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CONTRACTS*

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INTRODUCTION

Even the greediest actor would eschew as a self-defeating process the assumption of several roles at once. For realizing as he does, that human chameleons are rare, he refuses to chance a confused—or stuporized—audience. Your reviewer, whose objectives are several, assumes four roles (and hang the consequences): (1) watch-dog for cases of first impression for practicing lawyers; (2) remembrancer of theory long-forgot for bar candidates; (3) the same for current contracts classes; (4) self-appointed gadfly to the already beleaguered courts. (A thrifty audience will gloss its mummer with an appropriate cloak and make the best of its investment, remembering the while, that charity is the best of all possible virtues.)

Organization of the article roughly parallels that of contracts case books, the better to teach the theory of contracts. For the most part, only those cases involving principles common to all types of contracts were selected; some specialized categories are dealt with in other *Survey* articles. The article is arranged according to the following format:

I. FORMATION OF CONTRACTS

A. *Offer and Acceptance*

1. BROKER'S COMMISSIONS
2. PUBLIC AGENCIES
3. MISCELLANEOUS
4. CONTRACTS TO MAKE WILLS
5. GUARANTIES

* The article covers cases following the last *Survey*, contained in 114 So.2d through 130 So.2d. Excepted are most contract cases treated in other *Survey* articles, as well as federal cases.

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B. *Consideration*

II. INTERPRETATION AND CONSTRUCTION

A. *Municipal Contracts*B. *Sales*C. *Miscellaneous*D. *Accord and Satisfaction*E. *Conditions and Waivers*

III. THE PAROL EVIDENCE RULE

IV. THE STATUTE OF FRAUDS

V. ASSIGNMENTS

VI. THIRD PARTY BENEFICIARIES

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VIII. MISCELLANEOUS

I. FORMATION OF CONTRACTS

A. *Offer and Acceptance*

1. BROKER'S COMMISSIONS

Because these cases most often involve offers for unilateral contracts, the courts interpreting the landowner's promise (as employer) to pay his real estate broker a commission for *procuring* (not promising to procure) a customer, ready, willing and able to purchase for a price set in advance by the owner (or some close variant of the same), most of the problems arising are actually those of acceptance, acceptance of offers for unilateral contracts being synonymous with the bargained-for performance.¹ Florida courts make an interpretation which absolutely requires this construction, but then fail to give it. Because acceptance of an offer is a very different concept from performance of a bilateral contract, opinions are confused, and direction is uncertain. As a purely hortatory measure the cases are included here.

An owner of land who promises a broker an *exclusive right of sale* may or may not have promised to pay a commission even if the owner sells the property himself. All depends upon the intent disclosed in the entire instrument: the words "exclusive right to sell" are not definitive, the court held in *Nicholas v. Bursley*.² In the instant case, other provisions negated the owner's intent to deprive himself of his "inherent right to dispose of his

1. See Smith, *Contracts, Fourth Survey of Fla. Law*, 14 U. MIAMI L. REV. 534-37 (1960); 1 CORBIN, *CONTRACTS* § 50 (1950) for a full discussion of this area.

2. 119 So.2d 722 (Fla. App. 1960).

own property." One clause provided that a commission would be paid for "finding a purchaser." Another, that a commission was to be paid whether the purchaser was secured by the broker "or any other broker"; or if afterward sold, within three months of termination of the agency, to a customer of the broker. The word "exclusive" was ambiguous here, and since the broker drafted the instrument the ambiguity was resolved against him. Other recent cases in which the same question was involved³ were distinguished by the court on their facts. In these, by unequivocal language the owner had made clear his intent to pay a commission even if he should sell himself.

Another broker was the victim of his own draftsmanship, as well as a failure to recognize the theory of his own case. He alleged, in *Lindquist v. Burklew*,⁴ employment to find a purchaser, ready, willing and able to buy at the auction price. The answer denied this. Although the complaint also alleged the fall of the hammer, and subsequent entry into a contract of sale, the broker failed to support his complaint with an affidavit indicating an offer and acceptance by fall of the hammer. Thus on the seller's motion for a summary judgment, the broker was left with only the contract of sale as a basis of recovery. But the contract of sale, which he himself had drawn, provided that in event of forfeit of earnest money to the seller, the broker should have (only) half the forfeit as his commission. The court held that he was logically bound by it, and denied his claim for the full commission.

*De Lucca v. Flamingo Corp.*⁵ seems to be a case of first impression in Florida, the Statute of Frauds⁶ preventing a broker from recovering a commission. The defendant landowner employed the broker orally to find a purchaser for a net price to him, but specified that the broker should look to the purchaser for the commission. The broker procured the customer's written offer to purchase, as well as a promise to pay the commission, but the owner refused to sell. The broker in this action sued the owner for damages for an alleged breach of an employment contract. The court held, however, that the contract was not one of employment, but one to sell land, this being the owner's only promise, and affirmed the summary judgment for the owner. As Corbin notes,⁷ the court cited no cases in support of its decision. In the text-writer's opinion, this type contract is essentially an employment contract, not one to convey, though literally this is the

3. *Flynn v. McGinty*, 61 So.2d 318 (Fla. 1952).

4. 123 So.2d 261 (Fla. App. 1960). An interesting comment on this case may be found in 3A CORBIN, CONTRACTS § 768 n.1 (Supp. 1961).

5. 121 So.2d 803 (Fla. App. 1960).

6. FLA. STAT. § 725.01 (1961).

7. 2 CORBIN, CONTRACTS § 399 n.21 (Supp. 1961).

owner's promise. For one thing, fraud could be perpetrated only by collusion with the purchaser, a rather unlikely possibility. For another, the fact that the Statute of Frauds is rarely pleaded in these cases is reason enough to deny this construction. The Restatement⁸ supports the decision, according to Corbin.⁹

A broker who is employed to find a purchaser in accord with the terms of a listing does not perform so as to be entitled to a commission if he tenders merely an option. In *Orange City Hills, Inc. v. Florida Realty Bureau, Inc.*,¹⁰ the instrument tendered, though called a contract of sale, provided for automatic termination and retention of a binder by the seller as liquidated damages, if the buyer should fail to pay as agreed. Because of this provision, the court construed the instrument to be an option, and held that the defendant owner's motion for a directed verdict should have been granted.

Of interest in the same case was the court's holding that although the listing did not state the amount of the binder, or the terms of a contemplated mortgage, or the exact time for closing, these terms were suppliable in accord with local custom. Without comment, the court called attention to the holding of the supreme court in *McAllister Hotel Inc. v. Porte*¹¹ that terms not specified in the listing should be only those acceptable to the seller.¹²

A broker who sought to recover a commission from a husband and wife for procuring a customer to purchase property held by the entirety on the theory that the husband acted as implied agent for his wife was denied recovery in *Mister v. Thompson*.¹³ The defendants had signed nothing. Holding that the couple's motion for a directed verdict should have been granted, the court found there was no evidence from which such an agency could be found, nor citation of any authorities to support the plaintiff's theory under the circumstances of the case. The wife testified that she had not known of the listing until the plaintiff broker brought a prospect to see the house and told her. She replied that while she had never liked the idea of selling, if her husband wanted to sell, she was willing, and showed them the house. The decision seems right, since there was nothing to indicate the wife knew of a promise to pay *her money*. No such promise could be inferred from knowledge of the broker's employment, for she doubtless

8. RESTATEMENT, CONTRACTS § 193 (1932).

9. 2 CORBIN, CONTRACTS § 399 n.22 (1950).

10. 119 So.2d 43 (Fla. App.), cert. dismissed, 125 So.2d 880 (Fla. 1960).

11. 98 So.2d 781 (Fla. 1957).

12. In *McAllister* the intent was clear that omissions should *not* be supplied in accord with custom. It is thus distinguishable.

13. 114 So.2d 507 (Fla. App. 1959).

thought (like any wife) that her husband was paying. Her assent to the hiring was merely proper wifely conduct.

In *Sappington v. Town Properties, Inc.*,¹⁴ a broker promised to pay his salesman ten per cent of any commission paid to the firm, for which he was the procuring cause. In the salesman's action to recover on this promise, a directed verdict was given for the employer. The evidence showed that the plaintiff had worked unsuccessfully on the defendant's listing; that he had requested and had been given permission to enlist the aid of cooperating brokers. One of these sold the property (evidently without the help of the plaintiff), and paid 5,000 dollars to the employer as his part of the commission. Testimony showed that there was no agreement to pay the ten per cent if a cooperating broker was involved, and the court observed that the employer "owned" the listing. The court held that since the promise to pay was contingent on success, the plaintiff had not performed.

The recurring problem, whether a broker, who is employed to procure a customer at a price named in advance by the owner, can recover for his services if he introduces a customer to whom the owner sells for a price less than the listing, was presented again in *General Development Corp. v. Chaffin*.¹⁵ The difficulty in this type case is the existence of an express "contract" (as the courts put it), with promise to pay a commission expressly conditional on production of a customer who will and can pay a specific price.¹⁶ If there is an express contract, with an express condition, no contract will be implied (absent a total breach by the promisor)—or as the courts put it, "If there is an express contract, none will be implied." But if the express contract with the express condition is abandoned, then recovery may be had on an implied contract, and so the court held in the instant case. The trial court found that the seller had prevented the broker from further negotiation with the purchaser by negotiating with the purchaser himself, and thus abandoned the express "contract." Under these circumstances, while the seller is privileged to reject a counter offer of the buyer (introduced by the broker) for a new purchase price, if he accepts it he is also accepting the services of the broker for which he must pay.

