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PRIVATE LAW

CONTRACTS

JEANETTE O. SMITH*

INTRODUCTION**

"Never again will they know as much about contracts," one of our appellate judges sadly remarked of a group of law students dispersing and discussing as they left their contracts class.

The judge was right. The opinions do reflect a failing memory of the bird's eye view of contract law as a body of integrated and logical principles. Though the techniques of *interpretation* (determination of the intent of the parties, or a speaker) have not been forgotten, the classic analytical tools of *construction* that judges were taught to use in law school seem to have been left there for a new generation of students to learn and forget.¹

The indictment does not lie for contracts integrated in a single written instrument. With these our courts do well. The oral contract is our nemesis.

For example, if the question in a case is "Was there a contract?" the opinions make no mention of excursion through the indispensable preliminaries like "Was there an offer?"

Naturally this depends on a still more preliminary inquiry, that of *interpretation*:

- (a) "Did the speaker promise anything definite? Did he ask for a *promise* as an acceptance—to be indicated by words, or perhaps impliedly, by some small act, like the beginning of performance, from which a promise to perform could be implied?
- (b) Or did he instead ask for a *performance*, rather than a promise, as an acceptance?"

These are questions of intention. Only after interpretation of words used, in the light of all circumstances, objectives apparently intended etc.,

*The article covers cases following the last survey period, 96 So.2d through 113 So.2d. Excepted are most contract cases concerning land, insurance, domestic relations, workmens' compensation, mistake, as well as those involving constitutional law since these are treated in other articles. Federal cases have been arbitrarily omitted.

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1. The commentator makes no apologies for stating first principles. This article does not purport to be a complete refresher course, however. Recommended for that purpose are the excellent students' editions of SIMPSON, *CONTRACTS* (1954), WILLISTON, *CONTRACTS* (1938) and CORBIN, *CONTRACTS* (1952). Publishers will deliver in plain wrapper on request.

can the court construe them to be an offer. Only then can the court construe the offer to be one for a unilateral contract, or for a bilateral contract. Only then can it decide whether an acceptance has occurred, or whether communication of acceptance was necessary. Only then can it construe it to be a bargain, for a consideration.

But one can look long and hard in the cases for the words "offer," "acceptance," "bargain," "bilateral contract," "unilateral contract." The omission of labels leaves the reader wondering how the court found a contract and why it used the rules it seemed to think were applicable.

Admittedly when questions of intent are submitted to a jury, as they usually are, the general verdict does obscure the theory of the case. Still, how can an appellate court decide whether there was evidence from which a jury could find a contract without reconstructing *some* theory of the case?

Even when these questions are for the court, as in determining the sufficiency of a complaint, the words "offer," "acceptance," etc., are conspicuously absent. Facts are stated higgledy-piggledy at length, without comment.

Is the contract teacher's life misspent? Or are the judges wrong in not stating their constructions?

The real culprits are no doubt the lawyers who also have an astounding capacity for forgetting. Statements of shocked disapproval by supreme court justices might help to alter this.

The failure to analyze in print has serious consequences because it leads to further defects in reasoning.

Take, for instance, the action by a real estate broker for a commission.² Most often these cases are framed on a theory that the owner promised to pay a commission in exchange for *production* (a performance, not a promise) of a customer ready, willing and able to pay a price fixed in advance by the owner. A court then may determine that there was evidence from which the jury could infer that such a promise was intended; or it may hold as a matter of law that this is the proper interpretation. *Once this interpretation is made,*³ there is no choice to construe

2. The example may seem unfair since Florida courts are not alone in their peculiar treatment of broker's cases. See 1 CORBIN, CONTRACTS § 50 (1950). The more general point is best illustrated by them, however.

3. This interpretation may not be the only possibility, of course, and it is here that a court has the most latitude in shaping the case—while the offer is yet in the realm of intent. Did the owner apparently request a *performance* of the broker? Or did he, rather, want a *promise* to do something, perhaps a promise to use diligent effort to procure a purchaser, the owner conditioning his duty to pay on production of the customer, and perhaps on the further condition that a contract to purchase be effected. If an owner gives an exclusive right of some kind, it may be inferred reasonably that he does want a promise to use diligent effort in return, possibly to be signified by some relatively insignificant act from which such a promise is to be inferred. For the many possibilities of interpretation in brokers' contracts, see 1 CORBIN, CONTRACTS § 50 (1950). The offer is the sole determinant of the acceptance and the performance.

it as anything but an offer for a unilateral contract, a promise given to induce a performance. It is merely an offer.⁴ Until the performance requested by such an offer is given there can be no acceptance and no contract.⁵

Suppose then, that after the broker has taken substantial steps to procure a purchaser and is continuing his effort, the owner tells the broker that he does not care to sell after all, but later does sell to the broker's customer?

This is a revocation of an offer. But Florida courts, understandably anxious to aid the broker, treated so unfairly, timidly speak of an "employment agreement" — despite an initial interpretation of a promise in exchange for a *performance*, and without shifting gears proceed to make the broker whole as if there had been a bilateral contract from the beginning.⁶

There is no need for such perversion of principle and reason under the facts stated. The court can maintain its interpretation, properly construe it to be an offer for a unilateral contract and then apply the mitigating doctrine stated in Restatement of Contracts. Section 45 penalizes the owner for revoking his offer under these circumstances, *i.e.*, after the broker has taken substantial steps in beginning performance.⁷ Under this rule, the owner's offer is *accompanied* by a collateral implied promise not to revoke his offer after the broker has taken substantial steps in beginning his performance.

The owner also promises, collaterally, not to refuse a performance if tendered. So if the owner does refuse a tender before he has communicated a revocation of his offer, or before the happening of some other event terminating the offer, he will be liable for the full commission.⁸

Unless a court follows this course, it will apply rules applicable only to bilateral contracts, which these are not, by the court's own interpretation. Worse, as different fact situations are presented, logical extension of the bilateral contract construction further compounds the confusion.

While the function of this survey series is to survey merely — to note what the courts have done and why, briefly assessing changes — it is

4. 1 WILLISTON, CONTRACTS § 60 (3d ed. 1957); 1 CORBIN, CONTRACTS § 50 (1950).

5. *Ibid.*

6. In an early article there is an apt comment on this mechanism: "The opinion goes on to say that after part performance of an offer for a unilateral contract 'the contract had taken on a bilateral character.' This is a remarkable instance of confusion of thought. By what magic the offer had turned into a 'contract' does not appear." Ashley, *Offers Calling for a Consideration Other Than a Counter Promise*, 23 HARV. L. REV. 159, 164 (1910), SELECTED READINGS ON CONTRACTS 203, 296 (1931), cited in PATTERSON & GOBLE, CASES ON CONTRACTS 181 (4th ed. 1957).

7. The comment by the editor in RESTATEMENT, CONTRACTS § 45 (1932) explains its application.

8. *Ibid.*

impossible to do this with oral Florida contract cases. Since the brokers' cases (usually oral) outnumber all others, and because they are so misunderstood they are treated in this article in a body in the section entitled Offer and Acceptance. To assess these opinions (if not the decisions) more than superficial comment is required. Some critical analysis is necessary; much of this is relegated to footnotes.

OFFER AND ACCEPTANCE

The above implications are apparent in *McAllister Hotel, Inc. v. Porte*,⁹ one of our few supreme court cases involving a broker's commission during the survey period. The broker had a verdict in an action in which he alleged that the owner had promised him a commission for production of a customer ready, willing and able to purchase the McAllister Hotel for a price and at terms *acceptable to the owner*. Characterizing this an "employment agreement" the court found the determining point to be whether the broker had performed this agreement. The court construed "acceptable to the owner" to require "actual agreement"¹⁰ between owner and customer as a condition precedent to the owner's duty to pay.¹¹

The court then observed, pursuing its evident assumption that there was a bilateral contract, that in such a case the owner obviously has "broad discretion in determining acceptability of terms"; further, that the test of adequate performance by the broker is not whether the owner ought to be satisfied but whether he actually is satisfied. Since the court had already held agreement between owner and customer necessary, its reasons for these observation are obscure. If the court regarded this as a bilateral contract with an express condition of satisfaction, its guarded remark about "broad discretion" (indicating limits) might be in deference to the mutuality rule that both parties must be bound; neither can have a "free way out." Mutuality of obligation is applicable only to bilateral contracts; it is obviously inapplicable to unilateral contracts which involve a promise by only one of the parties.¹² The court may have meant only to hedge for future protection of brokers, by suggesting that while it does appear that the broker assumes the risk that the owner and prospect will never come into agreement, he does not assume the risk of the owner's refusal to negotiate. In these cases it is fair to imply a collateral

9. 98 So.2d 781 (Fla. 1957).

10. The court's discussion made it apparent that a formal contract was not contemplated.

11. Assuming an interpretation in conformity with the complaint, the teacher probably would say, "The owner made an offer for a unilateral contract, a promise to pay a commission in exchange for a customer ready, willing and able to purchase (as both performance and acceptance), the owner conditioning his duty to pay on agreement between owner and customer on all material terms." Since the court also used the "condition" construction, the results in this case would be the same. But under other facts the court's reasoning and its dicta make its direction uncertain.

12. 1 CORBIN, CONTRACTS § 152 (1950).

implied promise by the owner making such an offer, at least to enter negotiations.¹³

However, the owner in this case had negotiated extensively with the broker's prospect: they had not come into agreement on terms usually regarded as material in a deal of this magnitude. Furthermore, the owner had indicated that their agreement, if any, should be dependent on its reduction to writing. For these reasons, finding that the broker had not "performed," the supreme court correctly reversed.

*Mellet v. Henry*¹⁴ also is typical. The evidence showed and the court held that the broker was employed to find a purchaser ready, willing and able to purchase a hotel for \$225,000. The owner later set a price of \$219,000 but instructed the broker to submit any offer he might get. Through an advertisement the broker found an interested prospect to whom he "gave details and financing" and sent him to the seller to show the hotel. Although the broker did not accompany the prospect he immediately notified the seller that the prospect was his. A week later the owner notified the broker that she had decided to remove the property from the market. Six days later she sold the property to the same prospect.

Finding the question to be whether the broker was the procuring cause of the sale¹⁵ (a question of fact) the court stated that physical introduction of prospect to owner is "not so important" when a sale goes through as when it does not. The court then said "[T]he law protects a broker against cancellation of his *contract* when the cancellation represents a bad faith effort to defeat a commission,"¹⁶ and found the evidence sufficient to support a verdict for the broker. The court did not mention offer and acceptance.

In *Salter v. Knowles*,¹⁷ the court affirmed the judgment for defendant of a trial court trying without a jury a broker's action for a commission upon his allegation that he had been employed to produce a purchaser ready, willing and able to buy at a price acceptable to the owner and had done so. The proof showed that the broker was employed to find a purchaser at a fixed price which he did not do, and therefore could not recover. The court added that even if he had been "employed" to find a purchaser at a price acceptable to the owner,¹⁸ as he had alleged, there

• 13. *Costilla Land Co. v. Robinson*, 238 F.2d 105 (10th Cir. 1956).

14. 108 So.2d 69 (Fla. App. 1959).

15. See 3 MIAMI L.Q. 424, 427 (1949), for discussion of the "procuring cause" doctrine (current in some other states also), permitting recovery by a broker who procures a customer, ready, willing and able on terms other than those in his "contract" of employment. Continuing negotiations by the broker may show that he was the procuring cause, *Shuler v. Allen*, 76 So.2d 879 (Fla. 1955). The cases do not discuss a "new offer" or even a modifying "contract."

16. See Annot., *Broker's right to commission on sales consummated after termination of employment*, 27 A.L.R.2d 1348 (1953). The treatment of the subject in this annotation, the omission of all discussion of offer and acceptance, indicates the reason for the widespread conflict in these cases. The fact of agency, "the employment" seems to give rise to the supposition that there is always a "contract" to pay a commission.

17. 97 So.2d 138 (Fla. App. 1957).

18. *McAllister v. Porte*, *supra* note 9, construing "acceptable to the owner" had not yet been decided.

was lack of continuous negotiation and no showing that his service was the procuring cause of the sale.¹⁹ Applying the usual presumption of correctness to the finding of fact in the lower court, the district court held the findings of the trial court not clearly against the weight of the evidence.

