁰ the defendant was asserting an easement for the purposes of hauling shell. The court correctly denied the application of the statutory easement because the use being made of the way was not included within those specified in the statute. Likewise, the court found against an easement of necessity since there was no unity of title from some source other than the state. The court asserted that there is no basis for implying a grant in a conveyance by the state. The new statute²⁵¹ codifies the decision of *Guess v. Agar*, *supra*, as to the requirements for the common law implied easement of necessity, and endeavors to avoid the constitutional objections raised in *South Dade Farms, supra*, by providing a method of compensation to the owner of the land over which the easement is asserted.

244. *Peeler v. Duval County*, 66 So.2d 247 (Fla. 1953).

245. *Conner v. State Road Department*, 66 So.2d 257 (Fla. 1953).

246. *Natural Gas and Appliance Co. v. Marion County*, 58 So.2d 701 (Fla. 1952).

247. FLA. STAT. § 704.01 (1943).

248. 62 So.2d 350 (Fla. 1952).

249. 17 AM. JUR. 1003 (1938).

250. 57 So.2d 443 (Fla. 1952).

251. Fla. Laws 1953, c. 28070.

Restrictive covenants.—In line with the more or less general attitude towards restrictive covenants, the Florida Supreme Court, while adhering to a policy of favoring the free and untrammelled use of real property, reaffirmed its position of enforcing such restrictive covenants, though strictly construing them, if the intention is clear and the restrictions reasonable.²⁵² The reasonableness of such restrictions may be litigated either in toto or in regard to a particular building or application. A covenant restricting the use of land to single family residences was construed as prohibiting a church,²⁵³ and the fact that the covenant would expire in two years was held not a sufficient basis for changing the terms of the covenant. An earlier case²⁵⁴ with similar covenants which permitted the operation of a private school in a building which had been constructed as a private residence was distinguished. In that case the covenant was only against construction of such buildings whereas these covenants were against both construction and use, and the church was not yet constructed. In another case,²⁵⁵ the court enforced a covenant to always use the land as a sidewalk or highway, the purpose apparently being to use this corner lot as a mode of ingress and egress to the adjoining gas station.

Miscellaneous.—Among a number of cases not particularly significant it was held that an owner of an airport could not enjoin an adjoining drive-in theater as such an enterprise would not so unreasonably interfere with the airport owner's enjoyment of the surface as to constitute a nuisance, and that the owner of the land can certainly make reasonable use of the space above his premises.²⁵⁶ This was not a spite structure. It was also held that a garbage disposal plant in the same location for twenty-eight years, although enlarged several times, did not constitute a nuisance.²⁵⁷ Mandamus was said not to lie to compel city officials to record a plat, and an ordinance providing for minimum street and sidewalk requirements in platted areas was reasonable and did not deprive the owners of their property without compensation.²⁵⁸ The owners could still sell their property without reference to any plat. A defunct municipal corporation was held to have no power to convey real estate according to *Anglin v. Lauderdale-by-the-Sea*.²⁵⁹ The intentional interference with the flow of subterranean waters was held actionable.²⁶⁰ A bigamist was denied the right to inherit from his wife after twenty years of desertion on the doctrine of estoppel.²⁶¹

252. *Ballinger v. Smith*, 54 So.2d 433 (Fla. 1951).

253. *Bucklen v. Trustees Bayshore Baptist Church*, 60 So.2d 182 (Fla. 1952).

254. *Noble v. Kisker*, 134 Fla. 233, 183 So. 836 (1938).

255. *Sinclair Refining Company v. Watson*, 65 So.2d 732 (Fla. 1953).

256. *Reaver v. Martin Theatres of Florida*, 52 So.2d 682 (Fla. 1951).

257. *State ex rel. Knight v. Miami*, 53 So.2d 636 (Fla. 1951).

258. *Garvin v. Baker*, 59 So.2d 360 (Fla. 1952).

259. 60 So.2d 619 (Fla. 1952).

260. *Labruzzo v. Atlantic Dredging and Construction Company*, 54 So.2d 673 (Fla. 1951).

261. *Doherty v. Traxler*, 66 So.2d 274 (Fla. 1953).