14. 126 So.2d 906 (Fla. App. 1961).

15. 126 So.2d 748 (Fla. App.), *cert. denied*, 131 So.2d 202 (Fla. 1961).

16. Given the court's interpretation, that the owner promises to pay a specified commission in exchange for *production* of a customer ready, willing and able to pay a listed price (*not* in exchange for a "promise to produce," or to "use reasonable efforts to produce"), the owner has made only an offer, not as Florida courts maintain, a contract. The broker can accept the offer only by *producing* the customer in accord with the owner's offer. But he can make his own counter offer by producing a customer willing to pay a lesser price. In effect, the owner reasonably can infer from this that the broker is saying, "Here are my services—production of a customer at a different price. If you sell to him, you are accepting my services and my counter offer." The broker, in short, has made a counter offer for a reverse unilateral contract. When the owner sells to such a customer, from this fact, his promise to pay for services can be implied.

*Blackburn v. Alachua County Broadcasting Co.*¹⁷ held that if a person places property with a broker for sale, he impliedly agrees, in the absence of a special contract, to pay the customary commission for brokerage in the event a sale is consummated with a purchaser produced by the broker, who is ready, willing and able to pay the purchase price. Here, though there was also a count in special contract, the proof failed. Custom or usage locally prevailing as to the amount payable for like work determines the amount of the commission. "Like work" in the instant case was selling, not appraisal. The trial court had based recovery on the latter endeavor, in which the broker was also engaged. Accordingly, judgment for the broker was reversed.

In *Plumbing Indus. Program, Inc. v. Good*¹⁸ a broker sought to recover added compensation from an owner for whom he had procured a lessee. Prior to the making of the lease, the owner had signed a memorandum agreeing to pay a commission, and providing in part, "Should lessee . . . exercise its option to *renew* or *extend* said lease on the *same and/or additional space*, the Lessor . . . agrees to pay . . . an additional commission . . ."¹⁹ The *lessee's option* simply provided for renewal at a certain rental. Shortly before expiration of the lease, the lessor and lessee entered into a new lease on somewhat different terms, cancelling specifically the old lease. The court held that the lessor promised to pay only upon exercise of the "option to renew," and that this option was never exercised. The court refused to rewrite the contract to cover "any subsequent lease arrangement which the lessor and lessee may execute."²⁰ One wonders about this interpretation of the brokerage memorandum. From the memorandum the broker could reasonably believe that the lessor promised to include provisions for *additional space* in the option, and that added rent would be paid for it, necessitating a new lease on different terms. By not including an additional space provision in the lease, the lessor made the happening of the condition in the memorandum impossible, and breached, it would seem to the author.

2. PUBLIC AGENCIES

Among the most interesting offer and acceptance questions were two cases in which contracts with public agencies were alleged. Both are cases of first impression in Florida.

In *Hotel China & Glassware Co. v. Board of Pub. Instruction*,²¹ Florida joined a growing number of states holding that bids on public contracts,

17. 126 So.2d 303 (Fla. App. 1961).

18. 120 So.2d 639 (Fla. App. 1960), 79 A.L.R.2d 1060 (1961).

19. 120 So.2d at 640.

20. *Id.* at 641.

21. 130 So.2d 78 (Fla. App. 1961).

issued under competitive bidding statutes,²² are irrevocable once the bids have been opened and the results made known. Although Florida has no statute making such offers irrevocable, public policy, and possibly an implied contract not to revoke, dictate the rule. Reciprocal benefits and detriments would support such a contract, the court said.²³ A directed verdict for the school board was held proper in this action at law by a bidder who sought to recover his good faith deposit on the ground that an inexperienced employee had made a clerical mistake in preparing his bid, and that the bid was withdrawn before acceptance. Having elected to sue at law, the bidder was precluded from relying on equitable principles for relief.

In *William A. Berbusse, Jr., Inc. v. North Broward Hosp. Dist.*,²⁴ the court held that a request for bids on public works is an invitation; the offer, if any, emanates from the bidder. This rule, generally followed, is an expression of the requirement that an offer be promissory.²⁵ In the instant case the alleged offer lay in a public advertisement for bids to build a hospital, which stated that the award would be made to the lowest responsible bidder *if it were to the interest of the municipality to do so*. This obviously promised nothing. There was no statute requiring award to be made to the lowest bidder. Since the municipality was free to reject the bidder's offer, low or not, no contract resulted.

3. MISCELLANEOUS

While agreement on essential matters is necessary to form a contract, an agreement to leave other unessential matters for future agreement does not prevent formation of a contract, the court held in *Fincher v. Belk-Sawyer Co.*²⁶ The action was for breach of an alleged employment contract, the trial court directing a verdict for the employer on the following facts: the plaintiff employee²⁷ granted to the employer the exclusive right to distribute clothing and cosmetics bearing her name, and promised to supervise and direct the employer's fashion departments, shopping services and beauty salon, and to schedule and supervise fashion shows. The employer agreed to pay a weekly amount and a percentage of gross sales of products bearing her name. Left for future agreement were the added compensation based on gross sales in the departments involved, the dates for making personal appearances, and establishment of a beauty consulting service and shopping

22. E.g., FLA. STAT. § 237.02(2) (1961).

23. Difficulty in finding a bargain for such a contract may be seen. If so, promissory estoppel—enforcement of a promise to make a gift—might be an answer. RESTATEMENT, CONTRACTS § 90 (1932). See also note 49 *infra* and the accompanying text.

24. 117 So.2d 550 (Fla. App. 1960).

25. Except in the case of an offer for a reverse unilateral contract. See 1 WILLISTON, CONTRACTS § 24A (1957).

26. 127 So.2d 130 (Fla. App. 1961).

27. Former movie star Gloria De Haven.

service. The district court reversed and remanded, holding that the matters left for future agreement were not so essential that the remaining promises were unenforceable. The parties obviously *intended* an immediate obligation, and not one dependent on agreement on specific details and additional compensation, Corbin said approvingly of this case.²⁸

A so-called "purchase order" for a used car was held to be merely an offer in *Fricker v. Lester*.²⁹ The order in question contemplated possible cancellation of the order for a particular car, and transfer of the deposit or its return, and looked toward ultimate entry into a conditional sales contract.

Whether an insurance company is under a duty to act upon an application for insurance within a reasonable time was not decided in *Rosin v. Peninsular Life Ins. Co.*,³⁰ though the question was presented. If there is such a duty, it is not contractual, the court held. The applicant, by applying, makes an offer to purchase; the company may or may not accept. Delay or inaction is not an acceptance. Liability, if any, must rest on a theory of negligence, the court said. Because there was no factual basis from which to infer negligence in this case, the question remains unsettled in Florida.

The dictum in the next case is included solely because the writer of the opinion lately complained (no doubt, with reason) that young lawyers know nothing about the common counts. The case, *Jamerson-Lawson Corp. v. Central State Dev. Corp.*,³¹ was one for equitable relief, wherein a motion to dismiss was sustained and affirmed. The court suggested an action at law with a count in *indebitatus assumpsit*³² on the following allegation of facts. Defendant subdivision developer wanted to connect his sewage lines with municipal lines. At the time, the plaintiff developer, whose land was closer to municipal lines was already connecting his own lines to them, and had employed an engineer to draw plans and supervise construction. Learning of this, the defendant employed the same engineer, promising that if he would alter the plaintiff's lines to accommodate a heavier load, the defendant would pay plaintiff the added cost. After the deeper lines were dug, the plaintiff learned of the agreement from the engineer, and later paid the enhanced cost to the contractor. Meanwhile, the defendant connected its lines to the improvement. This was simply a

28. 1 CORBIN, CONTRACTS § 29 n.38 (Supp. 1961). In note 36 of the same section is *Fontainebleau Hotel Corp. v. Crossman*, 286 F.2d 926 (5th Cir. 1961), with Corbin's comment that courts are readier to find an agreement complete if some substantial performance has taken place under it, or if the promisee has taken other material action in reliance on the promise. The hotel case involved an oral lease, the parties contemplating further negotiation as to various matters.

29. 114 So.2d 694 (Fla. App. 1959).

30. 116 So.2d 798 (Fla. App. 1960).

31. 121 So.2d 680 (Fla. App. 1960).

32. *Id.* at 682. The judge probably had quasi contract in mind.

case of work done at the defendant's request, the court said, noting that the request was made of one in privity with the plaintiff. It also seems that the plaintiff should be able to recover on the *express* promise to pay the "added cost," whatever that should be, rather than the reasonable cost of the added work that the implied contract would afford. Whether the engineer was in privity would be immaterial, since a third party beneficiary contract could be found.

4. CONTRACTS TO MAKE WILLS

Contracts to make wills must have all the elements of a contract, and be proved by clear, cogent and convincing evidence. The proof in *Martel v. Carlson*³³ was not clear, resting only in the deceased's statements that he recognized his great indebtedness to the claimants for many favors, and intended to provide in his will for each of them to receive 10,000 dollars from his estate. This falls far short of a "present promise."

The same principle was evident in *Ugent v. Boehmke*,³⁴ but here proof of a contract was convincing. The contract was contained in a joint and mutual will expressing promises of both parties to make no other will in conflict without the consent of the other. Moreover, beneficiaries were given the right in the will to proceed at law or in equity to enforce the bequests made to them in the will. The intent to contract was clear.