A purchaser was held liable for a 5% commission under an implied contract, a district court held in affirming a summary judgment for a broker against a purchaser in *Lamborn v. Slack*.²⁰ The evidence showed that the broker had informed the defendant purchaser, then living in Sweden, of his listing of a newspaper business. Upon the purchaser's request for further information the plaintiff broker wrote, naming the paper and giving other pertinent details; but stated that because the seller would not pay a commission "[t]he only plan is for you to consider our commission of 5% in any price you might agree on . . ." and requested a letter to this effect. The defendant replied that he had asked a relative to negotiate with the seller, and then requested the broker to write to the relative giving suggestions on how to proceed, saying "[i]f we come to a deal, I am sure the price can be agreed in a way by which your help and work will be taken care of." Accordingly the broker did write defendant's relative, suggesting an approach to the seller (who was elderly and difficult), mentioning a 5% commission to be paid by the purchaser. A sale resulted. The court held that it was immaterial that the broker was not the procuring cause of the sale since the sale was not what the purchaser was bargaining for; he bargained for aid to the relative. Interpreting the final letter from the defendant, the court inferred a promise to pay a 5% commission if the purchase were completed, saying that the defendant requested aid to the relative²¹ and did nothing to disabuse the plaintiff of his expectation of a 5% commission.²²

19. See *Mellet v. Henry*, *supra* note 14.

20. 107 So.2d 277 (Fla. App. 1958).

21. To the challenge "inadequacy of consideration" the court reiterated the usual rule that adequacy is immaterial; that merely detriment to the promisee is sufficient. Nor is pecuniary benefit to the promisor requisite. Thus, "aid to the relative" is sufficient consideration.

22. One can quarrel with this inference and conclusion as a matter of law, bearing in mind that the defendant is entitled to any inferences in his favor that a jury could make. The plaintiff, in his second letter proposed, apparently, that he should furnish the usual services—negotiation with the owner directly, in exchange for a promise to pay 5%. The defendant countered with a different proposition, that the broker aid his brother-in-law, *i.e.*, requested a *different* service. The broker could not reasonably believe that his original invitation (or even offer) having reference to 5% for conducting the actual negotiations with the owner, with all the work that entailed, would also have reference to the defendant's offer to pay for a different service. The defendant's offer then would be, "I promise to pay you a reasonable commission for aid to the relative." The broker's later letter to the relative could not be a counter-offer and rejection because though this letter reiterated the statement that 5% was expected, the aid was furnished in the same letter, and the defendant never had an opportunity to reject it. An offeree must have an opportunity to reject an offer. This being so, the broker accepted the defendant's offer or none at all, and should be entitled to a reasonable price or nothing. It may well be that 5% is reasonable, but this was not the court's theory.

*Moylan v. Estes*²³ brings hope to the broker who cannot recover on his express contract for a commission because of failure of an express condition. In an earlier action between the same parties,²⁴ the supreme court had construed the express contract to require a consummated sale of certain land upon specified terms and price. Though the owner and prospect procured by the broker had entered into a contract of sale, the sale was not consummated and recovery was denied. The supreme court suggested that the broker might deem it advisable to sue on an implied contract, possibly since it appeared that after the land contract had been abandoned by owner and purchaser they secretly entered into negotiations which resulted in a sale of a portion of the land. Responding to the suggestion, the broker brought this action against the owner on an implied contract.

The trial court, however, gave summary judgment for the owner, applying the rule that one cannot recover on an implied contract when the subject matter is express; and held that there could be no implied contract since the broker had not continued negotiations with the purchaser with the knowledge of the owner.

The district court reversed and remanded, finding that the express contract between owner and broker could have been abandoned and that they might have tacitly entered another, the owner impliedly promising to pay a commission for the land actually sold. The court cited Corbin:²⁵

The fact that an express contract for a commission was made between principal and agent does not prevent the finding of a different promise by implication where the services contemplated in the express contract were never rendered. The acceptance by the principal of a different service, knowing that the agent expected pay for rendering it, justifies the finding that the agent expected reasonable price.²⁷

The court found "continuous negotiation" unnecessary because of the rule that where a party *contracts* to do a certain thing he impliedly promises to do nothing to hinder or obstruct (the broker's) performance.²⁸ [Yet if there were no negotiation, from what facts could a new promise be implied?]

23. 102 So.2d 855 (Fla. App. 1958).

24. *Estes v. Moylan*, 94 So.2d 362, 366 (Fla. 1957).

25. Implied in fact, not implied in law (quasi-contract).

26. 3 CORBIN, CONTRACTS § 567 (1951).

27. Corbin, *ibid.*, probably means that the broker offers a reverse unilateral contract—a performance (production of a customer, ready, etc., to pay a price acceptable to the owner) in exchange for the owner's promise to pay the broker a reasonable commission, inferrible from the owner's act in accepting the customer and selling to him. Students will recognize this as a "red flag situation" as described in PATTERSON & GOBLE, *CASES ON CONTRACTS* 105 (4th ed. 1957), example (7)(e), except that the casebook example presupposes an offer which is also a promise.

28. Corbin's analysis, *ibid.*, adopted by the court makes mention of "continuous negotiations" inappropriate.

*Golden Heights Land Company v. Norman Babel Mortgage Company*²⁹ also involved a broker's action to recover a commission. Here the owner conditioned its promise to pay out of particular funds, creation of the funds dependent upon securing certain subordination agreements which without its fault it had been unable to do. The trial court, finding that there could be no recovery on the express contract because the condition had not happened, nevertheless permitted recovery on an implied contract. The appellate court reversed on the general principle that where there is an express contract in existence the law will not imply a contract in contravention of it, stating that it had not overlooked its own decision in *Moylan v. Estes*.³⁰ Presumably in the instant case the court saw no facts from which it might infer that the express contract was no longer in existence as in *Moylan*, where recovery for beneficial services was allowed. The court, however, did not mention the distinguishing fact. Had it done so the decision would have been more valuable.

The court in *Sawyer v. Hime*³¹ construed the following provision in a broker's contract not to be a promise to pay only out of a particular fund (which had not materialized), but rather a means of determining the amount of the commission: "Commission for securing lessee, 5% for the first 5 years, 3% for the next 5 years and 2% for the balance of the lease." The amount was to be graduated downward, based on the length of the term upon which the leasing parties might agree, that is—the longer the term, the less, proportionately, the commission. The court's inference as to the intention of the parties was strengthened by evidence of the meaning which the parties themselves gave when the defendant obtained from the broker his consent to defer payment of half the full commission for some months, thus indicating their belief that the commission was presently due, and negating any belief that it should be paid *only* if the lease were not breached and the rent paid. The summary judgment for the broker was accordingly affirmed.

In *Melvin v. West*,³² a district court reviewed the evidence to determine whether it supported a judgment for the broker in his action against the landowner for a commission, and held that it did not. The owner had orally listed his property with several brokers, including the plaintiff, with the "distinct understanding" that the first broker to bring in a signed contract³³ to purchase at a certain price would be entitled to a commission. The plaintiff produced a prospect who was unwilling to pay the price, but to whom the owner made an offer to sell at a lesser price, the broker

29. 102 So.2d 858 (Fla. App. 1958).

30. 102 So.2d 855 (Fla. App. 1958).

31. 109 So.2d 193 (Fla. App. 1959).

32. 107 So.2d 156 (Fla. App. 1958).

33. The court said there are "two types of brokerage contracts in Florida": one for production of a customer ready, etc.; the other, to effect a sale, which requires a signed contract or an effected sale. This is of the latter type. "There are at least two types" would have been a more accurate statement.

participating in the negotiations. Before the prospect accepted his offer, however, another broker, acting under the original listing produced a signed contract with another customer for the full price.

The court construed the plaintiff's "brokerage contract" to be one in modification of the earlier "listing contract" incorporating all its terms, including that for payment of the commission to the first broker to produce a signed contract, but for a lesser sales price.³⁴ Since the other broker brought in a signed contract before the plaintiff brought in his, "the plaintiff's contract was terminated" as a matter of law. (The plaintiff's power to perform was cut off by the happening of a condition?)

The answer to the plaintiff's contention that the owner had prevented his complete performance (thus excusing it as a condition to the owner's duty to perform, entitling him to the commission) was that the owner did not prevent performance; the plaintiff's own "contract" did, with the happening of the condition—the procuring by another broker of a prior contract of sale with another.³⁵

In *Lalow v. Codomo*,³⁶ involving a broker's employment "agreement," the court interpreted and construed the *time term* for the broker's performance. "After we take title to the property that we on this day contracted to trade for our property. (sic) We hereby give you an Exclusive Right of sale for a period of six months from the time we take title of (sic) the property. . . ."³⁷ This was held to mean that "employment" began immediately, so that though the broker produced a customer (whose offer was accepted) *prior* to the owner's own acquisition of title, the broker was entitled to his commission upon the happening of the condition that the owner acquire title. The court does not use the word "condition," and fogs understanding of its theory of this aspect of the case by saying, "Even if it should be said that the plaintiff was not entitled to a commission at the time a purchaser was produced, it could not be said that he was not entitled to a commission after his principal took title, and *the exclusive right of sale became effective* and his principal sold the property."

An unusual fact situation is presented in *Mitchell v. Mercer*.³⁸ The broker happened also to hold the legal title to the land which he had

34. The commentator would say the owner made a new offer to the broker on the same terms except for the sales price.

35. The commentator would say that the offer lapsed.

36. 101 So.2d 390 (Fla. 1958).

37. On these facts there might be either of two interpretations of the writing: (1) "I promise to pay a commission in exchange for your implied promise to use diligent effort to procure a customer ready, etc., (perhaps) on condition a sale is effected, and on condition I acquire title." (construe as an offer for a bilateral contract, perhaps asking as an acceptance a return promise to be implied from beginning performance); or (2) "I promise to pay a commission in exchange for your procuring a purchaser, ready, etc., but I condition my duty to pay on my own acquisition of title." (construe as an offer for a unilateral contract, to be accepted by procuring a customer, but the duty to pay conditioned on acquisition of title by the owner).

38. 101 So.2d 19 (Fla. App. 1958).

previously sold on contract for deed to his present employer, from whom he sought a commission in the instant case. Their contract for deed provided for a total price of \$12,000 with deferred payments of \$75 a month, the vendee having the right to assign to a purchaser assuming the deferred payments.

After \$2,000 had been paid, the vendee, owner of the equity, employed the broker upon an exclusive listing for sale at \$15,000 total price with "down payment open." The broker did procure a signed contract to purchase at \$15,000, with a deposit and promise to pay a sum equalling \$4,200 by the time of closing, and a promise to pay the balance at \$80 per month to the original vendor (the broker) under the contract for deed. Consideration for the promise to purchase was to be an assignment of the contract for deed. The employer rejected the proffered contract and the customer.

In this action for a broker's commission, the employer contended the broker had not earned his commission; that the employment agreement "down payment open" meant terms acceptable to himself; that accordingly he had a right to demand all cash or cash enough for the means to secure his own release under the contract for deed.

But the district court found that while it was fair to imply the employer's promise to take cash because the employment agreement had left the terms open, his promise had to be interpreted in the light of the existence of the contract for deed.³⁹ Under it the employer had only a limited interest: He had a right to sell only this interest.⁴⁰ On it he could put any value he chose. But in the employment agreement he had prescribed a total selling price for the land of \$15,000. Of this, the balance remaining on the contract for deed was about \$10,000. The employment agreement and contract for deed thus disclosed the value he placed on his equity, approximately \$5,000. He could demand no more, the court held, and allowed the broker his commission.

However proper the court's conclusion that the employer promised to take \$5,000 cash for his interest, it does not seem proper also to imply the employer's promise to accept a purchaser contracting to assume *larger* payments than those provided under the contract for deed. The vendor had already consented under the original contract for deed to future assignment and assumption of the deferred payments (\$75 a month) by an assignee to the vendor. To this the prospective assignor had an unquestionable right. As vendor, the broker could not have demanded that the

39. See RESTATEMENT, CONTRACTS § 235, comment on clause (d) (1932).

40. Aside from this, the offeree-broker would have no reason to believe anything else, since the employer's offer to the broker contemplated an assignment by the employer to a prospective purchaser, presumably in accord with the terms of the existing contract for deed.

vendee assign only upon different terms, at \$80 per month.⁴¹ If the vendor-obligor could thus alter his contract permitting assignment, diminishing the right of the vendee-obligee by enlarging the terms upon which he could assign, he could demand an increase of not merely \$5 a month but \$500. If he could not increase the terms as vendor, then is it reasonable to infer the employer's promise to him as broker to pay a commission for procuring a purchase contract on any terms which the broker might set? If the broker could not enlarge the terms of assignment in his capacity as vendor, why should he be permitted to do it in his capacity as broker?

