Real Property Law

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PRELUDE

Legislative rather than judicial activity accounted for the principal developments in the field of real property during the period of this survey. A new Mechanics' Lien Law, a Marketable Title Act, a Condominium Act, and a Land Trust Act were enacted by the Florida Legislature in 1963. Litigation was customarily plentiful, with all major areas of property law being involved. The homestead continued to be a fruitful source of litigation and produced perhaps the most noteworthy decision of the biennium.

Because of the large number of decisions and the breadth of the subject matter, this material represents the writers’ selection of the most noteworthy and significant developments. A reaffirmation of principles well established in Florida, particularly as they apply to commonly recurring fact situations, is generally excluded.

The style of this article follows that of the previous surveys, with the subject matter divided into seven principal headings:

I. Vendor and Purchaser
II. Deeds—Recording, Description, Parties, Cancellation
III. Estates, Dower, Homestead and Future Interests
IV. Easements, Covenants, Water Law and Zoning

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1. The period covered is the 1961-1963 biennium, or more specifically, volume 132 through page 128 of volume 155 of the Southern Reporter, second series, and applicable Federal Reports.


V. Adverse Possession, Dedication, Tax Titles and Eminent Domain

VI. Mechanics' Liens and Mortgages

VII. Landlord and Tenant.

The major items of legislation are not included in this article since they merit special attention and are treated separately. Other legislative changes are noted in the appropriate sections.

I. Vendor and Purchaser

A. Oral Contracts to Devise; How to Not Enforce

The Florida statute which renders unenforceable parol contracts to make a will was twice considered by appellate courts during the period of this survey. Unfortunately, from the point of view of substantive law, the cases were primarily concerned with matters of pleading; thus, the precise nature and effect of the statute hardly can be considered to be definitely established. The courts have not decided whether, assuming the defense of the statute is properly raised, the statute will render all such contracts void or unenforceable in spite of such doctrines as part performance, estoppel, and promissory estoppel.

In Cypen v. Frederick, the plaintiff obtained a decree in the trial court against an executor for the specific performance of an oral contract to convey realty in exchange for services which had been performed for the decedent during his lifetime. The services had been substantially performed before the enactment of the statute in question, and the defense of the statute was not raised prior to the appeal. In sustaining the decree for specific performance, the appellate court stated that the statute in question was similar to the Statute of Frauds, that it created a defense personal to the defendant which must be affirmatively pleaded or is waived, and that since the defendant did not raise the issue in the trial court, he was estopped from raising it for the first time on appeal.

The case of Fletcher v. Williams also involved the enforcement of an oral contract to convey or devise land in return for services. The court

8. See notes 2-5 supra.
9. Fla. Stat. § 731.051 (1963). This statute provides:
   No agreement to make a will of real or personal property or to give a legacy or make a devise shall be binding or enforceable unless such agreement is in writing signed in the presence of two subscribing witnesses by the person whose executor or administrator is sought to be charged.
10. 139 So.2d 201 (Fla. 3d Dist. 1962).
11. Fla. Stat. § 725.01 (1963). This statute reads in part:
   No action shall be brought . . . upon any contract for the sale of lands, tenements or hereditaments, or of any uncertain interest in or concerning them . . . unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith or by some other person by him thereunto lawfully authorized.
12. So.2d 759 (Fla. 1st Dist. 1963).
followed the analogy\textsuperscript{13} of \textit{Cypen v. Frederick}\textsuperscript{14} to the effect that this statute is similar to the Statute of Frauds, and then held that it creates an affirmative defense which must be pleaded in an answer and cannot be raised by a motion to dismiss.\textsuperscript{15} The majority of the court also noted that the statute in question was simply declaratory of the decisional law of the state.\textsuperscript{16}

In a challenging dissent,\textsuperscript{17} Justice Sturgis took sharp issue with the majority, not only as to the pleading questions concerning the proper method of raising the defense, but also as to the very nature of the statute. Instead of regarding the statute as no more than a statute of frauds applicable to wills, the dissenting justice considered it both as invalidating such oral contracts and absolutely barring their enforcement. Thus the statute would establish a substantive public policy and not simply a defense personal to the the party defendant. Hence, the absolute unenforceability of contract would be subject to attack by a motion to dismiss.