5. GUARANTIES

New in Florida was the point decided in *Lee v. Rubin*,³⁵ in which a district court followed the majority view that a special guaranty—one naming a particular firm, person or corporation as promisee—cannot be assigned.³⁶ A special guaranty "implies a trust placed by the guarantor in the particular person addressed."³⁷ In this case, the corporation guaranteed against default of the principal debtor had been dissolved and its assets sold to a purchaser corporation which also was dissolved. The assets of the latter corporation were transferred to the plaintiff, which sold goods to a title company which was to be benefited by the guaranty. The guarantor, then, was not liable to this plaintiff, which took nothing by the assignment.

33. 118 So.2d 592 (Fla. App.), *cert. denied*, 123 So.2d 674 (Fla. 1960). See text accompanying note 97 *infra*.

34. 123 So.2d 387 (Fla. App. 1960).

35. 117 So.2d 230 (Fla. App. 1960).

36. As opposed to the general guaranty, addressed to anyone. Usually guaranties are offers for unilateral contracts, *i.e.*, the guarantor promises the prospective creditor that he will pay (if the principal debtor does not) in exchange for an extension of credit, or several extensions if the offer were continuing. Performance is acceptance of the offer. In this posture, the question is, "Can an offer intended for one person be accepted by another?" The answer is "No." 1 CORBIN, CONTRACTS § 50 (1950). In the usual case, then, it is not properly a question of assignment of a contract.

37. 117 So.2d at 233.

In *Frell v. Dumont Florida, Inc.*,³⁸ the court interpreted a guaranty reading, "You have been requested to open a line of credit not to exceed [10,000 dollars in favor of principal debtor] . . . [T]he undersigned, hereby undertakes to, and does guarantee payment of, any, and all, credit granted by you not to exceed [10,000 dollars]."³⁹ The guarantor defendant contended that after 10,000 dollars worth of goods had been purchased, the guarantee did not cover new purchases even though the indebtedness was not as much as 10,000 dollars. Of this the court said, "This argument overlooks the ordinary meaning of 'a line of credit,' which is a limit of credit to cover a series of transactions."⁴⁰ To an argument that the guaranty was ineffective as to purchases from the plaintiff after the date that the principal debtor changed its name and one of the partners withdrew, the court found an estoppel in that the guarantor participated in the name change, in profits of the principal debtor after the name change, and did not disclaim responsibility until suit.

A "contract" of guarantee which provides that it is to run until further written notice remains in force until it is revoked by the guarantor, a court held in *Bryant v. Food Mach. & Chem. Corp.*⁴¹ Parol evidence was not admissible to show that the purchases guaranteed were for the current growing season only, because the contract was not ambiguous. Nor did the subsequent request by the guaranteed creditor for a new guarantee operate to destroy the guarantee in the absence of evidence to indicate such an intent. Since the guarantee was still in effect, and had no provision requiring the guaranteed creditor to notify the guarantor that it intended to rely on it, no notice to that effect was required. The case appears to be one of first impression in Florida both on the time in force point, and the notice point.

B. Consideration

Present v. Mangus,⁴² involving a commission sharing agreement between two brokers, was one of the few contract cases to reach the supreme court. The plaintiff had a listing on certain property, and in a memorandum signed by both parties, promised to pay the defendant a commission if the defendant should produce a buyer. The defendant did succeed in selling and collected a commission from the seller. This was an action to recover a portion of it. The defendant admitted the promise, but denied that the plaintiff had furnished a consideration for it, since the plaintiff did not have an exclusive listing. The trial court struck this and other defenses and went to the jury on the sole question whether the plaintiff had a valid listing.

38. 114 So.2d 311 (Fla. App. 1959).

39. *Id.* at 312.

40. *Ibid.*

41. 130 So.2d 132 (Fla. App. 1961).

42. 122 So.2d 585 (Fla. App. 1960), *quashed*, 135 So.2d 417 (Fla. 1961).

The jury resolved the question in the plaintiff's favor. On appeal to the district court, judgment was reversed on the ground that because the plaintiff had no exclusive listing, he surrendered no right, and so did not suffer a legal detriment.

The supreme court reversed and reinstated the judgment of the lower court, saying that the district court by holding that an exclusive agency was requisite to support such a promise had advanced a rule unknown to Florida real estate transactions. Instead of saying, as it might and should have done, the legal detriment can consist in making a change in legal relations (as here, where by sharing his listing *at the time he did*, when the defendant had no listing from the owner, the plaintiff did something he was not legally bound to do),⁴³ the supreme court said that consideration consists in detriment to the promisee or benefit to the promisor. The district court noticed only the lack of detriment to the promisee, the supreme court observed, without inquiry into benefit to the promisor, and this promisor did receive a benefit. While it is customary, because of historical reasons, for courts to state the rule in the alternative, detriment to the promisee or benefit to the promisor, as the supreme court did, there are few courts which actually hold that benefit to the promisor is enough—and then, only in situations where the promisee is under a pre-existing duty to a third person.⁴⁴

Cohen v. Mohawk, Inc.,⁴⁵ another action for a broker's commission, reached the supreme court. A trial court trying the case without a jury had found for the plaintiff. Judgment was reversed by a district court⁴⁶ which interpreted the owner's promise to be one to pay the commission out of a particular fund which had not materialized. The supreme court, however, calling attention to the presumption of correctness of the lower

43. As Corbin observed in criticizing the district court opinion in a lengthy note. 1 CORBIN, CONTRACTS § 71 n.16 (Supp. 1961). Corbin's assumption, however, that this was an act for a promise, *i.e.*, a sharing of listing by the plaintiff, in exchange for the defendant's promise to share this commission, gave this reviewer momentary pause. The agreement was admitted by the defendant to be bilateral. Each broker promised the other to pay him money on condition the defendant produce a buyer. The plaintiff, however, did more than promise; as Corbin said, he shared the listing. This was sufficient consideration. It seems to this reviewer that the district court may have been vaguely troubled by a bargain question. Though each of these parties agreed to pay money, it was upon a grossly unequal condition—that in either case, the *defendant* produce the buyer. Many a case has foundered on the mutuality rule for this reason (the court calling the plaintiff's promise illusory) even though the bargain element otherwise seemed clear. The phenomenon is most common in exclusive dealership or agency cases in which some courts feel one of the parties is bound to everything and the other to nothing.

44. 1 WILLISTON, CONTRACTS §§ 102, 102A, 131, 131A (1957).

45. 137 So.2d 222 (Fla. 1962), *quashing* 125 So.2d 909 (Fla. App. 1961).

46. 125 So.2d 909 (Fla. App. 1961). The district court opinion did not mention that the agreement to take payment in instalments was in modification of an earlier agreement so the lack of consideration was not apparent from the facts it stated. Leaving aside the question of consideration, it is doubtful whether the district court should have interpreted the agreement to take payment in instalments as one to be paid out of a particular fund. It clearly provided that in event of sale of the property, payments to the broker should be accelerated, making any unpaid balance immediately due. This indicates an

court's judgment, re-examined the facts and reversed. At the time of employment the owner had promised to pay a five per cent commission for producing a ten year lease, payment to be made on closing. At the time of closing, however, the broker agreed to take the commission in instalments each year "as and when the rent is collected." The lessee terminated the lease. There was no consideration for the promise to take in instalments, the court held in allowing the broker his commission, earned at the time he produced the lessee.^{46a}

The bargain factor may have played a part in the court's holding that there was no consideration for an exclusive agency to sell shoes in *International Shoe Co. v. Carmichael*.⁴⁷ The retailer claimed the manufacturer had promised him an exclusive agency for the sale of the latter's shoes if he would sell the shoes in his city. The retailer did not promise to take any number of shoes or that he would not sell other makes. The court held the agreement void for uncertainty and for lack of consideration. Other courts have found no difficulty when dealing with exclusive agency agreements in finding a bargained-for implied promise to use reasonable efforts to sell,⁴⁸ in itself a legal detriment to the retailer. Corbin, in discussing this case, also finds the decision incorrect, but because promissory estoppel should have been applied to support the manufacturer's exclusive agency promise.⁴⁹

The retailer's claim above was on a counterclaim. The manufacturer had brought the action to recover an amount alleged to be owing for shoes already purchased. The retailer defended on the ground that the amount was not yet due; that after the debt was incurred, the parties had entered into a contract under which the retailer agreed to take and pay for more shoes and pay a part of the amount already owed in exchange for the manufacturer's promise to accept payment of the balance of the debt in instalments. The court applied the pre-existing duty rule, holding that it is not

absolute obligation. The promise to pay from rents merely fixed a convenient time for payment. When the time fixed became impossible because of the lessee's breach and non-payment of rent, payment should have been made in a reasonable time. See 6 CORBIN, CONTRACTS § 1362 (1962).

46a. 137 So.2d 222 (Fla. 1962). The supreme court disagreed with the interpretation of the district court, holding that the commission had been earned, that the obligation was therefore absolute, not conditional upon receipt of rent. In addition, the broker's promise to take payment in installments was given in modification of the original employment contract, and was without consideration. This latter fact did not appear in the district court opinion.

47. 114 So.2d 436 (Fla. App. 1959).

48. The classic case is *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917), familiar to all law students.

49. 1 CORBIN, CONTRACTS § 205 n.63 (Supp. 1961). Corbin thinks the decision would have been correct if the transaction had remained wholly executory. But since a promise was made, the promisor having reason to know this reliance would occur, and it did occur, injustice would result if it were not enforced. See also RESTATEMENT, CONTRACTS § 90 (1932).

sufficient consideration for an agreement to extend the time of payment that the debtor promise to do anything that he is legally bound to do. It is submitted that the promise to take and pay for *more* shoes made the pre-existing duty rule inapplicable.⁵⁰

Unequal bargaining power resulted in lack of a bargain; and the pre-existing duty rule vitiated an employee's promise not to compete, a chancellor held in denying the employer's application for a temporary injunction to restrain the employee from competing. A district court found a bargained-for consideration, saying that to hold there was inequality of bargaining power in these circumstances would vitiate all such contracts, and reversed.⁵¹ A dissenting judge would have affirmed on the pre-existing duty rule. The alleged contract (prompted by a competitor's higher wages) was entered into in the course of a continuing contract of employment, terminable at the will of either party. For the promise not to compete, the dissenting judge saw no other consideration than continued employment at the same salary.