If the employer had accepted the proffered contract of purchase, in the event of later default by the new purchaser, he would hardly be in a position (as assignor) to claim a novation releasing him from liability.⁴² But if he did not accept the customer (as here) he must pay the broker, who in actuality has been permitted by the court to dictate the terms of his own employment. To infer that the employer promised the broker *carte blanche* is unreasonable. The dual status occupied by this broker should have given the court pause.

In *Alex D. Smith Real Estate, Inc. v. Gables Venetian Waterways, Inc.*,⁴³ the plaintiff broker, seeking to recover a 10% commission, sued the owner upon a contract giving him an exclusive right of sale, the owner agreeing "to pay the Broker upon consummation of any sales the sum of 10% of the selling price . . .," but further providing that the owner could terminate the contract at any time it might wish to do so upon payment to the broker of \$45.40 for each acre remaining "unsold." The owner did terminate by notice, giving as a reason the fact that a sale of 263 of 365 acres was contemplated. He in fact had already entered into a contract to do so, at \$2000 per acre. First holding that under an exclusive right to sell contract the broker is entitled to a commission even though a sale was arranged by the owner and not procured by the broker, the court then held that the land contracted to be sold was not "unsold" within the meaning of the promise to pay 10%; that the phrase "upon consummation of any sales" did not require closing to constitute a sale, but merely made consummation a condition precedent⁴⁴ to the owner's duty to pay the commission. Termination of the brokerage contract after "sale" then, was a bad faith effort to avoid payment of the commission. The court made it clear, however, that the percentage commission would be due only if the sale were consummated, and returned that question to the trial court.

41. To do so would be an obvious breach.

42. An offer of novation, like any other offer, depends upon intent. The broker here made it clear when he proffered the purchase contract that he had no intent to discharge the original debtor; therefore, he made no offer of novation.

43. 98 So.2d 372 (Fla. App. 1957).

44. The court did not use the label "condition."

At least three cases involved questions relating to the *fiduciary relationship between real estate broker and his principal*, the owner. In one,⁴⁵ the fact that this relationship is also one of public trust was emphasized by the court in its holding that a broker who violated the terms of his listing by negotiating a sale to a non-Christian and concealing the fact from the owner was subject to disciplinary action by the state.⁴⁶ Concealment of the fact that the purchaser was an employee in the broker's office was also held to be a breach of trust in the same case.⁴⁷ On the other hand, it is no breach of faith for a broker to make his own offer to purchase while withholding from his principal knowledge that he has another offer for more than his own, but less than the amount fixed by the owner, even though the listing also provided for payment of a commission on "any other deal acceptable to us."⁴⁸

A contract by husband and wife to sell a homestead was held to exist notwithstanding the agreement left for future agreement the terms of a release clause to be inserted in the purchase money mortgage.⁴⁹ Holding that in subsidiary portions of the agreement it is not necessary that absolute certainty be present, the court noted that the only uncertainty was the amount to be paid for each individual release, but not to exceed a total equal to the amount of the mortgage. The court noted that the seller, who refused to perform, did not raise the question of indefiniteness at the time of refusal.

One who goes into equity claiming part performance to take an oral contract out of the land section of the statute of frauds⁵⁰ must, of course, prove the existence of a contract. Where the oral contract is to devise land by will,⁵¹ more than a preponderance of evidence is necessary to prove the contract because of the fact that usually the promisor has died and "his lips are sealed by death" before any claim is made. In the instant case⁵² the deceased had merely expressed an intention to make a will leaving his home to his housekeeper; he had not promised to do so, the court found. Testimony of witnesses was replete with statements like "He said he was 'going to' leave the property to (the housekeeper)."⁵³

45. *MacGregor v. Florida Real Estate Comm'n*, 99 So.2d 709 (Fla. 1958). The court did not determine the more interesting question whether enforcement of such a contract would violate the equal protection clause of the Fourteenth Amendment to the United States Constitution, observing that this question was not presented by these facts.

46. FLA. STAT. § 475.25 (1957).

47. See to the same effect, *Chisman v. Moylan*, 105 So.2d 186 (Fla. App. 1958).

48. *Lalow v. Codomo*, 101 So.2d 390 (Fla. 1958). It would seem that this offer was in the alternative; if so, the decision is questionable.

49. *Stone v. Austin*, 107 So.2d 232 (Fla. App. 1958).

50. FLA. STAT. § 725.01 (1957).

51. This cause was tried prior to the effective date of FLA. STAT. § 731.051 (1957). The new statute makes unenforceable any agreement to make a will to give a legacy or make a devise unless the agreement be in writing and signed by the person whose estate is sought to be charged.

52. *Gable v. Miller*, 104 So.2d 358 (Fla. 1958).

53. To the same effect is *Traurig v. Spear*, 102 So.2d 165 (Fla. App. 1958) in which the evidence is extensively reviewed; also *Lashua v. Cooper*, 97 So.2d 39 (Fla. App. 1957).

*A. M. Kidder & Co. v. Turner*⁵⁴ raised the question whether acceptance by silence had occurred as a matter of law. The action was brought by a stock brokerage firm against its customer for failure to deliver stock upon his alleged contract to do so. In the language of the trade such a contract is apparently known as "an open order, effective until cancelled." An instrument so entitled, stating in effect "We have from you such an order to sell x shares of stock at x dols" was sent, received and read by the customer.

The court held that the instrument was a mere offer, that its receipt could not impose on the customer the duty of repudiation under penalty of having a contract imposed on him; but that retention of the receipt, together with all surrounding circumstances might indicate acceptance. Circumstances to be considered were such matters as length of time the customer's account had been open, the number of confirmations the customer had received, the practice of the broker in making demands (for margin) or giving notice of sale, etc.⁵⁵

It would seem that this is merely a specialized application of the general rule enunciated in the old *Elskin* case⁵⁶ so familiar to students. Acceptance may be inferred from silence where there is a course of dealing indicating that an offeree's silence means acceptance. Since the inferences to be drawn in the instant case were conflicting, the trial judge's denial of the plaintiff's motion for a directed verdict was correct; and since there was evidence from which the jury could find for the defendant, the judgment for the defendant was affirmed.

In *Kitchens v. King*,⁵⁷ the court, after examining the evidence upon a question whether the defendant's motions for a directed verdict should have been granted, found the defense of accord and satisfaction⁵⁸ had not been proved, and that it was a jury question. The action arose upon an alleged contract in 1952 by defendant with her parents to build a home for them, and upon which they had paid defendant \$4,000 to start it, receiving her written acknowledgment for the payment and its purpose. The plaintiff alleged that defendant had neither built nor returned the money. The only material evidence of the defense of accord and satisfaction was the execution, delivery and recording of a deed to the parents for a life interest with remainder over to the defendant; and delivery of possession to the parents. The "Dead Man's Statute" precluded the defendant from testifying further. The jury returned a verdict for the plaintiff.

54. 106 So.2d 905 (Fla. 1958).

55. The supreme court of Florida, more frequently than the district courts of appeal, in its opinions cites specialized texts which help to orient the reader in the subject, an admirable practice—however important may be the facts in the case.

56. *Hobbs v. Massasoit Whip Co.*, 158 Mass. 194, 33 N.E. 495 (1893).

57. 102 So.2d 414 (Fla. App. 1958).

58. The issue was simply one of offer and acceptance. There must be an offer of an accord.

In *J. A. Cantor Associates, Inc. v. Blume*,⁵⁹ the question was whether under the evidence it appeared that an accord and satisfaction existed as a matter of law. In this action for a real estate commission, the evidence showed that the plaintiff, a real estate salesman and his employer had entered into a contract whereby the plaintiff should receive 50% of commissions paid upon property sold by the plaintiff; that the plaintiff procured a purchaser, but that the deal was closed by some one else in the firm because the plaintiff was out of town; that for this reason defendant wrote plaintiff that it would pay him only 25%; plaintiff protested by letter; both parties maintained their positions in exchange of several letters; defendant finally wrote that he would pay no more and "if you are satisfied, I will gladly send you your share. . . ." To this the plaintiff replied that though a grave injustice had been done him, he would not attempt reprisal, and "It will be acceptable to deposit the check to my account. . . ." The check was deposited.

The appellate court held that the intention to enter into an accord was to be garnered from the letters; that the parties, without objecting that it was a jury question had permitted the trial court to draw inferences to determine the fact; that it could not be said conclusively that the trial court's conclusions were wrong. The court found that there was "no negotiation and no offer to compromise an unliquidated claim. . . . Each party maintained an exact amount as due, and acceptance of a part payment could not be said as a matter of law to have terminated the dispute."⁶⁰

The court noted that the letters were subject either to defendant's interpretation — that he had issued an "ultimatum", which the plaintiff had accepted; or to the plaintiff's interpretation — that he had not *accepted* an ultimatum (offer) but had simply refused to carry the argument further. One wonders what the court had in mind. If the defendant made no offer (as the court had already concluded) nothing that the plaintiff said or did could be an acceptance.⁶¹ But if the defendant did make an offer ("I promise to pay an amount admittedly due in exchange for your promise to discharge the disputed debt"), it is doubtful, under the objective theory of contracts, whether, despite his ambiguous letter, the plaintiff could cash the check and still deny his acceptance.⁶²

Quite another matter would be the sufficiency of the defendant's promise (or even payment) of an amount admittedly due as consideration for a promise by the plaintiff to discharge a disputed claim.⁶³ Though one cannot quarrel with the result, the theory of the case is obscure.

59. 106 So.2d 603 (Fla. App. 1958).

60. No cases are cited.

61. 6 CORBIN, CONTRACTS § 1277 (1951).

62. *Id.* § 1279.

63. *Id.* §§ 1289, 1290, nn. 95, 96. See note 2 *supra*. It is possible that the court had this in mind.

CONSIDERATION

The most interesting case involving sufficiency of consideration and the preexisting duty rule is *Casa Marina Hotel Company v. Barnes*.⁶⁴ The holding, affirmed by a district court (certiorari denied by the supreme court) seems clearly wrong. The plaintiff owed the defendant a debt (not yet due) represented by a note and mortgage giving the debtor the option to pay before maturity. The plaintiff, desiring to sell the mortgaged property free of the mortgage, told the defendant that he would prepay the debt if the defendant would forego interest accrued to the time of sale. The defendant agreed, contingent on her attorney's approval. When approval was not forthcoming, the defendant promised that if the plaintiff would prepay the principal and accrued interest, she would refund the interest at a later date. The plaintiff did pay early but the defendant refused to refund the interest and this action to recover it resulted.

The court held that for this new promise of the defendant, the plaintiff did nothing he was not already bound to do; he paid an admittedly due debt. While the court doubtless would recognize the general rule that payment of a debt before maturity is a new detriment to the promisee,⁶⁵ it seemed to think that because the original contract contained a provision enabling the debtor to pay early, he did only what he was bound to do. The court overlooked the fact that the original contract provided for *alternative performances*—to pay early or pay on the due date. The debtor was under no legal *duty* to pay early; by paying early he gave up his legal right to pay on the due date.⁶⁶ Correlatively, the creditor received something to which she was not previously entitled to demand, payment early, a benefit in law. The court was in error when it stated that the only benefit redounded to the debtor who was thus enabled to sell his property free of the mortgage. It confused benefit in fact which is immaterial, with benefit in law, which is essential to establish the fact of bargain.⁶⁷ This creditor asked for and received something to which she was not at the time legally entitled: This is consideration.

The preexisting duty rule was in issue again in a suit for mortgage foreclosure but was found inapplicable in *Manufacturers & Traders Trust Company v. First National Bank in Fort Lauderdale*.⁶⁸ The mortgagors had borrowed from the plaintiff bank on an unsecured note. While in default they executed a 90 day renewal note secured by a mortgage. The court held that though the mortgage was taken for a pre-existing debt, the extension of time by the creditor contemporaneously with the taking of the

64. 105 So.2d 204 (Fla. App. 1958), *cert. denied*, 109 So.2d 574 (Fla. 1959).

65. WILLISTON, *CONTRACTS* § 121 (3d ed. 1957).

66. Corbin says, "If one has an option between two performances, the giving up of this option, or the exercise of it in one way rather than the other, is a sufficient consideration for a return promise." 1 CORBIN, *CONTRACTS* § 182 (1950).

67. 1 WILLISTON, *CONTRACTS* § 102a (3d ed. 1957).