Insofar as the language of the two statutes is concerned, the difference is between “no action shall be brought . . .” and “no agreement . . . shall be binding or enforceable . . .”\textsuperscript{18} Thus, a distinction such as Justice Sturgis makes is plausible so long as not “binding” is equated to not “valid.” However, the difference in wording is not so obviously fundamental that it compels such a conclusion. If literally “no action can be brought,” it would seem that the contract would necessarily not be “binding or enforceable”; on the other hand, if the contract is “not binding or enforceable,” it would seem that “no action can be brought.” Hence, the two statutes may mean exactly the same thing. Neither statute expressly declares that such contracts are void. Further, from a policy viewpoint, should the statute be so vigorously construed that oral contracts to devise could never be enforced regardless of how much reliance, how much service, how much performance, how much detriment is incurred by the other party? To the extent that these decisions leave room for application of principles of specific performance, promissory estoppel and estoppel

\textsuperscript{13} Since the statute was raised for the first time on appeal in the \textit{Cypen} case, the decision may have been predicated simply on the proposition that matters not considered by or raised in the trial court cannot be asserted at the appellate level.

\textit{Accord}, as to the proposition that the Statute of Frauds cannot be raised for the first time on appeal: \textit{Lerer v. Arvida Realty Co.}, 134 So.2d 798 (Fla. 2d Dist. 1961).

\textsuperscript{14} 139 So.2d 201 (Fla. 3d Dist. 1962).\textsuperscript{15} Fletcher v. Williams, 153 So.2d 759 (Fla. 1st Dist. 1963).

\textsuperscript{16} \textit{Id.} at 761.

\textsuperscript{17} \textit{Id.} at 765.

\textsuperscript{18} Another distinction between the two statutes overlooked by both the majority and the dissent is the requirement in § 731.051 (probate statute) that the contract be witnessed, whereas there is no such requirement in § 725.01. This may buttress Justice Sturgis' opinion that the former statute establishes a public policy rendering contracts which do not comply therewith not only unenforceable but also void. If equitable principles will permit the enforcement of an unwritten contract, the requirements not only of a writing and signature but also of witnesses will have to be disregarded.
generally, they permit a desired flexibility and prevent the statute from
itself becoming an instrumentality of fraud.

B. Specific Performance; Damages

In a case of first impression in Florida,\(^1\) the Third District Court
of Appeal has held that a seller of land will be denied the remedy of spe-
cific performance when the sales contract contains a provision for liquidated
damages and the language discloses that the parties intended to limit the
seller to this remedy in the event the purchaser defaulted in his perform-
ance. The language of the contract in question specifically stated that
in the event the purchaser defaulted the seller should retain the deposit
as liquidated damages "and the parties hereto shall be relieved of all obli-
gations under this instrument."\(^2\) The decision seems bottomed on the
well-established principle that in an action for specific performance, the
court will not make a new or different contract for the parties simply be-
cause the one made by them proves ineffectual.\(^3\) The decision also points
up the desirability of inserting into sales contracts a specific performance
clause as an alternative remedy to a liquidated damages provision.\(^4\)

Specific performance in favor of the seller will be denied when the
seller is unable to proffer a deed which complies with conditions specified
in the contract. Thus, when a contract recited that the land was being
sold subject to restrictions, but that none of the restrictions were violated
by the premises, specific performance was denied when there was a viola-
tion of a set-back provision.\(^5\) As an alternative basis of decision, the
court said that specific performance will be denied when the vendor can-
not convey good title to any interest in the property. The occasion for
the assertion of this rule was the fact that the sellers had conveyed and
sold the property pending appellate disposition.\(^6\) In another case,\(^7\) it was
held that although the purchaser may have notified the vendor of his
intention to exercise an option, specific performance nevertheless will be
denied if the purchaser fails to take affirmative action to bring about a
closing within a reasonable time after notifying the seller.