Sufficiency of consideration also came into question in *Weiss v. Storm*,⁵² in which tenants by the entireties had agreed to make a joint will devising and bequeathing all property of the survivor to the husband's children. That the survivor takes entirety property by operation of law does not affect the consideration for the agreement if some contingency is resolved by the promise. Here, though all property was in fact owned by the entireties, there remained the possibility that either might have acquired separate property, as well as the uncertainty as to which tenant might survive.

Also in question was the sufficiency of the evidence of the verbal promises alleged. While the making of a joint will is not in itself evidence of a contract to make it, the terms may disclose so clearly that it is the product of a contract, that the will itself is sufficient evidence to establish a contract.

II. INTERPRETATION AND CONSTRUCTION

A. *Municipal Contracts*

A concessionaire having a contract with a city for an exclusive right to serve a baseball stadium, year 'round, "artlessly drew" a provision for extension ("In the event owner shall fail to operate during any year or

50. The court may have overlooked the promise to take more shoes and pay for them, believing this to be a "benefit" to the debtor only—largesse of the creditor in letting him have more shoes when he was in arrears. But this kind of benefit is benefit in fact, not benefit in law, a difference not perceived by many Florida courts as mentioned in Smith. *Contracts, Fourth Survey of Fla. Law*, 14 U. MIAMI L. REV. 534, 548 & n.67, 549 & n.72 (1960). The debtor's promise was a legal detriment.

51. *Tasty Lunch Box Co. v. Kennedy*, 121 So.2d 52 (Fla. App. 1960).

52. 126 So.2d 295 (Fla. App. 1961).

years . . . this agreement will automatically be extended . . .")⁵³ by neglecting to define the word "operate" to mean "fielding a baseball team in any baseball season." Insufficiently persuasive of intent were the facts that the contract was tripartite, with a ball club as a party, and operation of minor league ball an objective and subject of the contract; and that the purpose of a baseball stadium is baseball. Sporadic summer events from which receipts were comparatively meagre were operation within the meaning of the clause and no extension of the term was due. The city had not promised organized ball would be played. What the ball club promised did not appear in the option.⁵⁴

A city failed to protect itself in *City of Tampa v. City of Port Tampa*⁵⁵ in its contract to purchase a waterworks from another city, agreeing to extend mains, laterals, and pipes in the seller city "whenever necessary to furnish water to its inhabitants,"⁵⁶ and could not charge the inhabitants for the extension in the absence of a provision to this effect. Omission of such a provision indicated an intent not to charge.

B. Sales

A conditional seller repossessed a farm rake under the following clause, and was sued for conversion: "If . . . seller deems himself insecure or the property in danger of misuse or confiscation (of which *Seller shall be the sole judge*), . . . seller . . . may . . . retake possession of said property, with or without process of law, and for this purpose may enter any premises where said property may be found and remove same."⁵⁷ (Emphasis added.)

The court found three alternatives under which the seller might be authorized to retake: (1) if he honestly deemed himself insecure; (2) if the circumstances were such that a reasonably prudent man, acting in good faith, would deem himself insecure; or (3) if, apart from appearance, he actually was insecure. The trial court correctly chose the second rule in charging the jury, the district court held in this case of first impression in Florida.⁵⁸ The court rejected the first alternative partly because of the difficulty of showing the seller's bona fides, but mainly because the court felt that to permit retaking upon the basis of the seller's state of mind, apart from his honest belief, would work a forfeiture, which the law abhors.

Whether a contract was one of absolute sale of trucks or merely a lease

53. *Florida Sportservice, Inc. v. City of Miami*, 121 So.2d 450, 452 (Fla. App. 1960).

54. *Florida Sportservice, Inc. v. City of Miami*, 121 So.2d 450 (Fla. App.), *cert. dismissed*, 125 So.2d 880 (Fla. 1960).

55. 127 So.2d 119 (Fla. App. 1961).

56. *Id.* at 119.

57. *Jacksonville Tractor Co. v. Nasworthy*, 114 So.2d 463, 464 (Fla. App. 1959).

58. 114 So.2d 463 (Fla. App. 1959).

was the question in *Transport Retail Systems, Inc. v. Hertz Corp.*⁵⁹ An assignee of the seller grounded this action on the theory of contract for sale, breached by the purchaser's return of the property, and recovered judgment on a jury verdict. In reversing, the appellate court found, in examining the entire instrument, that the parties intended a lease with option to purchase. While one provision gave either party the right to *cancel upon notice*, the lessee in such event agreeing to *purchase*, another provision (apparently overlooked by the lower court) included an agreement by the lessee to *return* the property upon expiration of the lease, or *upon cancellation*. Since the latter provision must have been intended to serve some function, the court concluded that the contract should have been held as a matter of law to be a lease with option to purchase.

C. Miscellaneous

In *North Shore Realty Corp. v. Gallagher*⁶⁰ a district court looked to the four corners of a lease and found no ambiguity to justify admission of parol testimony to show the maximum cost of improvements to be made by the lessee. The lessor had granted power to the lessee to make improvements to cost approximately 100,000 dollars and had agreed to a lien of a mortgage for fifty per cent of the cost of the improvements. In this bill for a declaratory decree, the lessor contended that the cost of improvements should not exceed 100,000 dollars. But in two clauses a contrary intent was apparent. In one, reference was made to improvements costing at least 100,000 dollars; in the other, there was provision for disposal of a security deposit if the lessee should fail to make any improvements of 100,000 dollars or more.

Interpretation of an option to repurchase stock determined the result in *Young v. Edwards*,⁶¹ a suit by the optionee for specific performance. The clause read:

In the event [the purchaser], at any time within *five (5)* years from date of closing decides to sell his . . . stock . . . , [the seller] shall have the first refusal to buy such stock, paying therefor an amount equal to any bona fide offer to purchase which [the purchaser] may have received, or in the absence of a bona fide offer, an amount equal to the going price of the market.⁶²

Within the five year period, the purchaser gave an option to a third person, offering to sell, not for a fixed price in money, but for personal

59. 129 So.2d 454 (Fla. App. 1961).

60. 114 So.2d 634 (Fla. App. 1959).

61. 122 So.2d 211 (Fla. App. 1960), *cert. denied*, 127 So.2d 679 (Fla. 1961).

62. *Id.* at 212.

services in managing the corporation, conducting research, and the like. The court interpreted the clause to mean if the purchaser decides to sell "for money," and construed it to be a condition which had not happened so as to activate the plaintiff's option.⁶³ It was open to the plaintiff to accept only if an offer were made to (or even by) the defendant to sell for a fixed "price" or the "market price." What appeared on its face to be merely a price-fixing feature thus qualified "decides to sell," and perhaps properly so. This plaintiff could not, in the nature of things, meet the terms of the defendant's option to the third person, the only terms upon which the defendant would "decide to sell."

In a suit against a corporation and its officers alleging a corporation contract to indemnify a vendee against having to make payments on a prior mortgage, with a provision that if the corporation should fail to make the payments, the "undersigned officers" would, a motion to dismiss the suit against the president individually was properly denied, though he signed as president. "[I]f in executing a contract for the corporation, a director or officer employs terms which in legal effect charge himself, he may be sued upon the instrument itself as a contracting party, for the reason that by the use of such terms he has made the contract his own."⁶⁴

A contract to employ permanently was construed to be one for life or so long as the employee should remain able in *Chatelier v. Robertson*,⁶⁵ and not one at will. Consideration for the promise was not merely services, but sale of a manufacturing business with trade-marks and copyrights. The additional consideration in this case distinguished it from the holding in the recent *Hope v. National Airlines*⁶⁶ case, in which only an at will employment was found. A reverter clause, which provided that all proprietary rights should revert to the seller-employee if the buyer should cease manufacture, was not intended to give the employer the right to renounce at will terminating all liability, in the light of provisions giving the employee a right to specific performance and binding the buyer's successors.

A subcontract which required the subcontractor to fulfill its contract by "supplying products designed and manufactured" by itself, the product "to be approved and accepted by Owner's and Architects and [general] Contractor"⁶⁷ would not be interpreted as a promise to furnish the product of any other manufacturer (despite the contractor's testimony that products were named by trade-name merely to serve as guides to quality and characteristics). Nor would it be interpreted as a promise that approval of the

63. *Id.* at 215.

64. *Steele v. Hallandale, Inc.*, 125 So.2d 587, 589 (Fla. App. 1960).

65. 118 So.2d 241 (Fla. App. 1960).

66. 99 So.2d 244 (Fla. App. 1957), *cert. denied*, 102 So.2d 728 (Fla. 1958).

67. *Windowmaster Corp. v. Jefferson Constr. Co.*, 114 So.2d 626, 627 (Fla. App. 1959).

third parties would be forthcoming. The trial court erred, therefore, in refusing to direct a verdict for the subcontractor in an action against him by the contractor for failing to furnish windows.⁶⁸ (There was no allegation or proof that the subcontractor failed in diligence or any other duty that might possibly have been inferred from the facts.)