68. 113 So.2d 869 (Fla. App. 1959).

mortgage was sufficient consideration for it. The definite period of forbearance promised was a detriment to the plaintiff and benefit to the defendant.⁶⁹

In *Greenfield v. Millman*,⁷⁰ a district court recognized the majority rule that a preexisting duty owed or promised, even to a third person, is insufficient consideration for a later counter promise by another person.⁷¹ But under the facts the court found that there was no preexisting duty since under the later contract a new legal detriment was in fact promised.

After negotiating a contract for the sale of land, the seller had orally contracted with the purchaser to subordinate his purchase money mortgage if the seller should want to consolidate existing mortgages with uncomfortably early due dates in a new mortgage. On closing the land contract the seller objected to signing the proffered subordination agreement because its terms were different from those orally agreed on, saying he would sign only upon the purchaser's attorney's promise to personally guarantee the purchase money debt. The attorney did promise and in this action against him claimed want of consideration and application of the pre-existing duty rule because the seller was already under a legal duty to the purchaser to subordinate.

The court correctly held, however, that the seller in promising to subordinate on conditions different from those agreed with the third person did promise a new legal detriment. The court's statement was that the purchaser was promised a benefit in that his refinancing was made easier. This is benefit in fact,⁷² (not in law) and is material only on the question of motivation toward the bargain for a legal benefit—about which there could be no question here. It was not material to whom the consideration moved. It should be noted that the benefit in law moved to the attorney in that he got what he requested—the plaintiff's signature on the new subordination agreement.

A district court struggled with two problems in *Hope v. National Airlines*.⁷³ One involved a question of consideration, the other the applicability of the one year section of the statute of frauds.⁷⁴ The trial court had dismissed, without specifying grounds, the action of an airline pilot who alleged that he was employed by an airline during a pilot's strike which was causing the airline difficulty in meeting its schedules; that he was assured that if he would work through the strike, "he would be employed permanently as long as the defendant corporation was in business." Whether the statute of frauds applied depended on interpretation of the word

69. An indefinite period would have made the creditor's promise illusory.

70. 111 So.2d 480 (Fla. App. 1959).

71. 1 WILLISTON, CONTRACTS § 131 (3d ed. 1957).

72. See on the same point, *Casa Marina Hotel Co. v. Barnes*, 105 So.2d 204 (Fla. App. 1958), *cert. denied*, 109 So.2d 574 (Fla. 1959), and note 67 *supra*.

73. 99 So.2d 244 (Fla. App. 1957), *cert. denied*, 102 So.2d 728 (Fla. 1958).

74. FLA. STAT. § 725.01 (1957).

"permanent": If it meant "for life," it was performable within one year because life might end, and was not within the statute. The court decided that no lifetime contract was intended, but only one at will, because no consideration other than the services was shown.⁷⁵ The court admitted that the pilot's giving up an advantage — i.e. prejudicing his right to join a union — could be a legal detriment, but apparently thought the airline was not bargaining for this. In view of its extraordinary promise to pay extra in the form of permanent employment it would seem that this is exactly what the airline was bargaining for, this benefit in addition to services.

However, aside from this, the court then dealt with the question of consideration, and held there was no contract because the agreement lacked mutuality of obligation. Since the court had first found that this was a unilateral "contract" ("the pilot never agreed to anything"), the mutuality rule, in the nature of things, could not apply, because there is never mutuality in a unilateral contract: By the time an offer for a unilateral contract is accepted only one person is bound.⁷⁶ A third reason "indefiniteness," the difficulty of assessing damages for life, at best uncertain, was ascribed by the court for its holding. Many courts would not find this an insuperable difficulty.⁷⁷ The opinion is not a success.

In *Wiley v. Dow*,⁷⁸ a tenant's implied promise to stay on and pay rent was held sufficient consideration for a landlord's promise to repair defective steps upon which the plaintiff was injured. The trial court had dismissed on this ground a complaint which alleged a month to month tenancy, reiterated promises to repair, the plaintiff's announcement that he would retain the then due rent for repairs, the landlord's reply that he would repair; the plaintiff's reliance on the promise in remaining on as tenant, forbearing to exercise his right to terminate the status by giving legal notice; payment of rent.

The court noted the resulting benefit to the landlord without indicating that benefit indicates the fact of exchange or bargain. This makes more interesting its (unlabeled) comment recognizing promissory estoppel as a substitute for consideration,⁷⁹ though it is questionable whether the court would have applied it had there been no conventional consideration. "In addition . . . the complaint . . . alleges . . . that the plaintiffs in reliance . . . remained as tenants . . ." This would seem to mean that even if the landlord did not bargain for the promise to remain and pay rent but merely made a gratuitous promise to repair, since he reasonably

75. Many, but not all courts follow this view. 1 CORBIN, CONTRACTS § 96, n. 27 (1950); see also, 1 WILLISTON, CONTRACTS § 39 (3d ed. 1957).

76. That is, the promises of only one of the parties remain to be performed. RESTATEMENT, CONTRACTS § 12 (1932).

77. Obviously. See cases cited by Williston, note 75 *supra*.

78. 107 So.2d 166 (Fla. App. 1958).

79. RESTATEMENT, CONTRACTS § 90 (1932).

knew the plaintiff would rely, and as indeed he did, he should be estopped to say there was no consideration since manifest injustice would result.

In the absence of contract, fraud or concealment a landlord is not liable for injuries caused by failure to repair. The doctrine of promissory estoppel, if freely applied as a substitute for consideration to support a landlord's promise to repair could vastly alter the landlord's duty.

In a situation that seems both novel and important in Florida, *Beck v. Hodge*⁸⁰ seems to make the general point that it makes no difference to whom consideration moves so long as it is thus bargained for. The trial court dismissed this mortgage foreclosure at the conclusion of the plaintiff's evidence on the ground that the plaintiff had failed to establish "valid" consideration.

Pleadings and testimony showed that the plaintiff had paid a construction company \$5,750 under an agreement with it to furnish it this sum to construct a house for the defendant, taking in exchange the defendant's note and mortgage for \$5,850. Prior to the agreement the defendant had told the plaintiff that the construction company was financing the project. The construction company, however, paid the defendant mortgagor only \$2,500 and would pay no more.

A district court held that the plaintiff had established a prima facie case, saying "we deem it unnecessary to pass on any question of whether or not the evidence showed a valid consideration moving to the defendant." But the holding is weakened by a finding "The \$2,500 which (the mortgagor) admitted having received . . . negatives the decision . . . that there was no consideration . . . and hence, it is necessary that we reverse this case." The court deemed it unnecessary to decide questions of agency⁸¹ or usury since it predicated reversal on the consideration point. The opinion would have been clearer had the court stated its interpretation of the defendant's promise, *i.e.*, what did the plaintiff's evidence show the defendant was bargaining for as consideration?

INTERPRETATION AND CONSTRUCTION OF WRITTEN CONTRACTS

The most definitive statement of the objective theory of contracts ever made by a Florida court was made by Justice Thornal in *Gendzier v. Bielecki*,^{81*} when he stated the rule expressed by Justice Holmes, "The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of *external signs*— not on the

80. 101 So.2d 47 (Fla. App. 1958).

81. The court noted a New Jersey case (in which the company was not an agent for the mortgagor) in which the mortgagee was permitted to foreclose for the amount actually received by the mortgagor, stating that if the company had been an agent, presumably the mortgagee could have foreclosed for the entire amount. This observation might forecast the ultimate outcome of the case.

81a. 97 So.2d 604 (Fla. 1957).

parties having meant the same thing, but on their having *said* the same thing." (Emphasis added.) Although Justice Thornal later used the colorful phrase "meeting of the minds," he made it clear that he meant apparent meeting of the minds.

It was error then, for a trial court to admit evidence of the defendant's unilateral secret intent not to agree to a document stating an account between the plaintiff and defendant, and initialed by the defendant, who apparently did not communicate his intent to the plaintiff. The document, the court said, spoke for itself, presumably as the *only* outward manifestation of the mutual intent of the parties. The parol evidence rule, the court added, is not the reason for exclusion of evidence of secret (uncommunicated) intent not to enter into a contract. It was unnecessary for the court to mention that the evidence would have been excluded even though there had been no writing.

In addition, the court held the trial court in error for refusing to instruct the jury that initials are as effective as a full signature to bind a party to an agreement, if it is an act in authentication of the document.

The court held that an account stated is presumptively correct and in the absence of proof of fraud, mistake or error (not claimed here) the correctness becomes conclusive.

Where two persons promise to make payment for goods ordered and delivered, the contract is a joint obligation, unless the words used require a contrary interpretation and construction. In *Edward Corporation of Miami v. David M. Woolin & Son, Inc.*,⁸² a seller (the plaintiff) refused to sell goods to the buyer "without the joinder" of the defendant "in the obligation." The buyer and the defendant both signed an instrument stating "The purpose of this contract note is also to receive a confirmation by [defendants] that they authorize you [buyer] to draw this merchandise from us on their behalf and that they will be responsible for payment of your invoices up to the total amount of approximately \$8,000."

In the lower court the defendant moved to dismiss the seller's action for goods sold on the ground that an indispensable party (the buyer) was not joined. The trial judge dismissed on the ground that the obligation was joint only and the buyer was therefore an indispensable party.

The district court affirmed, holding that there were two promises for the same act; that under these circumstances, in the absence of an indicated intent to the contrary, a joint obligation is presumed to have been intended. "The same act" (performance) is promised even though one promisor is principal and the other a mere surety or guarantor. Of this,

82. 113 So.2d 252 (Fla. App. 1959).

Corbin says, "One who guarantees payment of the debt of another is always promising the same performance as is the principal debtor. This is true even though he limits the amount of his liability."⁸³

Applying the rule that instruments must be construed together, the supreme court affirmed the judgment of a trial court and its holding that the following was not a complete release: "This is to certify that I have . . . made settlement with the Jacksonville Terminal Company for all claims for Injuries and Damages . . ." Payments were made to the plaintiff by the Terminal Company by vouchers with stubs, one of which read ". . . partial payment for personal injury."⁸⁴ This, with other corroborative evidence by the defendant's representative, that the first-mentioned paper was not the form used by the company for final releases, and further that the company did not consider the payments final, indicated there was no conflict in evidence to go to a jury; that the trial court was correct in holding the releases to be partial only.

In *Riley Aircraft Manufacturing, Inc. v. Koppers Company, Inc.*,⁸⁵ the supreme court held a circuit court in error for submitting to a jury the question whether two sales orders involved one contract or two. Although the orders were executed on identical forms, were signed by the same parties and covered the sale of the same kind of merchandise (propellers), they bore different dates, described varying quantities of goods and different prices, and the times of deliveries were not the same. There were therefore two contracts.

The seller attempted to justify his failure to perform the second contract by the buyer's failure to perform the first contract. The court pointed out that the buyer's failure to take and promptly pay for the goods was not, in any case, a breach of either contract, that this failure presumably, was an implied in law condition to the seller's duty to deliver⁸⁶ only under the first contract. The court indicated that in any event the breach of one contract cannot justify the aggrieved party in refusing to perform another contract.

In *Florida National Bank of Jacksonville v. St. Anthony's Hospital, Inc.*,⁸⁷ a declaratory decree was requested defining the rights and duties under a contract between a hospital which had agreed to perform certain services and to make money payments to the sister of the other contracting party. The formal document provided that \$65 per month should be paid, and in addition, within the discretion of the superintendent of the

83. 4 CORBIN, CONTRACTS § 926 (1951).

84. *Jacksonville Terminal Co. v. Misak*, 102 So.2d 295 (Fla. 1958).

85. 99 So.2d 227 (Fla. 1957).

86. Not a breach of the time term because a reasonable time had not yet elapsed?

87. 105 So.2d 198 (Fla. App. 1958).

Hospital, "such other payments as may be necessary" at any time. The court placed itself in the situation of the parties, considered the surrounding circumstances, the occasion, and apparent object of the parties to determine their intent, and from the evidence concluded that they did not intend to make payments over \$65 per month obligatory, irrespective of the assets of the beneficiary. The attorney who drew up the contract was permitted to testify (without objection) that full support for the beneficiary was not intended. Her other income was shown to be \$6,500 and assets ample, with place to live, rent free. The court concluded that the word "necessary" here meant "in case of need" only.

In construing a lease⁸⁸ providing for a "right of cancellation in case of sale . . . or in the event any of said land is required by the lessor for converting to pasture or for any other reason . . ." the court found the question to be whether this language vested the lessor with an unrestricted right to cancel. In applying two rules of interpretation, the court (1) applied the doctrine of *ejusdem generis* and held that the reason for cancellation must have been related in kind to the reasons specifically stated, which precluded cancellation for the purpose of leasing to a third party, and (2) held that since meaning must be given to all the language, had the parties intended a completely unrestricted right to cancel, there would have been no need for specifying even those stated.