C. Agency

The general principle that a broker cannot act as agent for both the
buyer and seller without the consent of each was reaffirmed but found inap-

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\(^1\) Dillard Homes, Inc. v. Carroll, 152 So.2d 738 (Fla. 3d Dist. 1963).
\(^2\) Id. at 739.
\(^3\) Giehler v. Ward, 77 So.2d 452 (Fla. 1955).
\(^4\) For an example of such an optional provision see Boyer, Florida Real Estate
\(^5\) Krause v. Owens, 138 So.2d 370 (Fla. 2d Dist. 1962).
\(^6\) Ibid.
\(^7\) Stenvall v. Wilson, 134 So.2d 502 (Fla. 3d Dist. 1961).
applicable in *Lerer v. Arvida Realty Co.* That case held that a real estate salesman not subject to orders and directions of the purchaser and who was to be paid by the seller was not a dual agent of both seller and purchaser. Further, the purchaser's action for return of the deposit was denied on a finding that there was no fraudulent misrepresentation.

The long established common law rule that a contract executed under seal is not enforceable against an undisclosed principal prevailed in a recent case when the vendors sought specific performance against the undisclosed principals of an agent who had executed the contract as the purchaser.

D. **Time of the Essence**

General principles governing the essentiality of time limitations specified in real estate contracts were reaffirmed in a recent case in which those principles were apparently overlooked by the attorneys and trial court. The contract in question provided that on or before a certain date the seller would furnish an abstract or a commitment of title insurance showing his title to be good and marketable, and that if the title was not marketable, the seller would have a reasonable time to make it marketable. The trial court had granted a summary judgment in favor of the purchaser, enabling him to recover his deposit because of the seller's failure to furnish an abstract or insurance commitment on the date specified. In reversing the summary judgment because of the existence of substantial issues of material fact, the appellate court stated that the provision allowing the seller a reasonable time to make the title marketable after the date specified for the furnishing of an abstract raised a question of whether time really was of the essence. Further, even if time had been made of the essence by liberally construing the purchaser's notice of termination as a demand for strict performance, the seller still would have had a reasonable time in which to comply. Thus, there were material questions not only as to possible waiver but also as to whether there was a breach of the contract at all.

E. **Fraud and Rescission; The Non-Looking Leapers**

In order to justify rescission for fraud or misrepresentation the complaining party, usually the purchaser, must not only show that he relied

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26. 134 So.2d 798 (Fla. 2d Dist. 1961).
27. McMullen v. McMullen, 145 So.2d 568 (Fla. 2d Dist. 1962).
28. Those principles are: time is generally considered of the essence in actions at law but is not considered so in equity unless the parties specifically so provide. Further, although time is not made of the essence originally, it can be so made even after time for performance by the nondefaulting party making a demand and giving notice that the other party perform within a specified reasonable time. See generally Boyer, *Florida Real Estate Transactions* § 4.04 (1959); National Exhibition Co. v. Ball, 139 So.2d 489 (Fla. 2d Dist. 1962).
on the misrepresentations, but also that he was justified in so relying.\textsuperscript{31} As a measure of the purchaser's right to rely, the courts are well agreed that he must use reasonable diligence to ascertain the truth, "because the court[s] will not protect those who with full opportunity to do so will not protect themselves."\textsuperscript{32} These principles frequently are applied in situations involving exaggerations of the magnitude of profits being realized from the operation of business property. Thus, in \textit{Kaminsky v. Wye},\textsuperscript{33} the purchaser entered into a contract for the purchase of a motel upon the seller's representation that the income from the property for the preceding year had been in excess of 24,000 dollars. Three months after closing, the purchaser sued for rescission when he discovered the actual income was 16,000 dollars. At trial, the evidence revealed that the sellers consistently refused to supply the purchaser with any proof of the supposed income and indicated that they would not do so even if the transaction were not consummated. Only on the day of closing did the sellers furnish a list of advance reservations and this disclosed reservations for only four to six people, though the purchaser had been told that the motel was booked solid for twelve weeks in advance. Under these circumstances the court denied relief, finding that although the purchaser "had every conceivable notice of the fraud," he still chose to close the transaction.\textsuperscript{34}

The question of justifiable reliance was further examined in \textit{Ramel v. Chasebrook Constr. Co.}\textsuperscript{35} an action for damages for fraud and deceit. In this case, the president of a tract development corporation represented to the prospective buyers of a house that it was "well constructed."\textsuperscript{36} In reality, the house had been erected on a muck foundation after the firm had been warned by an engineer not to do so. Shortly after the buyer moved in, the house developed cracks as the foundation, patio and pool began to settle and pull away from the house. On trial, the corporation defended on two grounds: first, that no positive representations had been made, and second, that there was no reliance, since the purchasers had visibly inspected the premises before purchase.