An extraordinary transaction in *Spector v. Vent Vue Window Corp.*⁶⁹ raised the question whether a land purchaser had promised to pay for a fire sprinkler; and if so, whether the obligation to pay was secured by the purchase money mortgage sought to be foreclosed, under a covenant "to pay all and singular the taxes, assessments, levies, liabilities, obligations and encumbrances of every nature . . ." Circumstances concerning installation of the sprinkler were these: Prior to this land purchase, the landowner (Louis Spector) had contracted with a general contractor (Louis Spector & Sons) to build a building on the land. The general contractor contracted with a sprinkler company to install a sprinkler system under a so-called "lease" for sixty months with option to renew for five years at a fixed monthly rental; the sprinkler system to remain personal property, removable on default; written consent of the landowner to be obtained.

When default in rental payments on the sprinkler occurred, the landowner sought to foreclose his purchase money mortgage on the theory that the purchaser had assumed the rental payments, and that they were a lien on the land by virtue of the general clause in the mortgage stated above. There was no allegation or proof that the landowner himself was obligated to make payments for the sprinkler, no allegation that the general contractor acted as his agent in making the lease. On the contrary, the landowner's consent was to be obtained, and it was never given. Nor was there evidence that the lease was ratified by the landowner. The landowner's claim that the purchaser promised lay solely in his statement that sprinkler rentals were deducted from the purchase price of the land. But the only evidence with respect to this deduction and the purchaser's knowledge of it at the time of purchase lay in a statement to him by the general contractor of *building cost*, that sprinkler payments had been deducted from it. The building cost was not the purchase price of the land. There could be no inference that the sprinkler cost was deducted from the purchase price by the seller who did not make the building cost statement, and was apparently not liable for it himself; nor could any promise by the purchaser to pay it be inferred. There could only be the too far-fetched implied promise to pay the debt of a third person (general contractor) to a fourth (sprinkler company), the court found.

Even assuming such a promise, it could not be reasonably assumed

68. *Windowmaster Corp. v. Jefferson Constr. Co.*, 114 So.2d 626 (Fla. App. 1959).
69. 115 So.2d 570 (Fla. App. 1959).

that such an unusual obligation was intended to be included in the catch-all promise to pay "obligations and encumbrances of any nature" so as to be a lien on the property.

A totally different and novel argument, that the land purchaser had committed waste by not making payments so that the landowner had to make them to prevent the sprinkler company from removing the sprinkler, failed. The sprinkler company was not a party to the suit and there was no evidence that this horrendous possibility would have occurred. Accordingly, foreclosure was denied.

In *Ronlee, Inc. v. P. M. Walker Co.*⁷⁰ the defendant had contracted to pay "reasonable attorneys' fees" if the contract were breached by it. The lower court directed a verdict, instructing the jury to award a certain amount which was reached on the plaintiff's testimony that he had promised his own attorneys a twenty-five per cent contingent fee, and other testimony that twenty-five per cent is a reasonable contingent fee. Judgment was reversed because it is well settled that, though testimony as to the value of an attorney's services is strongly persuasive, it is not binding on a jury. The need for a new trial brought into question, then, the nature of the evidence offered to prove reasonable attorney's fees, the court holding that this term in the contract cannot be interpreted to mean a contingent fee promised by the injured party to his attorneys. To hold otherwise would result in a higher than normal fee, and would encourage promisees to be over-liberal with their attorneys at the expense of promisors not privy to the fee contract.

D. *Accord and Satisfaction*

In *Vance v. Scanlon*⁷¹ a district court made clear that interpretation of an offer for an accord is important. The parties may intend the offer to be in exchange for a *payment*, or may intend it to be in exchange for a *promise*. If for the former, and payment does not occur, there is no satisfaction (only an executory accord). The allegations of the plaintiff here were sufficient to show the former, an unsatisfied accord, and the motion to dismiss should have been denied.

E. *Conditions and Waivers*

An antenuptial contract provided that the wife would receive a cash payment of 5,000 dollars on her husband's death in lieu of any interest in her husband's property, to be paid not later than six months after his death. The husband made a will bequeathing 5,000 dollars to the widow and

70. 129 So.2d 175 (Fla. App. 1961).

71. 121 So.2d 709 (Fla. App. 1960).

directing his executors to carry out the contract, but did not set up a fund from which the money could be paid; nor were there assets at any time, aside from the homestead, to pay it. After the husband's death the executor wrote to the widow stating she would be paid providing she delivered over possession and vacated the premises. She did not comply and was not paid. The executor sought unsuccessfully to evict her in the county judge's court, and then filed a bill in chancery to require her to surrender the property. Holding that *payment* of 5,000 dollars was a condition precedent to the widow's duty to deliver, the chancellor rendered a summary final decree in favor of the widow. A district court, in *Cohen v. Rothman*,⁷² affirmed. (Corbin points out that the letter of the executor was not a fulfilment of the condition, and would not have been, even if his offer had not been conditioned on various performances by the widow.)⁷³

Whether a covenant is dependent depends upon its materiality as disclosed by the contract and circumstances. If the promise goes to "whole consideration" as an essential part of the bargain, it is material. These statements, *used together*, true though they may be, seem inappropriate as support for the holding in *Mease v. Warm Mineral Springs, Inc.*,⁷⁴ though the result is unquestionably correct. The suit was one for rescission and cancellation of a deed given by a corporation, then developing a mineral spring under a contract with a doctor, who agreed to build a clinic within a year and operate it. He promised that if he did not do so, he would surrender all privileges and make no "claim or demand for the conveyance of [the] land."⁷⁵ The corporation, on its part, agreed to convey the land (and did so), to give him exclusive rights to the waters and protect his exclusive right. The doctor did not build. Because the doctor's promise to build and operate the clinic was the only consideration for the corporation's promise to convey, it was found material and the corporation was held entitled to rescission. The breach, in short, was total, entitling the plaintiff to an election of remedies—damages, or restitution by way of rescission and cancellation. But the court also held that the doctor's promise to build was a "dependent covenant" and "cancellation may be granted when failure of consideration consists in a breach of a *dependent* covenant of the contract."⁷⁶ The court, of course, means "material," not "dependent." The latter word connotes a condition, which (though a condition is always material) is a matter of no import here, because the corporation had already substantially performed by its conveyance. The distinction between "material promise" and "dependent covenant (condition)" is important, at least to teachers and students. *Sun City Holding Co. v. Schoenfeld*⁷⁷ was cited by the court

72. 127 So.2d 143 (Fla. App. 1961), *cert. discharged with opinion*, 138 So.2d 328 (Fla. 1962).

73. 3A CORBIN, CONTRACTS § 639 n.4 (Supp. 1961).

74. 128 So.2d 174 (Fla. App.), *cert. denied*, 132 So.2d 291 (Fla. 1961).

75. *Id.* at 175.

76. *Id.* at 180. (Emphasis added.)

77. 97 Fla. 777, 122 So. 252 (1929).

as authority for the holding in the instant case; but the result there depended on the finding of a condition, and not the breach of a promise. In *Sun City* there were several promises of questionable relative materiality remaining to be performed. Here, the corporation had conveyed. The problem was not one of dependency of a promise, but its materiality.

Dade County found an unexpected hurdle in its drive for a county-owned, county-wide bus system in an elderly contract for the sale of the stock in a bus company. A bill for injunction (and rescission of a contract) to prevent a sale to the county was brought by a former owner who had sold the stock under a contract which provided that it should be paid for by the bus company out of net earnings; that there should be no change in the principal business of the company; and that there should be no sale of the franchise or certificate of public convenience without the plaintiff's consent. The defendants were the company and a purchaser twice removed. The court held that a sale to a county would inevitably result in a breach of all the foregoing terms, and the injunction was granted in *Coast Cities Coaches, Inc. v. Whyte*.⁷⁸ Of more general interest is the holding that if a purchaser promises to pay for a business out of profits, he impliedly promises to keep the business going so that profits may result.

In *Pan Am. Distrib. Co. v. Sav-a-Stop, Inc.*⁷⁹ the question was whether a seller had waived the time requirement for returns under a sale or return contract as a matter of law. Under the contract, the seller had an option to terminate the buyer's right of return upon notice. The seller did give notice that return must be made by a certain date, or credit would not be given. (The buyer returned two shipments on time but no credit was given, the seller denying until the court decision that return was made on time. No question arises as to these returns on appeal.) A third return was received a week late. Because none of the shipments carried a proper return label, all were briefly delayed at the seller's distant warehouse, so that it did not know for a time what it had. By mistake, the seller issued a credit memorandum for the third shipment, and did not discover it for over a year, by which time this action was in progress. One can sympathize with the finding of the lower court that the defendant's failure to discover its mistake in spite of a strong incentive to do so, coupled with its retention and virtual forfeiture of the plaintiff dealer's goods, was as a matter of law a waiver. However, on appeal the question was held to be one of fact.

III. THE PAROL EVIDENCE RULE

*Petrus v. Bunnell*⁸⁰ appears to be a case of first impression in Florida on the question whether parol evidence is admissible, when there is a

78. 130 So.2d 121 (Fla. App. 1961).

79. 124 So.2d 753 (Fla. App. 1960).

80. 129 So.2d 702 (Fla. App.), cert. denied, 135 So.2d 742 (Fla. 1961).

written cost-plus building contract, to show a contemporaneous oral agreement for a maximum cost. The court realistically held that if the writing does not mention total price, nor any amount as a maximum cost, the parties obviously did not intend it as a complete expression of their intent, since *cost must have entered into their negotiations*. In the instant case evidence that the owner, during negotiations, had stressed the fact that the building should not cost more than 30,000 dollars was admissible.