Usual rules of interpretation of contracts were held⁸⁹ to apply to two separately titled separation and property settlement agreements. Under one the husband promised to set up a trust for wife and child. Under the second agreement, executed on the same date, and in consideration of the trust agreement, the husband promised to make certain annual "gifts . . . so long as the wife lives and remains unmarried." A final decree of divorce incorporated the first agreement but not the second. The court held that notwithstanding the use of the word "gift," the husband's promise was not to make a gift but was clearly one in exchange for consideration. The instruments were executed simultaneously and constituted the entire agreement between the parties, this "gift" agreement being merely part and parcel of the overall agreement.

*Collins v. National Fire Insurance Co. of Hartford*⁹⁰ presented an interesting problem of construction. A materialman brought an action against the sureties of the members of a county Board of Public Instruction⁹¹ on the theory that the members of the board had failed to perform their ministerial duty of requiring the contractor to furnish a bond conditioned

88. *Mann v. Thompson*, 100 So.2d 634 (Fla. App. 1958).

89. *Pentland v. Pentland*, 113 So.2d 872 (Fla. App. 1959).

90. 105 So.2d 190 (Fla. App. 1958).

91. Note that these are sureties under a contract with the members of the Board, not sureties under the general contractor's bond; the latter are not parties to the suit.

in the manner prescribed by statute⁹² to protect persons supplying material and labor.

The contract between school board and general contractor provided that the contractor should furnish all materials and that the contract should become effective on delivery of a bond guaranteeing "performance of the contract and as security for the payment of all persons furnishing materials." The bond, executed with general contractor and surety as principals and the Board of Public Instruction as obligee, provided that the principal should "indemnify the obligee against any loss . . ." and further, "That no right of action shall accrue . . . for the use and benefit of any one other than the obligee named; and that the obligation of the surety is . . . one of suretyship only. . . ."

The trial court granted a motion to dismiss the action on the ground (1) that the complaint did not show that the use plaintiff was unable to collect the debt due and (2) the bond read with the contract did protect laborers and materialmen.

On the second point the appellate court agreed that the bond did protect materialmen; that the purpose of Florida Statute section 255.05 is to protect persons whose labor and materials are put into public buildings on which they can acquire no lien, and that the bond should be construed in the light of this section. The court distinguished *Warren for the Use and Benefit of Hughes Supply Co. v. Glen Falls Indemnity Co.*,⁹³ in which the court held that a Board of Public Instruction had failed to demand the statutory bond, its mandatory ministerial duty, which resulted in individual tort liability of members of the board. In that case neither contract nor bond included language creating the obligation called for by the statute for protection of materialmen. In the instant case, the contract required the bond as security for payment of all persons furnishing materials; and the bond specifically referred to the contract annexed. Read together, under usual rules of interpretation, and in the light of the statute, the bond provided the required statutory protection.

The court did not comment on the contract provision which denied a right of action for the use and benefit of anyone other than the obligee-school board, a right the statute specifically requires. The court, however, quoted at length from a West Virginia case⁹⁴ which involved similar statutory requirements, as well as a similar bond and contract denying the right to sue for the use and benefit of others. In holding the bond sufficient, the West Virginia court found this provision to be against public policy and denied it effect. Presumably the Florida court agreed.

92. FLA. STAT. § 255.05 (1957).

93. 66 So.2d 54 (Fla. 1953).

94. *Hartford Acc. & Indem. Co. v. Board of Educ.*, 15 F.2d 317 (4th Cir. 1926).

A public school teacher was held⁹⁵ to be entitled to a continuing contract by virtue of relevant provisions of the Florida teacher tenure statute⁹⁶ and regulations of the state board of education.⁹⁷ The court held that where the teacher, certified to teach, though not in the field of elementary education, was appointed to teach and taught elementary school for three years under procedure authorizing teaching outside the certificated field, and then became certified in the field of elementary education and was appointed to teach for the fourth year, applied for and was refused a continuing contract, the three years which the teacher had taught out of her certified field counted toward the statutory probationary period, entitling her to a continuing contract. The court held that reading of statutes and regulations of the state board together required this result. At the time her "eligibility" for a continuing contract was established, (i.e., at the end of these three years of teaching) she was properly certificated in the field of elementary education, and upon her appointment for the fourth year she was entitled to a continuing contract. The court also held that although she signed her fourth contract, (only a one year contract) this did not have the effect of extending the probation for another year, for the contract did not mention extension as the statute requires. As to this, the court also observed that when she became entitled to a continuing contract, the Board had no authority to issue any other kind.⁹⁸

A contract not to compete within a seven mile area by engaging in the restaurant business directly or indirectly, as principal or as agent, as employer or as employee, as officer, director, stockholder, partner (dormant, special or otherwise), or as licensee in a business involving retail sale of food for consumption on premises or for retail sale of bakery products off premises, was held⁹⁹ by the supreme court to have been breached and to justify injunction for future breach.

The evidence showed that the covenantor was supervisor of a central commissary procuring food and handling accounting, not only for one res-

95. *State ex rel. Alderman v. Board of Pub. Instruction of Palm Beach County*, 105 So.2d 510 (Fla. App. 1958).

96. FLA. STAT. § 231.14 (1957) requires that every teacher have a certificate to teach under rules prescribed by the State Board of Education (FLA. STAT. § 231.16 (1957)) which prescribes the types, classes and ranks of certificates, the types of instruction these certificates shall cover and the requirements therefor.

FLA. STAT. § 231.36 (1957) provides that ". . . each member of the instructional . . . staff . . . who holds a regular certificate . . . and who has completed three years of service . . . and who has been reappointed . . . for the fourth successive year, shall be entitled to . . . a continuing contract, provided the period of service . . . may be extended to four years when prescribed by the county board and agreed to in writing by the employee."

97. A regulation of the State Board of Education adopted April 24, 1951 defines the "regular" certificate as one of five types (listed) "based at least on graduation from a standard four year college *regularly covering* the teaching work or *the position* (as prescribed by the State Board Regulation) *to which the teacher is appointed at the time eligibility for a continuing contract is established.* . . ."

98. Citing Annot., 110 A.L.R. 791, 800 (1937).

99. *West Shore Restaurant Corp. v. Turk*, 101 So.2d 123 (Fla. 1958).

restaurant managed by him and outside the prohibited area, but for another within the area owned by a corporation whose principal stockholders and officers were his father and another person with whom he had been closely associated in negotiating the purchase of yet another restaurant within the prescribed area, even furnishing a part of the price, though ostensibly only as a loan.

The court noted that covenants not to compete are, in the best of circumstances, difficult to enforce in that violation may not be apparent and damages hard to prove; for this reason "the moral obligation of the covenantor, the obligation to observe the spirit as well as the letter of the agreement must be considered and enforced." The father and the third party, also parties to this suit, though strangers to the covenant, were enjoined from aiding and assisting the covenantor from violating his covenant. The chancellor's decision, based as it was, only upon pleadings, affidavits and depositions, was not entitled to as strong a presumption of correctness as where the evidence is conflicting or where the chancellor heard the witnesses himself.

A provision in a lease that the lessees should furnish the lessors an annual audit of the lessee's business by a certified public accountant showing the gross sales upon which the rental was to be based during the preceding rental year was held ¹⁰⁰ to require, not merely a compilation of sales tickets, but application of accepted accounting practices which could prove, with reasonable accuracy, the correctness of reported sales—this being the obvious object of the requirement that an audit be made.

Among such methods are comparison of cash receipts, as deposited in banks or otherwise disposed of, with reported total sales. Another compares cost of goods sold, plus markup customary to the individual business or to the trade, against total reported sales. The certificate of the C.P.A. should detail the procedure followed, the records checked, and state that, based upon such audit, the gross sales were a figure named therein. The court held that no other information concerning the lessee's business need be given unless the C.P.A. finds it necessary.

The lower court however, entered a final decree requiring the audit without taking testimony on the lessee's affirmative defenses of waiver and estoppel. The appellate court reversed on this ground saying that the lessor's conduct in accepting without objection the defective audit and rental based thereon for three years may well have led the lessee to a change of position in reliance thereon, as perhaps in continuing an inadequate accounting system, creating an estoppel. Or, a waiver might be inferred from conduct leading the lessee to believe that the right had been waived. No consideration is necessary for such a waiver if an estoppel exists.

100. *Macina v. Magurno*, 100 So.2d 369 (Fla. 1958).

In *Reid v. Johnson*,¹⁰¹ a suit by a client for a declaratory decree construing a contract for attorney's fees, the court emphasized the high responsibility of an attorney to make an understanding as to fees clear, particularly where the contract is made during existing employment, or where he is upon retainer. The burden is upon him to establish fairness. Ambiguities in the contract are resolved against him. Both rules operated in the client's favor in the instant case, since the contract (evidenced by a letter composed by the client), mentioned certain "advances" but did not indicate whether they were upon an independent retainer, or whether they were to be a part of contingent fees there provided. Further, the attorney did not establish clearly his right to be paid for extra work from another fund.

In construing a contract a court will not presume the parties intended an illegal performance.¹⁰² The contract in question, one for the sale of all the corporate stock in a corporation, called for (1) payment of the purchase price from "net earnings", and (2) payment by the corporation—on a newly executed note—of an existing corporate indebtedness owed to the seller, also out of "net earnings". Two different debts were thus involved. The sellers in this suit for a declaratory decree contended that they were entitled to be paid both debts from operating income, without prior deduction of interest payments (to others), and the lower court so held. The appellate court reversed.

Both principal debts were to be paid from the same fund, since the words used were the same, *i.e.*, "net earnings", the court held. But payment of the purchase price, the personal debt of the buyer, could be made lawfully only from funds legally allocable to dividends, by Florida statute¹⁰³ payable only from "net earnings", by general law¹⁰⁴ defined as "that amount remaining *after* payment of interest on corporate indebtedness." Since the personal debt and interest thereon could be made only from such a fund, and the contract as construed called for payment of the corporate indebtedness to the seller from the same fund, the court held that a lawful construction required all payments (interest as well as both principal debts) to be made from a fund from which interest paid (to others) on corporate indebtedness had first been deducted as an expense. Under the facts the seller had received no payments of any kind; under the court's construction the defendant corporation properly deducted interest paid to others in arriving at "net earnings", but paradoxically, was under no duty to pay even corporate interest to the seller since there were as yet no "net earnings", interest payments to others having resulted in a net loss.

101. 106 So.2d 624 (Fla. App. 1958).

102. *Coast Cities Coaches, Inc. v. Whyte*, 102 So.2d 848 (Fla. App. 1958).

103. (Or from assets in excess of liabilities.) FLA. STAT. § 608.52 (1957).

104. Citing 13 AM. JUR. *Corporations* § 668 (1938).

In a suit by a purchaser for specific performance,¹⁰⁵ the appellate court found the evidence sufficient to support the decree upon findings that the contract was a usual sales contract for land, though drawn in the form of an option at the request of the vendors in order to obtain income tax benefits by postponing completion of the sale until the following year. The intent to contract to sell was further evidenced by two checks delivered to the seller as a deposit upon the purchase, and was so accepted according to notations on the check, though the notation was changed to "lease" at the seller's request for tax reasons. The court further held the seller estopped to insist that time was of the essence as provided in the "option contract" because of his own failure to deliver the abstract as promised. It made no difference then that the "option" was exercised belatedly.

The general rule of interpretation, that specific or particular provisions of agreement are to be given such effect as to supersede provisions in conflict with them which have been stated in general terms was applied in *Suncoast Building of St. Petersburg, Inc. v. Russell*.¹⁰⁶ The vendors in their contract for the sale of land had disclosed the right of the federal government to redeem the land within one year from the date of the foreclosure sale at which the vendor had purchased the land, and had agreed either to secure the release of the right to redemption or to fully indemnify the purchaser for all damages which might accrue from redemption: but the contract also provided for conveyance by warranty deed free of all encumbrances. The deed actually tendered was not a full warranty deed but provided for the right of redemption and promised indemnification. It was held sufficient under the rule.

