

January 1949

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Recommended Citation

Wilson R. Caffee, *Limitations Upon Instruments Encumbering Real Estate*, 2 Fla. L. Rev. 420 (1949).
Available at: <https://scholarship.law.ufl.edu/flr/vol2/iss3/7>

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lature has not changed the fundamental situation that the Court held fatal to the act. Nevertheless, the way may be open for the Court to limit the *Liquor Stores* case to its facts and hold the act valid in so far as it applies to those who expressly agree to price fixing by a trade-mark owner. This cannot be done, however, without a partial retraction of the Court's basic thesis in that case — indirect price fixing.

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LIMITATIONS UPON INSTRUMENTS ENCUMBERING REAL ESTATE

Florida Laws 1945, c. 22560, §1
Florida Statutes §95.28 (Cum. Supp. 1947)

Does a statutory limitation such as Florida Laws of 1945, c. 22560, §1, apply to an equitable mortgage? The statute provides:

"The lien of a mortgage or other instrument encumbering real estate (hereinafter referred to as mortgage), . . . shall terminate and no action or other proceeding of any kind shall be begun to enforce or foreclose the mortgage after the expiration of the following periods, unless an extension of any such period shall have been effected in the manner provided in Florida Laws of 1945, c. 22560, §2.

(1) If the final maturity of an obligation secured by a mortgage is ascertainable from the record of the mortgage, the period of limitation shall be twenty years after the date of such maturity;

(2) If the final maturity of an obligation secured by a mortgage is not ascertainable from the record of the mortgage, the period of limitation shall be twenty years from the date of the mortgage."¹

I. THE NATURE OF EQUITABLE MORTGAGES

An equitable mortgage arises whenever an agreement of the parties contemplates that specific property is to be security for a debt or obliga-

¹FLA. STAT. §95.28 (Cum. Supp. 1947). See FLA. STAT. §95.32 (Cum. Supp. 1947). The provisions of §95.28 have no application to mortgages or deeds of trust executed

tion.² The Supreme Court of Florida has said that, since an equitable mortgage or lien arises by operation of law from the conduct of the parties, express or implied, equitable mortgages or liens are not within the requirements of the Statute of Frauds and thus may be predicated upon mere oral agreements, as when money is lent upon the promise that certain property is to be security therefor.³ Another class of equitable liens is found in cases in which courts of equity, on the basis of estoppel and considerations of justice, declare certain property subject to a lien to satisfy a demand of another, as when one joint owner makes improvements on the joint property.⁴

An equitable mortgage or lien is not an estate in property but is rather a peculiar right to proceed in equity and sequester the specific property over which the lien exists, in order to satisfy the debt or obligation.⁵ The creditor in whose favor the lien exists, however, has neither legal title nor any right to possession of the property.⁶ Concisely stated, it is a special equitable "remedy for a debt."⁷

Equitable mortgages or liens appear most frequently in the following types of security transactions: a defectively executed legal or regular mortgage,⁸ oral or written contracts to give a mortgage,⁹ oral or written agreements made on the reliance that certain property is to stand as se-

by a railroad or public utility corporation or by any receiver or trustee thereof; nor does the statute apply to liens under FLA. STAT., cc. 84, 85 (1941).

²Foster v. Thornton, 131 Fla. 277, 179 So. 882 (1938); Holmes v. Dunning, 101 Fla. 55, 133 So. 557 (1931); Longdon v. Wakeley, 62 Fla. 530, 56 So. 408 (1911); Margarum v. J. S. Christie Orange Co., 37 Fla. 165, 19 So. 637 (1896); 5 TIFFANY, REAL PROPERTY §1563 (3d ed. 1939).

³Craven v. Hartley, 102 Fla. 282, 135 So. 899 (1931). In this case a married woman obtained a loan to complete payments on property she had purchased on the oral promise to execute a mortgage. It was held immaterial that the promise to execute was in parol. See 9 THOMPSON ON REAL PROPERTY §4822 (Perm. ed. 1940).

⁴See Jones v. Carpenter, 90 Fla. 407, 414, 106 So. 127, 129 (1925).

⁵Foster v. Thornton, 131 Fla. 277, 179 So. 882 (1938); Folsom v. Farmers' Bank of Vero Beach, 102 Fla. 899, 136 So. 524 (1931); Jones v. Carpenter, 90 Fla. 407, 106 So. 127 (1925); International Realty Associates v. McAdoo, 87 Fla. 1, 99 So. 117 (1924).

⁶See note 5 *supra*. See also FLA. STAT. §697.02 (1941), providing that a mortgage creates a specific lien and does not pass any title or right to possession.

⁷See Aldrich v. R. J. Ederer Co., 302 Ill. 391, 134 N. E. 726, 728 (1922).