Notwithstanding a provision in a writing that it represents the entire expression of the parties' intent and that it may not be modified except by a writing, the parol evidence rule does not preclude oral testimony of a modification if the parties have acted on the modification. This holding in *Larnel Building, Inc. v. Nicholas*⁸¹ followed an earlier expression of the supreme court.⁸² Not to enforce the oral agreement would work a fraud on the party who had performed. To the same effect is *Broderick v. Overhead Door Co.*,⁸³ from another district.

In *Ross v. Florida Sun Life Ins. Co.*,⁸⁴ a district court, after reviewing cases from twenty-two jurisdictions and several texts decided that objection to parol evidence must be raised in the lower court to be available on appeal. In a very few of these jurisdictions in which the parol evidence rule is regarded as a rule of substantive law, not merely one of evidence, objection may be raised for the first time on appeal, the reason being that substantive rights should not be so easily waived. In this type case, most states make no point of the effect of the parol evidence rule as one of substantive law or only one of evidence. Though the parol evidence rule is one of substantive law in Florida, the court saw no good reason for following the minority, preferring not to add to the exceptions to the general rule that objections must be raised in the trial court to be available on appeal. The question seems to have come up in Florida only once before.⁸⁵

*Paradise Beach Homes, Inc. v. South Atl. Lumber Co.*⁸⁶ presents the most interesting analytical problem in the parol evidence cases in this period. The suit was one to foreclose a mortgage securing a negotiable promissory note, and was between the immediate parties to the note. The chancellor had excluded oral evidence of the circumstances under which the note was given. At the time the note was made and delivered, the maker owed the payee a debt for lumber, then uncertain in amount. The payee, needing money, asked the maker for the note and mortgage in suit, fixed

81. 123 So.2d 284 (Fla. App. 1960).

82. *Professional Ins. Corp. v. Cahill*, 90 So.2d 916, 917 (Fla. 1956).

83. 117 So.2d 240 (Fla. App. 1959).

84. 124 So.2d 892 (Fla. App. 1960).

85. *Frank v. Pioneer Metals, Inc.*, 121 So.2d 685 (Fla. App.), *cert. denied*, 123 So.2d 676 (Fla. 1960) (in accord with the instant case).

86. 118 So.2d 825 (Fla. App. 1960).

in amount, to use as security for a loan. It was then orally agreed that if the mortgage was in excess of the amount actually owed by the maker for lumber, credit would be given the maker on the note and mortgage.

There were three opinions in agreement that parol evidence was admissible. The majority and one judge saw in the evidence a conditional delivery, and followed the common law rule that conditional delivery, even of a negotiable instrument, may be shown by parol, holding that nothing in the Florida Negotiable Instruments Law⁸⁷ precluded its application. The writer of the third opinion found an unconditional delivery, but would admit the oral evidence as a collateral (and unintegrated) agreement on the authority of the recent case of *B. F. Goodrich, Inc. v. Brooks*.⁸⁸ The other judge concurred to distinguish *Goodrich*, in that the agreement for off-setting credits in *Goodrich* arose from a completely different transaction, not the situation here.

Corbin has commented on this case, preferring the opinion following *Goodrich*. "[W]holly apart from the parol evidence rule," he says, "it appears that the note was a valid contract, *but only to the extent of the debt that supported it*. That debt . . . was only \$1,588.77. There was no consideration of any kind for the promise to pay \$4,714.96 other than the pre-existing debt. That debt would support the new promise, dollar for dollar, but not for one cent more."⁸⁹ The holding of the third judge that the note and mortgage were unconditionally delivered and valid, and the evidence admissible to prove off-setting credits should be approved, he says, even though this "credit" does not arise out of a collateral and independent transaction, because it shows both a mistake and partial invalidity of the express promise in the note.^{89a}

The hand-written word "Partial" in the title of a printed instrument ("Waiver of Lien") was not a part of the instrument so as to qualify or make ambiguous the body of the instrument which was otherwise unambiguous. Thus the parol evidence rule precluded explanation of the word "Partial" in *Westinghouse Elec. Supply Co. v. Levin*,⁹⁰ an action to foreclose a mechanic's lien.

IV. THE STATUTE OF FRAUDS

An oral promise to pay money for land, notwithstanding the land has already been transferred to the promisor, is within the Statute of Frauds,⁹¹ a district court decided in *Williams v. Faile*.⁹² In so holding, the court

87. FLA. STAT. chs. 674-76 (1961).

88. 113 So.2d 593 (Fla. App. 1959).

89. 3 CORBIN, CONTRACTS § 589 n.63, at 533 (1960).

89a. *Id.* at 533-34.

90. 115 So.2d 423 (Fla. App. 1959).

91. FLA. STAT. § 725.01 (1961).

92. 118 So.2d 599 (Fla. App. 1960).

adopted a rule contrary to the universal rule.⁹³ Text-writers disapprove,⁹⁴ for as Williston says, it is a unilateral obligation to pay a sum of money, and is not a contract to buy or sell land. The sale has been made. Even if initially the oral contract were bilateral (and within the Statute), the actual sale would leave only a promise to pay money, taking that promise out of the Statute. Despite an able dissent to this effect, the majority denied a petition for rehearing, saying that the supreme court has refused to engraft exceptions to the land section of the Statute of Frauds because of the prolific frauds that prompted its passage. The court ignores, it seems, the reason for this section—to prevent transfers a landowner never intended to make. This one intended to make a transfer and made it in exchange for an oral promise to pay money, only part of which (the landowner testified) the buyer paid. The landowner was not precluded from showing the total price by the parol evidence rule, for the consideration could be explained. But he still ran afoul of the rule adopted for his protection, and his protection alone.

In *Heffernan v. Keith*⁹⁵ the court, in affirming a decree for conveyance, found a memorandum sufficient under the land section of the Statute of Frauds.⁹⁶ The memorandum rested in two writings, one of the buyer and the other of the seller, connected by an oral link—testimony of a real estate broker that the buyer's written deposit receipt (which covered all essentials) making an offer to purchase was the transaction alluded to in the seller's telegram of acceptance. That the seller did not himself sign the telegram was immaterial, since he constituted the telegraph company his agent to do so. By admitting the sending of the wire he admitted the authority of the agent. Since the burden was on the defendant to establish the defense, and he did not make out a prima facie case, the summary decree for conveyance was proper.

The 1957 statute⁹⁷ requiring a contract to make a will to be in writing had no application to a contract allegedly made in 1956, a district court held in *Robinson v. Malik*.⁹⁸

V. ASSIGNMENTS

A contract provision against assignment without the consent of the obligor is generally a valid and effective restriction of the right to assign. In *Troup v. Meyer*⁹⁹ an unconsented-to assignment was void against a later

93. According to 2 CORBIN, CONTRACTS § 419, text at n.5 (1950).

94. WILLISTON, CONTRACTS § 493 (3rd ed.); RESTATEMENT, CONTRACTS § 193 (1932).

95. 127 So.2d 903 (Fla. App. 1961).

96. FLA. STAT. § 725.01 (1961).

97. FLA. STAT. § 731.051 (1961).

98. 115 So.2d 702 (Fla. App. 1959).

99. 116 So.2d 467 (Fla. App. 1959).

assignment to which the obligor had consented. An insurance agent had made three successive assignments of commissions to come due to him under his contract with an insurance company. The contract had a provision which prohibited assignment without written consent of the company. The company (obligor) had consented to the first assignment; it did not consent to the second (though it had notice of the second, and had itself given notice of the conditions under which it would consent); and had consented to the third on condition that the first assignment be released by payment of the debt secured. Release of the first was forwarded to the obligor insurance company. Since the second assignment was never consented to—it had not met the conditions nor secured the approval of the obligor—the third assignee, though subsequent in both time and notice to the obligor, prevailed. The second assignment was void for lack of consent.

An assignee steps into the shoes of his assignor, so when an assignor abandons his rights under the contract and then assigns, his assignee takes nothing by the assignment. So the court held in *Sykes v. Booth*,¹⁰⁰ a suit by an assignee to determine his rights under a contract between a landowner and the assignor permitting the assignor to hunt for buried treasure on the defendant's land. Under the contract, the assignor was limited to one excavation. About two years later, the parties to the contract licensed a third person to search for a one year period, without limit as to the number of excavations. After another three years, the assignor began excavating and was ordered off the property by the landowner. Four years after eviction this assignment was made. Summary judgment for the landowner was affirmed.

*George G. Tapper Co. v. Bank of Fort Walton*¹⁰¹ is unremarkable except that the theory of the case seems uncertain—whether of assignment or contract. Two contractors had contracted with a city to build sewers. After the project was begun, as between themselves, the joint venturers terminated their relationship, one becoming prime contractor and the other a subcontractor. The subcontract provided for periodic progress payments, with specific deductions to be made from each payment. (The deductions were chargeable to the subcontractor as expense incurred under the prime contract.)

The subcontractor then borrowed from the plaintiff bank, giving his notes and assigning the progress payments *under the subcontract* as collateral security. Before lending, however, the bank secured the promise of the general contractor by letter to forward to it *all* progress payments "due them" (the subcontractors) under the subcontract. The bank, the court found, would not have lent to the subcontractor without this promise.

100. 119 So.2d 66 (Fla. App. 1960).

101. 117 So.2d 8 (Fla. App. 1959).