THE PAROL EVIDENCE RULE

The parol evidence rule came into question in *Bessemer Properties, Inc. v. Barber*.¹⁰⁷ While parol evidence may not be admitted to vary or contradict a writing, if the writing does not embody the entire agreement obviously the rule does not apply. Whether an agreement does embody the entire agreement (*i.e.* is *integrated*) depends on the intent of the parties. In determining that intent, courts follow either of two rules: (1) Williston¹⁰⁸ takes the stand that if an instrument is *on its face* apparently complete—this is a question of law to be determined by the court—the parties obviously intended the writing as a complete expression of their agreement; (2) Wigmore,¹⁰⁹ on the other hand, says in effect that whether an agreement appears on its face to be complete is immaterial; that the court must examine the surrounding circumstances, take testimony pro and con on the question

105. *Grim v. Ware*, 105 So.2d 807 (Fla. App. 1958).

106. 105 So.2d 809 (Fla. App. 1958).

107. 105 So.2d 895 (Fla. App. 1958).

108. 3 WILLISTON, CONTRACTS § 633 (rev. ed. 1936).

109. 9 WIGMORE, EVIDENCE § 2431 (3d ed. 1940).

whether the transaction was intended to be covered by the writing, deciding this as a matter of law, but merely for the purpose of ruling on the applicability of the parol evidence rule. If the court decides the transaction was intended to be integrated, it does not decide the factual question that the negotiations as to extraneous matters did not take place; it merely decides that *if* they took place, they are "legally immaterial." But if the court determines the parties did not intend the writing to cover the whole agreement, it rules that the parol evidence rule does not apply, and then leaves to the jury the question whether the negotiations did or did not take place. Thus the apparent paradox of receiving proof of certain negotiations in order to determine whether to receive them is resolved. In the instant case, the court followed the Wigmore rule, quoting it at length.¹¹⁰

The trial court correctly took testimony to determine whether the parties had intended their written agreement to be complete (though on its face it may have appeared to be so), and then finding that they had not, properly admitted parol testimony to prove the partnership was a limited one, extending only to picking, packing and resale of oranges, but not to initial purchase of oranges from the grower.

The court also held again that only parties to a contract or their privies may invoke the parol evidence rule. In this case the plaintiff who attempted to invoke the rule, was not a party to the partnership agreement, but rather was seeking to charge a party to it, and thus was not eligible to invoke it.

The parol evidence rule was involved also in *Greenwald v. Food Fair Stores Corporation; 27th Avenue Market Inc.*¹¹¹ The suit for accounting and damages was predicated on fraud of the 27th Avenue Market in tricking the plaintiff into entering into a lease. The lease granted store privileges for a certain business, and reserved to the landlord the right to rent competing stores to third parties or to compete itself. The plaintiff sought to introduce evidence to show that prior to making the lease the landlord's agent had represented that Food Fair Stores had no interest in the building and would not compete. The evidence was rejected and defendant had a summary judgment.

A district court affirmed (1) holding rejection of the parol evidence was proper, because the writing was integrated, the matter of competition having been dealt with in the lease.¹¹² On the charge of fraud the court found the representation to be immaterial and so, not actionable.

The defendant Food Fair was not a party to the lease, and so had made no promise¹¹³ to refrain from competing, and so was not liable. That the

110. The opinion cited Wigmore verbatim, but in transcription of the last sentence of the quoted portion, several lines were omitted and the sense of the passage is severely distorted.

111. 100 So.2d 200 (Fla. App. 1958).

112. Citing 9 WIGMORE, EVIDENCE § 2430 (3d ed. 1940).

113. The commentator's assumption.

officers in the two corporations were overlapping was not discussed by the court, probably because the parol evidence rule would also apply to any representation or promise made in behalf of Food Fair.

An ambiguity in a written instrument may of course be explained by parol evidence, the parol evidence rule having no application to that situation. In *J. M. Montgomery Roofing Co., Inc. v. Fred Howland, Inc.*,¹¹⁴ the court held that though the contract between the plaintiff subcontractor and the defendant general contractor was unambiguous on its face, the existence of another contract between the general contractor and a different subcontractor served to cast some doubt on the meaning of the plaintiff's contract "to render ambiguous a contract that otherwise would not have been so;" and that in these circumstances parol evidence should have been admitted to show the true intention of the parties.¹¹⁵

The plaintiff's subcontract required him to furnish labor and materials for "all ventilation" in accord with plans and specifications in the general contract for a ventilating system which included hoods and ducts. The defendant general contractor let a sub-contract for hoods and ducts to another sub-contractor, and in this action by the plaintiff to recover a balance due on his contract, claimed a credit for this work under a provision in the plaintiff's contract allowing credit for work called for by the plaintiff's contract and not done by it.

The very existence of the other contract for hoods and ducts, of the same dignity and executed by the same official of the defendant general contractor almost simultaneously with the contract with the plaintiff indicated ambiguity, the court said, in reversing a summary judgment for the general contractor and remanding the cause for further proceedings to resolve the ambiguity.

THE STATUTE OF FRAUDS

Where, despite other inducements, marriage is in whole or in part the real consideration for an agreement, an oral promise to marry is within the statute of frauds: the statute is no defense if the marriage is not the real end or purpose of the agreement but was a mere incident or condition thereof.¹¹⁶ In *Greene v. Miller*,¹¹⁷ a case of first impression in Florida, the court found within the statute a woman's promise that if a man would continue to render services to her in operation and management of a hotel she would marry him and share with him the net income from the hotel. The promise

114. 98 So.2d 484 (Fla. 1957).

115. This would seem to be a question of whether the contract was integrated, i.e., a question of intention, and therefore of fact, determinable by the Wigmore rule in the *Bessemer* case, notes 107 and 109 *supra*. Williston's rule in this case would put a bludgeon in this general contractor's hand.

116. Mutual promises only to marry are, of course, not within the statute.

117. 104 So.2d 457 (Fla. 1958).

of marriage was an essential element and could not be removed and leave remaining a contract expression of the parties' intentions. The contract was not divisible, the court said. It rejected the minority view that if a promise be made upon a lawful and sufficient consideration, not within the statute, the promisor cannot evade liability because there was another consideration, proof of which is excluded by the statute. Nor was the contract taken out of the statute because of the fact that *no* marriage took place, as contended by the complaining party, his theory being that actual marriage is itself a necessary part of every agreement made in consideration of it. The latter assumption the court rejected, noting that the statute applies to bilateral as well as unilateral contracts, marriage itself generally being held not sufficient part performance to take the contract out of the statute.

The court distinguished the cases involving promises to transfer land in consideration of marriage where the injured party took possession or made improvements, stating that these involved equitable doctrines peculiar to land transactions. It held however, that though the remedy on the express contract was barred, he should have been permitted to plead in *quantum meruit* to recover the reasonable value of his services.

In *Bruce Construction Corp. v. State Exchange Bank*,¹¹⁸ the question was whether the promise of a Miami general contractor to a Lake City bank to repay moneys advanced for a payroll to a subcontractor working on a Lake City project of the general contractor, was a promise to pay the debt of another.¹¹⁹ The trial court had directed a verdict for the plaintiff. The evidence on the point showed that an official of the general contractor had "promised" bank officials that if the bank would advance money for payrolls to the subcontractor on checks drawn on the subcontractor's Miami Beach bank his "firm would take care of the checks when they were presented in Miami," and assured them he would "guarantee payment" on it. When two checks were returned, the plaintiff bank first charged the subcontractor's account.¹²⁰ The district court reversed, holding that from these facts conflicting inferences might be drawn, that there was some evidence from which the jury might infer the general contractor's promise to pay his own debt which would be outside the statute.

PERFORMANCE

A university which reserves the right to have a student withdraw at any time after his acceptance may do so without the necessity of furnishing the student with a reason or cause; though the university must act in good faith

118. 102 So.2d 288 (Fla. 1958).

119. Statute of Frauds. FLA. STAT. § 725.01 (1957).

120. Students will be reminded of *Lawrence v. Anderson*, 108 Vt. 176, 184 Atl. 689 (1936) included in PATTERSON & GOBLE, *CASES ON CONTRACTS* 460 (4th ed. 1957). Also consider the "main purpose" doctrine for which see 2 CORBIN, *CONTRACTS* § 369, n. 25 (Supp. 1959) citing *Bensam Corp. v. Felton*, 63 So.2d 278 (Fla. 1953).

and without malice. In a student's suit for specific performance of an enrollment contract,¹²¹ the reserved right having been set out in the university's bulletin, the court found that the dismissal had not been arbitrary. The university had acted to dismiss the student only after receiving information prompting an investigation; had granted a hearing before a committee set up to deal with questions of admissions in the school of education in which he was entered, and had acted upon the advice of the committee.

Although it upheld the right of the school to dismiss without cause, the court found cause in that the student, a candidate for a certificate in secondary education, had been found by the committee to be fanatic in his views on atheism, and concluded that he would seek to impose them on pupils he might teach. He was thus ineligible to teach as an intern in the prescribed student teaching program. The court also noted that a university should consider itself under a duty not to graduate with its stamp of academic approval persons having "attitudes of fanatical ideas, such as with reference to atheism, which if imposed on the impressionable minds of the young . . . would be calculated to operate to their detriment and injury." The court held that there was no abuse of discretion in denying specific performance.

In *Enid Corporation v. Mills*,¹²² a contractor's suit to enforce a lien for an amount alleged to be due for the construction of streets in a subdivision owned by the defendants, a district court held that the risk of soil subsidence was not to be borne by the contractor. The contract provided that the roads were to be built to a grade set by stakes placed by the defendant's engineer. The evidence showed that the engineer set the stakes for a five foot elevation, and that the contractor built the roads accordingly, but repeatedly warned the defendant that they might settle and offered to build them higher. The defendant refused to permit this because a higher road would have required additional fill for lots adjacent to the road. Both defendant and plaintiff were aware of the character of the subsoil at the time the contract was entered into and later, when the condition was encountered; each was aware of the possibility of settlement. In view of the defendant's control of the elevation, the decision seems correct.

The court also held that this was not an act of God which would excuse the contractor. Florida courts might well abandon the misleading phrase "act of God" in the rule "An unexpected impediment to the performance of a contract will not relieve a party from his contractual obligations, unless his performance is rendered impossible by an act of God."¹²³ Since the court well knows that even an act of God will not excuse a contractor who promises to build a building (as opposed to merely repairing one), his assumption of risk depends on other factors than divine

121. *Robinson v. University of Miami*, 100 So.2d 442 (Fla. App. 1958).

122. 101 So.2d 903 (Fla. App. 1958).

123. See 6 CORBIN, CONTRACTS § 1324 (1951).

whim.¹²⁴ This court could also eschew the words "meeting of the minds", which seem to connote a kind of subjective harmony the court itself would not regard as requisite to formation of a contract.¹²⁵ If habit must persist, insertion of the word "apparent" would make "meeting of the minds" more accurate.

Restitution of a down payment pursuant to a land contract was sought by a purchaser's representative apparently on the ground of impossibility of performance by reason of insanity in *Baroudi v. Hales*.¹²⁶ Relief was denied. The court did not speak of "impossibility," but in the opinion recounted facts to show that performance was not impossible.

The purchaser had entered into the contract during a lucid interval, between judgments of incompetency following sanity restoration by court decree. The contract provided that time was of the essence and for retention of the down payment as liquidated damages.

Although the proof showed that the incompetent himself could not have closed the deal at the appointed time, his curator (appointed a month before the time for closing) knew of the contract, and further, eight months later offered to close.¹²⁷

Citing the Florida rule that a defaulting purchaser may have restitution where the reason for non-performance is "some misfortune occurring to the purchaser," and there is a resulting benefit to the seller resulting in unjust enrichment,^{127a} the court found the rule inapplicable because the reason for non-performance was not the purchaser's incompetence.

The Florida rule might better be stated in terms of supervening impossibility of performance, a recognized excuse in contract law for not performing.¹²⁸ "Some misfortune occurring to the purchaser" — undoubtedly a bequest from some pioneer court, in trust to successors — is virtually meaningless. It probably is meant to signify that even a defaulter may have restitution (to the extent of the defendant's unjust enrichment) if his breach was not wilful.¹²⁹

Specific performance of a land contract was denied, but restitution of the deposit was decreed in a suit by a defaulting purchaser in *Greenfield v. Bland*.¹³⁰ Although the contract made time of the essence, the plaintiff

124. *Ibid.*

125. See *Gendzier v. Bielecki*, *supra* note 81a.

126. 98 So.2d 515 (Fla. App. 1957).

127. Impossibility of performance, if it had existed, might have excused the condition of the time term, though not necessarily the duty to purchase.

127a. *Goldfarb v. Robertson*, 85 So.2d 504 (Fla. 1955); *Beatty v. Flannery*, 49 So.2d 81 (Fla. 1950).