⁸Holmes v. Dunning, 101 Fla. 55, 133 So. 557 (1931); Longdon v. Wakeley, 62 Fla. 530, 56 So. 408 (1911); Margarum v. J. S. Christie Orange Co., 37 Fla. 165, 19 So. 637 (1896).

⁹Craven v. Hartley, 102 Fla. 282, 135 So. 899 (1931); 9 THOMPSON ON REAL PROPERTY §4821 (Perm. ed. 1940).

curity for a debt or obligation,¹⁰ a deed absolute that is actually intended as security for a loan,¹¹ and a mortgage on property to be acquired in the future.¹²

As all mortgages in Florida create specific liens without the passing of legal title or right to possession,¹³ the essential nature and effect of an equitable mortgage differ but little from a regular or formal mortgage¹⁴ executed according to the requirements of a deed.¹⁵ Both are enforceable exclusively in equity courts.¹⁶

II. LACHES AND THE STATUTE OF LIMITATIONS

The doctrine of laches as a bar to a suit in equity developed as a peculiar aspect of equity jurisprudence, independently of any fixed statutory limitations.¹⁷ If the plaintiff in equity delays to the prejudice of the defendant in seeking equitable relief to which he is entitled, and his delay is accompanied by important changes in the value of the property or other changes in the situation of the defendant that would make the

¹⁰*Crown Corp. v. Robinson*, 128 Fla. 249, 174 So. 737 (1937); *Craven v. Hartley*, 102 Fla. 282, 135 So. 899 (1931) (Statute of Frauds not applicable to equitable liens or mortgages).

¹¹FLA. STAT. §697.01 (1941) provides that all conveyances executed for the purpose of securing payment of money shall be deemed and held "mortgages." Although the term "mortgage" is used in this statute, such a transaction has traditionally been considered an equitable mortgage or lien. See WALSHE, MORTGAGES §7 (1934). Several Florida cases state that such a conveyance will be "treated in equity" as a mortgage. See *Hull v. Burr*, 58 Fla. 432, 462, 50 So. 754, 764 (1909); *Franklin v. Ayer*, 22 Fla. 654, 660 (1886).

¹²*Rose v. Lurton*, 111 Fla. 424, 149 So. 557 (1933); *Marion Mtg. Co. v. Teate*, 98 Fla. 713, 124 So. 172 (1929); *Davis v. Horne*, 54 Fla. 563, 45 So. 476 (1907).

¹³See notes 5 and 6 *supra*.

¹⁴To distinguish between a true or regular mortgage and an equitable mortgage or lien is beyond the scope of this article. See, however, 5 TIFFANY, REAL PROPERTY 660 (3d ed. 1939): "It is somewhat difficult to understand what constitutes an equitable mortgage in states in which the lien theory of a mortgage prevails." See also 1 GLENN ON MORTGAGES 46 (1943): "And even under our 'lien theory' of mortgages, . . . the mortgagee gets a legal interest in the land, which is quite different from an equity, as that term is commonly understood."

¹⁵FLA. STAT. §689.01 (1941). See also FLA. STAT. §697.02 (1941), *Walker v. Heege*, 78 Fla. 667, 670, 83 So. 605, 606 (1920) (witnesses to a mortgage not required by the laws of Florida, since a mortgage does not pass legal title but gives only a specific lien).

¹⁶FLA. STAT. §702.01 (1941).

¹⁷*Harcourt v. White*, 28 Beav. 303, 54 Eng. Rep. 382 (1860); 2 POMEROY, EQUITY JURISPRUDENCE §418 (5th ed. 1941).

delayed enforcement of the relief sought unjust and unfair, equity denies the relief to which the plaintiff would otherwise be entitled.¹⁸

Statutes of limitation, however, are of statutory origin¹⁹ and generally do not apply to suits in equity unless made applicable by statute.²⁰ Unlike laches in equity, the application of which depends upon the facts and circumstances of each case showing a prejudicial delay,²¹ a statute of limitations is a mere matter of time, without any consideration given to the inequities of a delay in bringing an action.²² Nevertheless, there is a strong tendency in other states²³ as well as in Florida²⁴ for courts of equity to follow, by analogy, the corresponding limitation statutes applicable to legal actions, although not bound to do so.²⁵

Even in jurisdictions in which statutes of limitation are expressly made applicable to suits in equity, or the jurisdiction of law and equity is concurrent, laches may bar the suit in a period less than that prescribed by the statute of limitation. In such cases the statute merely sets the outside

¹⁸*E.g.*, *Halstead v. Florence Citrus Growers' Ass'n*, 104 Fla. 21, 139 So. 132 (1932); *DeHuy v. Osborne*, 96 Fla. 435, 118 So. 161 (1928); *Norton v. Jones*, 83 Fla. 81, 90 So. 854 (1922). Laches does not depend merely upon a lapse of time; but a long lapse of time unexplained is some evidence of acquiescence. The determining feature is the presence of circumstances showing that the delay was prejudicial. Its application depends upon the facts and circumstances of each case.