The bank brought this action against both the general contractor and subcontractor, claiming the entire progress payments under the subcontract against the general contractor's claim that deductions provided for in the subcontract should first be made. The lower court adjudged the general contractor to be jointly and severally liable for the obligation represented by the subcontractor's notes, *i.e.*, without deductions, on a theory of "equitable assignment."

The district court reversed, in part, holding that the general contractor could be held only to the extent of its promise—to pay the amount "due" the subcontractors. Under the subcontract, the terms of which the bank knew, deductions were to be made before anything became "due." The court then said that the general contractor by his letter made an "equitable assignment" of the total amount of the progress payments due under the subcontract. One wonders how the *obligor* under the assigned subcontract could be the assignor, equitable or otherwise. The prime contract with the city was not mentioned in the reasoning, and rights under it were not assigned. The general contractor, it would seem, was held as a promisor under a contract, not an obligor under an assignment—though he could have been.¹⁰²

A ninety-nine year lessee, in *U.S. Properties, Inc. v. Marwin Corp.*,¹⁰³ promised to erect a building on the leased premises, and to this end procure a construction loan and mortgage, and a commitment from an institutional lender to make a permanent loan, secured by a mortgage, to pay off the temporary construction loan. By the lease, the lessor agreed to subordinate its reversion by signing the mortgages, and to join in the notes; it further agreed to sign the construction loan instruments simultaneously with the lessee's presentation of the commitment to make a permanent loan. The commitment was to be immediately assigned to the lessor by the lessee to enable the lessor to finish the building should the lessee default in its building obligation.

This suit for a declaratory decree, brought by the lessee against the lessor, resulted from the lessor's refusal to accept the commitment proffered by the lessee, and his refusal to execute instruments for the construction loan. The question was whether the commitment presented by the lessee was proper, it being held a condition to the lessor's duty to execute the construction loan instruments. The institutional lender in its commitment letter promised to make the permanent loan *on condition third parties* (not parties to the lease) also sign the notes and mortgage.

102. Had the general contractor been held as an obligor under an assignment (and not as a promisor under a contract), notice to the assignee (bank) of set-off or counterclaim would have been unnecessary. *RESTATEMENT, CONTRACTS* § 167 (1932).

103. 123 So.2d 371 (Fla. App. 1960).

The court held that the commitment called for by the lease was to be an assignable commitment (contract); that the commitment presented could not be *effectively assigned because of* the requirement that the third persons also sign; that the third persons might not sign and might thus deprive the lessor of the benefit of a permanent loan—the rule being that when the contract shows that “reliance was placed on the personal credit of a party, its benefits cannot be assigned.”¹⁰⁴

The applicability of the rule to this case *as the court applied it* escapes this reviewer. Normally, the rule has reference to objections which might be made to assignment of its contract by one in the position of the obligor under the assigned contract¹⁰⁵ in this case. While certainly the institutional lender here might have objection to assignment, the court’s reasoning deals with objections of the *lessor*—objections which are not referable to the fact of assignment, but rather to interpretation of the lease. The declared purpose of assignment *in the lease* was protection of the lessor should the lessee default. The commitment intended was one which would do this. But the one presented was conditional (on an unexpected condition) and might never happen (third persons might never sign, even though they contracted to do so) so as to place the insurance company under a duty to make the loan. The lessor’s only right would be against the third persons. This was not the kind of commitment bargained for by the lessor in the lease. And if the lessor had accepted an assignment of the conditional commitment, he would have waived his right to object. The reason given by the court was the inherent lack of protection to the lessor *because of* the requirement that third persons sign. The rule the court applied does not fit its reason. For all that appears, this commitment was assignable, but it did not conform to the requirements of the lease.

Assignments, like other transfers, may be shown by parol evidence to have been given only as security for a debt. The rule expresses a policy of liberal construction of such statutes as section 697.01 of the Florida Statutes, which in part provides that conveyances of personal property given with the intention of securing the payment of money shall be deemed mortgages. So the court held in *Miami Station, Inc. v. Coplan Pipe & Supply Co.*¹⁰⁶

The lower court had decreed that the assignment was absolute, and not merely security for a debt. But the testimony belied the conclusion. Although the words of assignment were words of transfer, the instrument also contained promissory terms, with a statement that the consideration for

104. *Id.* at 375.

105. See RESTATEMENT, CONTRACTS § 151 (1932): “A right may be the subject of effective assignment unless, (a) the substitution of a right of the assignee for the right of the assignor would vary materially the duty of the obligor, or increase materially the burden or risk imposed upon him by his contract, or impair materially his chance of obtaining return performance, or (b) the assignment is forbidden by statute or by the policy of the common law, or (c) the assignment is prohibited by the contract creating the right.”

106. 128 So.2d 170 (Fla. App. 1961).

its execution was a debt of 60,000 dollars due by the assignor to the assignee. In short, the instrument was a contract, to be interpreted like other contracts, if ambiguous, in the light of the surrounding circumstances. Highly persuasive of the conditional nature of the assignment (to the court) was the fact that the assigned debt was worth only 50,000 dollars at the time of the assignment, but worth 98,000 dollars at the time of trial—and the plaintiff was also claiming a balance remaining due on the 60,000 dollar debt for which the assignment was given. The court concluded the two claims were inconsistent—for an absolute assignment on the one hand, and a claim for a balance due on the other.

More persuasive to the reviewer was the presence of other promissory terms which, with parol testimony, indicated a conditional assignment only.

VI. THIRD PARTY BENEFICIARIES

At least three third party beneficiary situations presented problems within the *Survey* period. Possibly one belongs in the *Survey* on torts; but because it is new, and because of a concurring opinion, it is included here.

The contract of insurance was held to define the right of an injured party who recovered judgment against the assured in excess of the policy limits and in a subsequent action claimed a direct right to sue the insurer for negligence or bad faith of the insurer in failing to settle.¹⁰⁷ While the *insured* unquestionably has such a right in either tort or contract, the court held that there is no relationship between the insurer and the injured party beyond the latter's right as a third party beneficiary *under the contract*. The policy in the instant suit provided that the judgment creditor should be entitled to recover "under this policy to the extent of the insurance afforded by this policy."¹⁰⁸ In *Auto Mut. Indem. Co. v. Shaw*¹⁰⁹ the judgment creditor was permitted to sue for an amount in excess of his judgment against the assured, but provisions in the policy there permitted it. A concurring judge noted the argument that every automobile liability insurance policy (regardless of its provisions) should be construed as a third party beneficiary contract entitling a judgment creditor to recover in an action against the insurer for the excess of the judgment over policy limits when the insurer is guilty of negligence or bad faith in handling the claim. This argument is based on the public policy proclaimed in the Florida Financial Responsibility Law,¹¹⁰ which requires liability insurance for the benefit and protection of third persons. But the judge thought the change should be made by the legislature, not the courts.

107. *Canal Ins. Co. v. Sturgis*, 114 So.2d 469 (Fla. App. 1959), *cert. discharged*, 122 So.2d 313 (Fla. 1960).

108. *Id.* at 470.

109. 134 Fla. 815, 184 So. 852 (1938).

110. FLA. STAT. ch. 324 (1961).

A materialman who had supplied a subcontractor with materials was held to be a third party beneficiary, who had a direct action against a general contractor and its surety on a contractor's bond in *Di Camillo v. Westinghouse Elec. Corp.*¹¹¹ Whether one is a third party beneficiary depends on the contract—here, a bond running to the owner as obligee, which included an express provision that “all persons who have furnished labor or material for use in or about the improvement shall have a direct right of action under the bond”¹¹² Also included was the usual condition that if the principal (general contractor) should “pay all persons” furnishing labor and materials, etc., the obligation should be void. From both these provisions, the promise of contractor and surety to pay materialmen could be inferred.

A case of first impression in Florida, *Phoenix Indem. Co. v. Board of Pub. Instruction*,¹¹³ required a surety on a contractor's bond for performance of a public works contract to pay insurance premiums. The court held that although the statute governing contracts for public works¹¹⁴ does not require payment of these premiums, it does not preclude them. It was contended by the surety that the statute was meant only to fill the void left by the Mechanics' Lien Law;¹¹⁵ that the public works statute, construed in the light of the latter, would exclude protection for supply of anything except “materials,” “labor” and “supplies”; and that as insurance is none of these, the public works statute does not cover it. While conceding that one purpose of the statute is to fill the void left by the lien law, the court held that the public works statute goes beyond the lien law in some respects. It found that, as under previous decisions, the words “material” and “labor” could include “services,” not merely things entering into the physical structure.

The terms of the bond, construed in the light of the contract,¹¹⁶ were controlling. Both were to be construed against the surety for hire in favor of the indemnity the obligee-owner could reasonably expect. The *bond* required the contractor to pay for “services,” which the insurance provided—in the investigation of claims, settlements, furnishing of medical services, etc. It also required the contractor “to complete all work comprehended by the contract free and clear of all liens for labor or materials, or otherwise.”¹¹⁷ The *contract* required the contractor to procure insurance before beginning the work. Insurance is one of the costs of the work. Whatever might have

111. 122 So.2d 499 (Fla. App. 1960).

112. *Id.* at 500.

113. 114 So.2d 478 (Fla. App. 1959).

114. FLA. STAT. § 255.05 (1961).

115. FLA. STAT. §§ 84.01, .02 (1961).

116. The general rule requires construction of the bond and contract together, as the court held.

117. 114 So.2d at 481.

been the case had the contract not required insurance (as in some cases holding the surety not liable), this contract did; the bond was broad enough to contemplate such payment and the statute did not preclude it.