128. Presumably the Florida rule applies to a performance which can be performed only by the promisor. See 6 CORBIN, CONTRACTS § 1334 (1951). This was not such a case.

129. Of course no breach wilful or otherwise is involved if performance is excused by impossibility. The Florida rule, however, is undoubtedly broad enough to include situations other than impossibility.

130. 99 So.2d 727 (Fla. App. 1958).

did not pay at the agreed time nor at the time extended by the seller. A year elapsed before the purchaser demanded performance. Meanwhile, the defendant, knowing the plaintiff had contracted to purchase for speculation and that the event upon which increased value was expected had not come to pass, believed the plaintiff did not intend to honor the contract and placed valuable improvements on the land.

Noting that specific performance lies within the discretion of the chancellor, whose decree will not be disturbed on appeal unless clearly erroneous, the district court agreed that there was evidence that the plaintiff had been dilatory, and that the time term (a condition) had not been waived or excused, and affirmed the decree denying specific performance.

The court's reason for allowing restitution is not stated, the court decreeing it "in the light of the record." Since Florida courts seem to follow the rule that a defaulting vendee cannot have restitution in the absence of fraud or fortuitous "unfortunate inability to perform,"¹³¹ or some other equity such as forfeiture, shocking to the court's conscience,¹³² it must be assumed that the record indicated one of these circumstances, or some special equity. In view of the fact that there are no definitive conclusions concerning the right of a defaulting vendee to recover a down payment (either with or without a provision for liquidated damages),¹³³ the district courts should state their reasons.

An attorney employed under a contingent fee contract and discharged without cause before the occurrence of the condition on which the contract was based was held by a district court¹³⁴ to be entitled to the reasonable value of his services to the time of discharge, but subject to the happening of the condition, with a charging lien to secure his right.

The client's cause for personal injuries had gone to trial, had resulted in a mistrial following an offer of settlement which the client had rejected. The attorney was then notified that his services were no longer required.

On the attorney's petition for authorization to withdraw and for fees, the lower court entered judgment for the agreed 40%, based on the rejected offer of settlement, and authorized a retaining lien on papers in the attorney's possession pertaining to the cause.

In granting petition for certiorari, the appellate court held that the attorney could be discharged with or without cause, that the lower court erred in permitting recovery on the contract since the condition, recovery by the client, had not happened.

131. See note 129 *supra* and accompanying text.

132. See BOYER, *FLORIDA REAL ESTATE TRANSACTIONS* § 4.07 (1960).

133. *Ibid.*

134. *Osius v. Hastings*, 97 So.2d 623 (Fla. App. 1957).

Holding that he was nevertheless entitled to the reasonable value of his services,¹³⁵ the court directed the lower court to enter an order establishing a charging lien upon any settlement or judgment in the client's favor. The retaining lien was discharged on the ground that it would hinder further prosecution of the client's action and the happening of the condition upon which the attorney's quantum meruit claim still depended.

That an attorney may recover in quantum meruit, but limited to the happening of the condition in the contract seems anomalous. While it is true that the client may discharge an attorney, with or without cause, (because the nature of the relationship requires complete confidence), it does not follow that the client's action is not a breach. The Florida Supreme Court in *Goodkind v. Wolkowsky*,^{135a} declared that discharge without cause is a breach. Discharge then, is an exercise of a power, not a right; there is no implied in law condition permitting discharge, as a few courts hold. In the *Goodkind* case, the plaintiff had substantially performed and recovered on the contract, but the court in extensively reviewing many authorities, observed that though the plaintiff had the alternative remedy of recovery in quantum meruit, he was not confined to it, as the lower court had held.

If the client's action was wrongful, the holding that the attorney's right still depended on the happening of the condition in the contract is questionable, and not merely anomalous. Admittedly there is conflict in authority upon the question whether the amount of a quantum meruit recovery by an attorney wrongfully discharged should be limited by the provisions of the contract.¹³⁶

Restitution and illegality were unlikely companions in *Wilson v. Rooney*.¹³⁷ Like the little tailor who slew three with one blow,¹³⁸ a district court in one decision smote a blow for three cherished, though unofficial, tenets of Florida public policy: (1) judicial protection of Florida's land economy, (2) judicial aversion to sin — in women, and perhaps (3) Florida's superiority over California, metaphorically speaking.

In this case, a Florida man wooed and won a thrice-divorced California woman before her fourth divorce became final. As man and wife they removed to Florida where he established their home. He bought a house (in his name) and paid living expenses; she contributed the furniture, for which he ultimately paid her \$25,000.¹³⁹ After a year or two, for reasons

135. In practically all jurisdictions such recovery is allowed. 5 AM. JUR. *Attorneys at Law* § 182 (1936); but see § 172, n. 3, citing a few cases limiting recovery to the occurrence of the condition.

135a. 132 Fla. 63, 180 So. 538 (1938).

136. For complete discussion see WOOD, *FEE CONTRACTS OF LAWYERS* 203 (Prentice-Hall, New York, 1936).

137. 101 So.2d 892 (Fla. App. 1958).

138. Flies, not giants. Perhaps Grimm's Fairy Tales.

139. What she did with the money does not appear, nor is it material except perhaps tangentially, as a factor in the court's stated effort to "do complete justice regardless of whether the litigants originally come into court with clean hands."

not disclosed, the relationship was broken off; he moved out and ordered her out.

She brought this suit in equity alleging his promise to give her the house and pay her living expenses for the rest of her life, in exchange for her promise to serve as his housekeeper. The court found, however, that the consideration for his promise was the meretricious relationship and was therefore illegal, and denied her relief.

But the keeper of the king's conscience took jurisdiction of the Floridian's counterclaim and graciously awarded him \$3,500 for her use and occupation¹⁴⁰ of the house. In truth, the court seems to have allowed the man for her unjust enrichment only during the period she had overstayed her welcome, for ten months, finger counting reveals — the court did not say. Nor did the court state whether it regarded her as a tenant at sufferance or a trespasser or give any reason why he should be recompensed so handsomely. In the end, the man still had his house; had her furniture; had had two years' housekeeping service, admittedly non-recompensable; still, he did have them; and in addition, a munificent rent. In view of the fact that these people had been in *pari delicto*, to assume, as the court evidently did, that the man could so easily, even precipitately, end the illegal bargain¹⁴¹ and immediately start afresh, with property to rent, is shocking. With this kind of encouragement, Florida landowners can detour around the next boom-bust with both ease and profit. Our court has shown the way.

A party wall agreement was held unenforceable in *H. B. Holding Company v. Girtman*¹⁴² because performance would be in violation of law. The contract provided that either party could build a new party wall in case of partial or total destruction. A city ordinance prohibited repair costing more than 20% of the building's value without compliance with the building code for new buildings. Since the repairs proposed by the plaintiff could not be accomplished without violation of the ordinance, he was not entitled to enter the defendant's land to make them.

The usury laws of Florida cannot be defeated by use of a corporate shell to cloak a loan which is actually being made to an individual borrower.¹⁴³ Statutes make usurious interest provisions exceeding 10% on loans to individuals, but 15% on loans to corporations.¹⁴⁴

Whether a loan to a corporation is actually a loan to an individual, and merely a device to avoid usury laws is a question of fact to be determined in each case. The evidence in *Gilbert v. Doris R. Corporation*^{144a} showed

140. FLA. STAT. §§ 83.05, 83.20 (1957) make provision for the common law action for use and occupation.

141. See 6 CORBIN, CONTRACTS § 1536 (1951); RESTATEMENT, RESTITUTION § 140, and comment (1937).

142. 96 So.2d 781 (Fla. 1957).

143. *Gilbert v. Doris R. Corp.*, 111 So.2d 682 (Fla. App. 1959).

144. FLA. STAT. §§ 687.02, 687.03 (1957).

144a. See note 143 *supra*.

that the lender refused to lend unless the borrower would form a corporation for the sole purpose of borrowing in order that he might exact the higher rate of interest. The borrower, therefore, formed a corporation, transferred his land to it, executed its note and mortgage to the lender carrying the corporate interest rate, in exchange (as the trial court found) for money loaned for the use and benefit of an individual. So whatever may be the right of a lender to exact incorporation as a condition of lending money, he may not do so as a device to avoid usury laws. This particular device is doubly opprobrious because it adds the cost of incorporation to the higher interest. Under the statute the borrower was entitled to a credit of double the amount of interest paid for willful violation.¹⁴⁵

In *Parker v. Bryce*,¹⁴⁶ the Supreme Court held that since any claim of usury involves the question of intent and willfulness, it is a question of fact and should be disposed of by a jury, and not by the court on motion for a summary judgment. The court said that the question of intent is not fully determined by the fact that the lender actually gets more than the law permits; he must also have a purpose to do so. The judgment was reversed and remanded for proceedings consistent with the opinion.

Usury was again in issue in *Silverstein v. Wakefield*¹⁴⁷ as the basis for the plaintiff's suit to declare a note and mortgage void. The court held, however, that the evidence showed no usury though it did show that unconscionable advantage was taken of the plaintiff. The loan was procured through a mortgage broker and bore a legal rate of interest. The mortgage broker was found not to be an agent of the lender, so the heavy fees deducted by the broker as a commission for services from the proceeds of the loan were not attributable to the lender, who thus had no intent to charge more than the legal rate of interest. A dissenting judge differed on the inferences to be drawn from the evidence with respect to the broker's agency for the lender.

In *Dillon v. Walter*,¹⁴⁸ a district court held that usury laws were not applicable where there was no loan of money, advance of money, or forbearance of a debt. Where no money passed, and the plaintiff's note and mortgage were executed in exchange for work and materials in building a house, it made no difference that the cash price offered by the construction company was different from and less than the credit price; the difference was not a loan.

In *Brown v. Dyrne*,¹⁴⁹ champerty was alleged as a defense to the plaintiff's action upon an express contract by the defendant to pay for his

145. FLA. STAT. § 687.04 (1957) (the court held the case distinguishable from *Holland v. Cross*, 89 So.2d 255, 63 A.L.R.2d 920 (Fla. 1956), with analysis and discussion of the *Holland* case in annotation at page 955).

146. 96 So.2d 154 (Fla. App. 1957).

147. 112 So.2d 406 (Fla. App. 1959).

148. 98 So.2d 391 (Fla. App. 1957).

149. 109 So.2d 788 (Fla. App. 1959).

services in aiding the defendant in bringing suit for an accounting against her real estate agent. The district court held that there was evidence of champerty sufficient to go to the jury and from which a jury might infer champerty in the following: the plaintiff and defendant met at a social gathering; the defendant, a widow and inexperienced in business, was encouraged by the plaintiff to suspect her real estate agent of improper profit-making activities against her interest. At his instance she later sued her agent for an accounting. The litigation thus provoked resulted in a finding that the agent had faithfully discharged his trust. Champerty was not, in this case, a question of law to be decided by the court.

A suit for rescission of a land contract for fraud failed in *Sutton v. Crane*.¹⁵⁰ In his complaint the plaintiff alleged that the defendant's agent, in presenting the contract for the plaintiff's signature, orally represented to the plaintiff that the writing contained a provision giving the plaintiff an option to contiguous lands, whereas it did not; that he did not read the writing because of diseased eyes and extremely poor vision. In affirming the lower court's decision, the district court held that one of the necessary elements for relief from fraud is the right to rely upon the truth of the representation. One who cannot read a contract is grossly negligent in not having some third party read it to him, and thus has no right to rely. The plaintiff's right to rely was further diminished by his having entered into an amended contract with the defendant after he had knowledge of the false representation.

A brokerage commission already paid by the seller to the broker was sought to be recovered in an action by the seller against the purchaser in *Park Central Hotel Co. v. Park Corporation*¹⁵¹ on either of two theories: (1) an alleged contract of indemnity, or (2) fraud.

As to the first cause, the court dismissed, holding that no contract (offer?) to indemnify could be implied from the purchaser's mere statement to the seller that he had not been introduced by any broker to the negotiations resulting in the contract of purchase.^{151a}

As to the second cause, fraud, the court held the seller estopped to claim that he was misled by the purchaser to believe no broker was involved by a judgment in a prior action by the broker against both seller and purchaser. In that action the broker had judgment in two parts, recovering (1) against the seller upon its contract with the broker, and (2) against the buyer upon a conspiracy with the seller to defraud the broker of his commission.

150. 101 So.2d 823 (Fla. App. 1958). Note that it is the appearance of assent, not actual assent which justifies the offeror in assuming the offeree has accepted (in the absence of fraud). This is the objective theory of contracts. See 1 WILLISTON, CONTRACTS § 35 (3d ed. 1957).