¹⁹*Board of Adjustment v. State ex rel. Sossaman*, 231 Ala. 520, 165 So. 761 (1936); *Uscienski v. National Sugar Ref. Co.*, 19 N. J. Misc. 240, 18 A.2d 611 (1941).

²⁰*Parrot v. Dickson*, 151 S. C. 114, 148 S. E. 704 (1929); *see Hayes v. Belleair Dev. Co.*, 120 Fla. 326, 332, 162 So. 698, 700 (1935), "In courts of equity, there is no such thing in fact as a statute of limitations. . . ."

²¹*See note 18 supra.*

²²*See Sharrow v. City of Dania*, 131 Fla. 641, 649, 180 So. 18, 21 (1938), "Laches is not like the statute of limitations a mere matter of time."

²³*Castner v. Walrod*, 183 Ill. 171 (1876). After stating that the question of laches turns on the facts of each case, the court added, ". . . but when the statute has fixed the period of limitations under which the claim if interposed in a court of law, would be barred, courts of equity, by analogy, follow the limitation followed by law." To the same effect *see Updike v. Mace*, 194 Fed. 1001 (C. C. A. 2nd 1892).

²⁴*See Jones v. Hammock*, 131 Fla. 321, 331, 179 So. 674, 678 (1937), "We recognize the rule that such a limitation is not necessarily binding upon a court of equity. But there is also a rule that, in the absence of contrary equities, a court of equity may follow the law"; *Hayes v. Belleair Dev. Co.*, 120 Fla. 326, 332, 162 So. 698, 700 (1935), ". . . but in the application of the doctrine of laches courts of equity, while not bound by, usually act or refuse to act on, the basis of provisions in statutes of limitations relating to actions at law of like character." *See also Fillyau v. Laverty*, 3 Fla. 72, 108 (1850). The Court stated that when a purely legal claim is being asserted in equity the statute of limitations applies to it as if the suit were in a court of law.

²⁵*See note 24 supra.*

limit, but courts of equity may still refuse relief when to grant it would be unjust and against conscience, however meritorious it might be if pursued with reasonable diligence.²⁶

III. BAR OF DEBT AS BARRING MORTGAGE

There is a division of opinion as to the effect that the bar on collection of a debt has upon the mortgage given to secure such debt, when the debt is subject to a shorter limitation period than the one applicable to the mortgage as an instrument under seal. Florida and some other jurisdictions hold that the life of a mortgage on real estate is not measured by that of the underlying obligation, and that the mortgagee can pursue his remedy on the mortgage by foreclosure notwithstanding the fact that the debt or the evidence thereof is barred by the statute of limitations.²⁷ These decisions proceed for the most part on the theory that the statute of limitations goes merely to the remedy without extinguishing the right; and since a mortgagee has two remedies — one on the security and one on the principal obligation — the bar of one is not necessarily destructive of the other.²⁸ In other jurisdictions, however, there is another line of decisions holding that a mortgage is a mere incident of the debt and hence cannot be foreclosed when the note or other evidence of the indebtedness secured by it is barred by the statute of limitations. If an action on the debt is barred, a suit on the mortgage is likewise barred.²⁹

IV. WHEN THE LIMITATION PERIOD BEGINS TO RUN

The statute under consideration provides that the twenty-year limitation period runs from the final maturity date of the obligation secured by the mortgage if such is ascertainable from the record, but if not so ascertainable it will run from the date of the mortgage.³⁰ Another statute requires that an instrument must be properly acknowledged in order to be

²⁶*DeLamar Mines v. Mackay*, 104 F.2d 271 (C. C. A. 9th 1939); *Ussery v. Darrow*, 238 Ala. 67, 188 So. 885 (1939); *Dixmoor Golf Club v. Evans*, 325 Ill. 612, 156 N. E. 785 (1927); 5 POMEROY, EQUITY JURISPRUDENCE §419b (5th ed. 1941).

²⁷*Ellis v. Fairbanks*, 38 Fla. 257, 21 So. 107 (1897); *Browne v. Browne*, 17 Fla. 607 (1879); *Harper v. Raisin Fertilizer Co.*, 158 Ala. 329, 48 So. 589 (1908); *Belknap v. Gleason*, 11 Conn. 160 (1836).

²⁸*McNair v. Burt*, 68 F.2d 814 (C. C. A. 5th 1934).

²⁹*Dupree v. Mauer*, 214 U. S. 161 (1909); *Morgan v. Kendrick*, 91 Ark. 394, 121 S. W. 278 (1909).