VII. ILLEGALITY

Florida's 1951 gaming act¹¹⁸ made its first appearance in an appellate court in *Young v. Sands, Inc.*¹¹⁹ The statute provides that a check given for the repayment of money lent or advanced at the time of a gambling transaction, for the purpose of being wagered, is void. The court observed that a gambling obligation, even if valid in the state where created, can not be enforced in Florida because it is contrary to public policy. Defendant had cashed the check sued on here in a Las Vegas hotel, operated by the plaintiff corporation, in which there was a gambling casino. Testimony was conflicting on whether the defendant received cash or had part withheld to repay the casino money he had lost, and received the balance in gambling chips, and whether the plaintiff knew the purpose for which defendant intended to use the cash (plaintiff denying that it knew; defendant insisting the contrary). The trial judge, acting without a jury, resolved the conflict in favor of the plaintiff; and though the district court grumbled that it was "hard to believe that such a transaction conducted in a gambling casino in a Las Vegas hotel could be disassociated from gambling so as to escape invalidity under the statute,"¹²⁰ it held that the judgment was not against the manifest weight of the evidence.

*Fountain v. Hudson Cush-N-Foam Corp.*¹²¹ was an employer's action to restrain defendant company from employing the plaintiff's former employee and to restrain the employee from disclosing trade secrets. A temporary injunction issued. Relief was sought on the basis of the employee's contract not to engage in the same or similar business for one year, and not to disclose trade secrets. The complaint also alleged the plaintiff's business to be nationwide. On appeal, the employee contended that because the contract contained no territorial limitation (it was not urged that it was ipso facto void), facts should have been alleged to show that *absence* of such a limitation was reasonable. The court deemed the contention without merit and held that the contract created an issue of fact as to whether it was reasonable under all the circumstances. Temporary injunction of both employment and disclosures was held proper, since employment would almost inevitably result in disclosure.

The test as to whether an apparently valid contract is actually some-

118. FLA. STAT. § 849.26 (1961).

119. 122 So.2d 618 (Fla. App. 1960), 15 U. MIAMI L. REV. 326 (1961).

120. *Id.* at 620.

121. 122 So.2d 232 (Fla. App. 1960).

thing else is the operation of the contract. The mere possibility of illegality is not sufficient to void it. So the court held in *Wall v. Bureau of Lathing & Plastering, Inc.*,¹²² a suit for an accounting brought by a nonprofit corporation against employers on their contract to pay to the corporation three cents an hour per man for each union man employed. The employers' defense that the contract was in restraint of trade or a closed shop agreement brought the above response. There was nothing in the record to show illegal operation. Illegal possibilities were delineated and rejected under the rule.

In *Cutri Enterprises v. Pan Am. Bank*¹²³ a district court reaffirmed its decision in a 1958 case¹²⁴ that a contract is not made usurious by the fact that an intermediary in negotiating the loan charges the borrower a heavy commission, the lender in good faith lending at a legal rate of interest. Here, as is usual in this type case, there was question as to whose agent the intermediary was. The lower court decided that the intermediary was not an agent of the lender, nor was the lender to receive any part of the brokerage fee. The intermediary in this case also guaranteed the debt. Since usury must be proved by clear and convincing evidence, the defendant, upon whom the burden of proof lay, failed in his defense.

In *Coral Gables First Nat'l Bank v. Constructors of Fla., Inc.*,¹²⁵ a suit to foreclose chattel mortgages was brought by a national and a state bank. The borrower defended on the ground of usury.¹²⁶ The record amply showed usury, the district court held in affirming that portion of the decree, observing that when a borrower receives a net of approximately 263,000 dollars from a 442,000 dollar loan, it requires little mathematical calculation to discern that something is amiss. If an original contract is tainted by usury, a renewal contract (alleged by the banks here, and shown by the evidence) retains the taint. It is otherwise if the old contract is abandoned. The chancellor's decree for the defendants was reversed as to that part assessing penalties against the national bank not prescribed by the federal act, the exclusive source for penalties against the national bank. Since penalties for usury are wholly statutory, no penalties other than those prescribed by applicable statutes can be imposed, the court held in rejecting the defendant's claim for various consequential damages.¹²⁷ Also rejected was the defendant's claim (as consequential damage) for attorneys' fees, these being dependent on either contract or statute.

VIII. MISCELLANEOUS

Ray-Hof Agencies v. Petersen,¹²⁸ although a conflicts of law case, is

122. 117 So.2d 767 (Fla. App. 1960).

123. 115 So.2d 592 (Fla. App. 1959).

124. *Shaffran v. Holness*, 102 So.2d 35 (Fla. App. 1958).

125. 119 So.2d 741 (Fla. App. 1960), *cert. denied*, 365 U.S. 811 (1961).

126. 12 U.S.C. §§ 85, 86, 343 (1958); FLA. STAT. § 687.07 (1961).

127. Among them, tortious breach of contract by the usury.

128. 123 So.2d 251 (Fla. 1960), *quashing and remanding* 117 So.2d 497 (Fla. App.).

included here because it illustrates the importance of understanding the unilateral contract concept. The action was brought under the Florida Workmen's Compensation Law,¹²⁹ recovery depending on whether the alleged employment contract was made in Florida. The evidence showed that the employer (in Georgia) telephoned the employee (in Miami) that he would employ him if he would return to Georgia to work there as a foreman. The employee did return, was employed and was injured in the course of his employment. The district court held that there was a Florida contract by construing the employer's telephone call as an offer for a unilateral contract, and finding that leaving Miami was part of the bargained-for performance, applied Restatement of Contracts § 45 in holding that the employer became bound when the employee left Miami.

On review the supreme court also construed the employer's offer (if any) to be one for a unilateral contract, interpreting it to call for the employee's presenting himself in Atlanta as the last act necessary to complete the agreement. Until that occurred, the employer was not bound. The district court misapplied Restatement § 45, the supreme court held, saying that this rule merely prevents the offeror from revoking his offer, not the case here. The Restatement contemplates an implied collateral promise not to revoke, made at the time the main offer is made.¹³⁰

Corbin, in discussing this case, also doubts that the telephone call could be construed as an offer because no terms were stated. But if they had been, the employer's offer would have to be carefully interpreted. If the employer had indicated that the offeree might accept by leaving his job in Florida, presenting himself in Atlanta might be construed as merely a condition to the duty to employ. Under this construction, acceptance occurred in Florida.¹³¹

In *M. A. Kite Co. v. A. C. Samford, Inc.*,¹³² the place of accrual of a cause of action upon a contract was in issue for venue purposes. The court pointed out that causes of action growing out of contractual relationships

129. FLA. STAT. ch. 440 (1961).

130. RESTATEMENT, CONTRACTS § 45 clearly contemplates an implied subsidiary offer not to revoke the main offer. This is Williston's view as well. 1 WILLISTON, CONTRACTS § 60A (1957). Corbin appears to reject the option concept, regarding the beginning of performance as acceptance of the main offer. 1 CORBIN, CONTRACTS § 63 (1950).

131. 1 CORBIN, CONTRACTS § 49 n.71 (1950); see also § 51 n.3 and § 194 n.6 of same volume. In so saying, Corbin does not make entirely clear his interpretation of the offer. The offer (if any) may have been one to enter into an employment contract later in exchange for leaving his job in Florida—construed as an offer for a unilateral contract, which may, of course, be subject to a condition. Or the offer (if any) may have been one to employ given in exchange for either a promise (which might be signified by leaving Florida if this were asked for as the acceptance) or for a performance. But if the latter, what performance? Surely not merely leaving Florida as the price of the employer's promise, relegating presentation for work in Atlanta and the work itself to subordinate positions as mere conditions. What the employer was bargaining for is, of course, a question of fact.

132. 130 So.2d 99 (Fla. App. 1961).

may accrue in different forums, depending on the nature of the breach. In the instant case, the gravamen of the action (on the common counts for work and materials) was failure to pay money. The parties had entered into an express contract, the plaintiff, a Volusia County, Florida subcontractor, contracting in Alabama with the defendant, an Alabama prime contractor, to do the work in Alabama.

Since the contract was silent as to the place of payment, the usual rule of interpretation, that payment is to be made at the place of business of the payee was applied. Because default occurs there, the cause of action accrues there. The rule is applicable whether either or both parties are individuals or corporations, domestic or foreign, and regardless of where the contract was consummated or where other provisions of the contract were performed. The plaintiff's action, then, was brought properly in Volusia County, notwithstanding the defendant had no resident agent there.

Building contracts are not ordinarily susceptible to the remedy of specific performance, nor was the one in *Levene v. Enchanted Lake Homes, Inc.*¹³³ The landowner also asked for an accounting, claiming a right to a return of a deposit which the builder had declared forfeit. While a court of equity will retain jurisdiction if there are complicated accounts, even though a court of law could compel payment of damages, this was not such a case.

Olin's, Inc. v. Avis Rental Car Sys.,¹³⁴ paid its fifth visit to a district court in proceedings for declaratory relief, this time on the question of whether a court's discretion to select issues for trial by jury¹³⁵ extends to a privilege to grant or deny a jury trial of a cause or issue clearly triable by jury at common law. The court held that it does not; a violation of the constitutional right to a jury trial¹³⁶ would result if a request for a jury trial on such an issue were denied. A cause of action for damages for breach of contract is such an issue. What constitutes a breach is a question of law for the court; whether that which would constitute a breach has occurred is a question of fact for the jury.

133. 115 So.2d 89 (Fla. App. 1959).

134. 131 So.2d 20 (Fla. App. 1961).

135. *Id.* at 22.

136. FLA. CONST. DECL. OF RIGHTS § 3.