151. 97 So.2d 28 (Fla. App. 1957).

151a. On the "offer" point, the court held that no reasonable person in the position of this seller could reasonably believe the purchaser was promising that no broker was involved.

Duress which will avoid a contract must be duress which exists when the contract was made, the court held in *Stone v. Austin*.¹⁵² It is immaterial that there may have been prior influence or pressure. Thus where the evidence showed that although for a time a husband attempted to induce a wife to sign a contract for the sale of their homestead by threatening to divorce her if she did not sign, but that ultimately she did sign freely, without apparent hesitation or unhappiness, there was no duress.

A right of rescission not adhered to will be regarded as a waiver of the right, the court held in *Rood Company, Inc. v. Board of Public Instruction of Dade County*¹⁵³ in the company's suit for rescission for mistake.

The defendant Board had contracted to purchase from the plaintiff company certain land in a larger tract which the company proposed to subdivide, and promised the Board that it would cause the plat of the subdivision to be recorded. In carrying out this promise, however, the company was required by Dade County, as a prerequisite to recording the plat, to enter into an agreement with the county to fill the subdivision (including the lot the plaintiff had contracted to sell to the Board) to an elevation of seven feet. The plaintiff did make such an agreement, recorded the plat and nine months later conveyed the land to the Board.

Because the plaintiff did not act promptly to rescind and continued to recognize the contract by conveying and accepting the money for the conveyance, an intention to waive any right of rescission was readily found. That the parties may not have intended that the plaintiff fill the land when they entered into their contract; that there may have been a mutual or unilateral mistake on this point, was immaterial then. The court characterized this as "waiver by election."¹⁵⁴ ". . . [W]here one has an election to ratify or disaffirm a conveyance, he can either claim under or against it, but he cannot do both. . . ."

A conditional seller who sells to a dealer, delivering the chattel with indicia of authority to sell is estopped to claim the right to possession of the chattel against a bona fide purchaser for value without actual notice of the conditional seller's interest, notwithstanding the fact that the conditional seller recorded its contract.¹⁵⁵ The effect of recording presented a novel question in Florida, the court said, prior cases not having involved that fact. This appeared to the court to be the general rule, which is generally bottomed on estoppel, however dissimilar the reasoning in the several states.

152. 107 So.2d 232 (Fla. App. 1958).

153. 102 So.2d 139 (Fla. 1958).

154. For the numerous meanings of waiver, see 3 WILLISTON, CONTRACTS § 679 (rev. ed. 1936).

155. *Llewellyn Mach. Corp. v. Miller*, 108 So.2d 916 (Fla. App. 1959).

ASSIGNMENT

In *Ayala v. Murrell*,¹⁵⁶ a suit to enjoin a breach of contract, the question was whether an assignee had assumed¹⁵⁷ the duties of the assignor (a filling station owner and operator) under the assignor's contract with a distributor of petroleum products to purchase from it all his requirements for the station for 15 years; "all covenants to run with the land and constitute an obligation on the premises."¹⁵⁸ The assignment to the defendant contained no express assumption of the duties under the contract, *i.e.*, to take and pay for plaintiff's products. However, for approximately two years the assignee did so, up to the time it sought another distributor and began removing plaintiff's tanks. From the fact that the defendant had performed, the court found his implied promise to assume all the duties under the contract, in that he thus led the plaintiff reasonably to believe that "he had made the contract his own," his acts being explicable only on that theory.¹⁵⁹ The bill for an injunction should not have been dismissed.

An obligor with notice of an assignment cannot safely pay the assignor even if the assignor retains a note evidencing the assigned debt, it was held in *Kaufman v. Bernstein*.¹⁶⁰ The owner of land took a note and purchase money mortgage which he bequeathed to his son. The son made a partial assignment of the mortgage to his sister, whose interest the obligor (maker of the note and mortgage) recognized by making a substantial payment to her. Later the obligor and assignor entered into a compromise agreement under which the assignor gave the obligor a discharge of the entire mortgage. In this suit by the partial assignee to foreclose, the court held that although the assignor retained the note, the obligor knew of the assignee's interest and therefore could not obtain a discharge of the debt without her consent.

A lessee who had assigned the lease with the consent of the lessor was denied the right to recover a security deposit which under the lease was to run concurrently with the rent payments for the last six months of the term.¹⁶¹ In the assignment the assignor-lessee transferred the privilege of availing itself of the previously paid security deposit, but reserved the right to the security deposit to itself, the assignee promising to pay the last six months rent to the assignor. Notice of assignment, but not of the reservation, was given to the lessor who later (but before the final

156. 97 So.2d 13 (Fla. 1957).

157. Students sometimes need to be reminded that this is merely a question of offer and acceptance in a special setting.

158. The court found it unnecessary to decide whether the contract constituted a covenant running with the land or an equitable servitude.

159. Though the assignee did not expressly promise his assignor to perform, undoubtedly the assignor did delegate his duty to perform, giving the assignee power to perform. The assignee's conduct might be referable to his power only. But under the circumstances of this case, the court's conclusion as to the assignee's apparent intent to promise seems more reasonable.

160. 100 So.2d 801 (Fla. 1958).

161. *Hayes v. Cameron*, 101 So.2d 45 (Fla. App. 1958).

six months) accepted a surrender of the lease from the assignee, and in so doing, assigned all his rights in the lease. The reservation in the contract between assignor and assignee could not affect the lessor because he was not a party to it, the court held. Even if one should disagree with the court's conclusion that the assignor intended to assign all his rights (in the face of his reservation), the obligor who was without notice of it could reasonably assume all rights were assigned to the assignee, who so far as the obligor knew, could give him a valid discharge.¹⁶²

THIRD PARTY BENEFICIARY CONTRACTS

That restrictive covenants may be enforced by any grantee in a subdivision on a third party beneficiary contract theory, rather than as a servitude or easement, was again indicated in *Batman v. Creighton*.¹⁶³ Who is liable to whom, of course, is dependent on the manifested intent of the parties. The owner who subdivides his land according to a plan for uniform development with restrictions as to its use, promises each grantee that the land will not be used otherwise, for the benefit of a class, any member of which may enforce the covenant against him. Moreover, each grantee who takes his land with reference to such a recorded plat thus becomes a promisor to his own grantor and liable for breach to any member of the class for whose benefit the contract was made, *i.e.*, any other owner in the subdivision.¹⁶⁴ Whether one's own deed contains such a restriction, then, is immaterial, whether one be plaintiff or defendant in any action to enforce the restriction.

Yet another contract involved the question whether the plaintiff was a third party beneficiary who could sue on a contract made between an employer and a local plumber's union.¹⁶⁵ Whether one can sue, or whether he is a mere incidental beneficiary who cannot sue, is a question of the apparent intent of the parties "that one of the parties should become the debtor of the third."¹⁶⁶

In this instance, the plaintiff was a non-profit corporation, known as the Plumbing Industry Program, having as its main purpose the advance-

162. What rights were transferred and conversely retained is, of course, merely a matter of interpretation: What did the offeror apparently intend to transfer? As between the assignor and assignee, the assignor's intent to retain this right was manifest. But as against the obligor without notice, the usual rule should apply. See RESTATEMENT, CONTRACTS § 170(2)(b) (1932).

163. 101 So.2d 587 (Fla. App. 1958).

164. The court states that this precise point is new in Florida, but does not label such a grantee a "promisor" though its meaning is evident.

165. *McCann Plumbing Co. v. Plumbing Industry Program, Inc.*, 105 So.2d 26 (Fla. App. 1958).

166. Citing *Wright v. Terry*, 23 Fla. 160, 2 So. 6 (1887). Corbin criticizes this rule for determining intent to benefit (as have many other legal writers), and quotes from a case: "Payment direct to the third person is, of course a benefit to him, and, if that is required by a contract, the intent to so benefit is beyond question." 4 CORBIN, CONTRACTS § 777 (1951). In short, if performance is to go directly to the third party, the intent is clear. It is only in the cases where the contract does not call for this that there is a problem.

ment of the plumbing industry through education and institutional advertising. The contract first stated the union's understanding that the employers were carrying out such a program for the benefit of the industry; that certain employers had consented to contribute to the Program, and that the union required that the employer contribute to the Program a minimum of 10¢ per hour paid for each employee. A clause then provided that the employer "agrees to contribute to the Plumbing Industry Program" the amount specified.

Applying its own test to determine the parties' intent, the court found that although they intended this provision for their own mutual benefit in that it would advance the industry as a whole, they also intended to benefit the plaintiff corporation to which the defendant employer had agreed to make payments. The court also held that it was proper, in a suit for accounting to determine finally the question of the third party's *right*, to accounting prior to the actual accounting.

DAMAGES

The proof required to show that damage to a residence was caused by subterranean termites, after a contract to insulate it was in force, was in question in *Termitrol Engineers, Inc. v. Duncan*.¹⁶⁷ (The defendant exterminator had agreed to insulate against subterranean termites in 1955, make additional chemical applications up to May 1957, and to replace and repair any damage caused by such termites accruing after the contract was in force.) The lower court was held to have been correct in its refusal to direct a verdict for the defendant, it being unnecessary for the plaintiff owner to show definitely that the damage did not occur before the contract was signed, or that the damage was done by subterranean and not "dry" termites, strict proof as to either matter being virtually impossible.

There was, however, testimony by an expert biologist that the damage was caused by subterranean termites, though dry termites may have been present also, and that in his opinion it was caused within a year before his inspection in February 1957, and if it had been properly treated in 1955 and 1956, the damage would not have occurred. There was also testimony by a contractor and the president of the defendant company that live termites were present a year to two years following initial treatment. This evidence was held to be sufficient to support a jury verdict for the plaintiff.

At least two brokers' cases involved a question of damages. One was an action for a commission¹⁶⁸ in which the broker had a jury verdict to which the trial court had added interest for almost three years prior to the

167. 112 So.2d 419 (Fla. App. 1959).

168. *Bailey v. Swartz*, 97 So.2d 310 (Fla. App. 1957).

judgment, the jury having made no finding as to interest nor included it in the verdict. In reversing, the district court held inapplicable the rule in *Tucker v. Hughey*,^{168a} in which a federal trial court had noted the Florida rule that a trial court is without authority to add interest to the verdict of a jury, but had held that in the case before it certain features in handling altered the rule. The district court reaffirmed the Florida rule.

The other case concerned the measure of a stockbroker's recovery in the event a customer breaches his contract to take and pay for stock.¹⁶⁹ The court noted that in such an event a broker may elect to treat the stock as property of the customer, tender it and sue for the full purchase price; or in the alternative, sell the stock promptly or within a reasonable time thereafter, and recover the difference between the purchase price and the amount received on sale. The latter remedy is available if he chooses to retain the stock as his own, with the latter measure of damage. The trial court then, erred in charging the jury that the measure of damage was the purchase price of the stock less its value at the time of the trial, and erred in excluding evidence of the value of the stock at the time of the customer's refusal to take it. No Florida cases were cited, but the court followed the general rule which denies the broker the right to choose the time of breach and thus the amount of his recovery.

THE STATUTE OF LIMITATIONS

The statute of limitations applicable to actions for malpractice against a physician is now governed¹⁷⁰ by the same rule applied to other situations in which a party has an election to sue in contract or in tort, viz: if the action sounds in contract, the general three year statute of limitations¹⁷¹ governing contract actions applies; if in tort, the four year statute¹⁷² applies. In an earlier malpractice action, *Palmer v. Jackson*,¹⁷³ the supreme court had seemed to hold that although the action sounded in tort, the statute governing contract actions applied. To the extent that this was so, the supreme court here held *Palmer* overruled, adding that the action in tort is not converted to one upon the contract merely because the contract is disclosed as a matter of inducement.

168a. 6 F.R.D. 545 (S.D. Fla. 1947).

169. *Mass v. Gordon*, 101 So.2d 836 (Fla. App. 1958).

170. *Manning v. Serrano*, 97 So.2d 688 (Fla. 1957).

171. FLA. STAT. § 95.11(5)(e) (1957).

172. *Id.* § 95.11(4).

173. 62 Fla. 249, 57 So. 240 (1911), followed in *Slaughter v. Tyler*, 126 Fla. 515, 171 So. 320 (1936). The court noted that the *Palmer* rule was then supported in only one jurisdiction (Ky.), since then abandoned by virtue of a statutory amendment. (Many states, unlike Florida, have statutes expressly covering malpractice actions, and so are unconcerned with the problem).