³⁰FLA. STAT. §95.28 (Cum. Supp. 1947).

entitled to record;³¹ and the Supreme Court of Florida has held that an instrument that has been spread upon the records when not entitled to be recorded because of the lack of or defect in acknowledgment is, in effect, no record at all and does not give constructive notice to subsequent purchasers and creditors.³² Construing the word "record," then, in its proper sense, it follows that the twenty-year limitation period will run only from the final date of maturity of the secured obligation when that date appears on the face of the mortgage and the mortgage has been properly acknowledged so as to be entitled to record. Thus if the mortgage is not recorded at all, or if its maturity date does not appear on the recorded instrument, or if it is not properly acknowledged so as to constitute a "record," the limitation period runs from the date of the mortgage. This same construction should also apply to extension agreements.³³

V. CONCLUSION

Although the term "mortgage" has a somewhat indefinite meaning in Florida,³⁴ in its traditional sense it has signified a formally executed instrument attested by witnesses.³⁵ These formalities are not now necessary for its validity, however, since a mortgage does not pass legal title as at common law.³⁶ In view of the fact that in Florida a mortgage creates only a specific lien,³⁷ its legal meaning may have changed to include a great variety of instruments that would be treated as creating a lien on property. The Supreme Court of Florida has repeatedly said that any instrument, however informal, that shows an intent that certain property is to be security for a debt will be treated in equity as a mortgage or lien as effectively as a formally executed mortgage.³⁸ Whatever theoretical differences there may be between the lien of a formally executed mortgage and

³¹FLA. STAT. §695.03 (1941).

³²*McEwen v. Schenck*, 108 Fla. 119, 146 So. 839 (1933); *McKeown v. Collins*, 38 Fla. 276, 21 So. 103 (1896); *Keech v. Enriquez*, 28 Fla. 597, 10 So. 91 (1891).

³³FLA. STAT. §95.29 (Cum. Supp. 1947).

³⁴See note 14 *supra*.

³⁵See *Connor v. Connor*, 59 Fla. 467, 472, 52 So. 727, 729 (1910); 4 KENT'S COMM. 133 (14th ed. 1896).

³⁶See note 15 *supra*.

³⁷FLA. STAT. §697.02 (1941).

³⁸See *Torreyson v. Dutton*, 145 Fla. 169, 175, 198 So. 796, 799 (1940); *Vanderpool Properties v. Hess & Slager*, 100 Fla. 933, 935, 130 So. 457, 458 (1930); *Stovall v. Stokes*, 94 Fla. 717, 741, 115 So. 828, 837 (1927); *Pittman v. Milton*, 69 Fla. 304, 320, 68 So. 658, 663 (1915); *Connor v. Connor*, 59 Fla. 467, 471, 52 So. 727, 729 (1910).

an equitable lien or mortgage,³⁹ the fact remains that no greater rights accrue under the one than the other. By the use of the phrase "mortgage or other instrument encumbering⁴⁰ real estate,"⁴¹ it follows that the term "mortgage" was being used in its broadest sense, which would include any instrument that had the effect of a mortgage. This would mean that all the various types of equitable mortgages or liens evidenced by a writing are to come within its terms.⁴² To hold otherwise would leave a large number of security transactions unaffected by the statute and would curtail the additional certainty in land conveyancing that is sought to be attained by the statute.

Even though the statute of limitations would mark the period beyond which the lien of a mortgage or equitable lien cannot extend, of course courts of equity, by the application of the doctrine of laches, may bar a suit to foreclose a mortgage or equitable lien in a shorter period when it is shown that the delay was unreasonable under the circumstances.⁴³

An equitable mortgage that rests upon an oral agreement, however, is not an "instrument encumbering real estate" so as to come within the terms of the statute. The enforcement of such a lien, therefore, is still barred only by the application of the doctrine of laches. Since courts of equity usually follow statutes of limitation by analogy,⁴⁴ it may be held that equitable mortgages based upon oral agreements will be barred by the lapse of a period comparable to that prescribed by the statute under consideration unless extraordinary circumstances exist that require an opposite result. From the standpoint of conveying a clear title, free from any uncertainty of this sort, the statute could well be amended to apply specifically to all mortgages, legal or equitable, whether in writing or not and whether express or implied by operation of law.

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³⁹See note 14 *supra*.

⁴⁰The term "encumbrance" was defined in *Prescott v. Trueman*, 4 Mass. 627, 629 (1808): ". . . every right to, or interest in the land granted, to the diminution of the value of the land, but consistent with the passing of the fee of it by the conveyance, must be deemed in law an incumbrance." This would include judgments, restrictions, tax liens, mortgages, liens, etc.

Considering the subject-matter of Section 95.28, it is clear that the term was not meant to be used in such a broad sense.

⁴¹FLA. STAT. §95.28 (Cum. Supp. 1947).

⁴²See notes 8, 9, 10, 11, 12 *supra* for some common examples of equitable mortgages or liens.

⁴³See note 26 *supra*.

⁴⁴See notes 23, 24 *supra*.