As to the first defense, the court held that although in the nature of opinion, "statements of a party having exclusive or superior knowledge may be regarded as statements of fact although they would be considered as opinion if the parties were dealing on equal terms."\textsuperscript{37} As to the second defense, the court noted that the foundation was laid upon knee deep muck without proper support and was not visible or discoverable without excavations.

\textsuperscript{32} George E. Sebring Co. v. Skinner, 100 Fla. 315, 323, 129 So. 759, 762 (1930).
\textsuperscript{33} 132 So.2d 44 (Fla. 2d Dist. 1961).
\textsuperscript{34} These, in essence, are the words of the trial court. \textit{Id.} at 47.
\textsuperscript{35} 135 So.2d 876 (Fla. 2d Dist. 1961).
\textsuperscript{36} \textit{Id.} at 879.
\textsuperscript{37} \textit{Id.} at 882.
tion. Hence, a visible inspection in itself would not be sufficient to preclude reliance. Accordingly, a judgment of dismissal was reversed.38

The basic proposition that a contract cannot be rescinded when it is impossible to put the parties back in their original positions was reaffirmed in Smith v. Chopman.39 The plaintiffs in this case bought a parcel of realty from the defendants, who in turn granted a 99-year lease to the plaintiffs on another piece of property. In the interval before they sought rescission, the plaintiffs defaulted on the mortgage payment and the defendants assigned their interests as lessors to a purchaser for value without notice. Thus, rescission of the contract was denied because neither of the parties could have been restored to their original positions.

F. Equitable Conversion

General principles of equitable conversion40 were employed to help ascertain the rights of a vendee against the estate of a deceased vendor and to allocate insurance proceeds of a fire policy between a divorced couple. The cases discussed below are consistent with traditional conversion doctrine, but the first extends without discussion the protection of the recording act to the holder of an equitable interest beyond previous Florida decisions.41

Buck v. McNab42 was a suit for specific performance of a contract to convey against the executor of the estate of a deceased vendor. The chancellor had dismissed the complaint because of laches and because of the plaintiff’s failure to comply with the non-claim statute.43 In reversing, the appellate court found no laches because the delay was primarily caused by the defendants and because the purchasers had not been aware of previous unrecorded deeds. The court also found it unnecessary for the

38. Ramel v. Chasebrook Constr. Co., supra note 35. A dissenting opinion took the view that the evidence was insufficient to prove the allegation of misrepresentation.

39. 135 So.2d 438 (Fla. 2d Dist. 1961). The broker in this case had promised to “amass a fortune” for the plaintiffs by trading in realty, and he was also charged with wrongful dual representation.

40. I.e., that the purchaser is regarded in equity as the owner of a real property interest and the vendor as the holder of a personal property interest, the right to the purchase money, because equity regards as done that which ought to be done. The doctrine is discussed in the cases cited at notes 42 & 45 infra.

41. See text accompanying notes 42 & 72-75 infra.

42. 139 So.2d 734 (Fla. 2d Dist. 1962).

43. FLA. STAT. § 733.16 (1961):

No claim or demand, whether due or not, direct or contingent, liquidated or unliquidated, or claim for personal property in the possession of the personal representative or for damages, including but not limited to actions founded upon fraud or other wrongful act or commission of the decedent, shall be valid or binding upon an estate, or upon the personal representative thereof, or upon any heir, legatee or devisee of the decedent unless the same shall be filed in the prescribed manner and no cause of action, at law or in equity heretofore or hereafter accruing, including but not limited to actions founded upon fraud or other wrongful act or omission, shall survive the death of the person against whom such claim may be made, whether suit be pending at the time of the death of such person or not, unless such claim be filed in the manner and within the said six months as aforesaid.
vendees to comply with the non-claim statute, since the doctrine of equitable conversion regarded their interest as realty, thus in rem in nature, and as an equitable claim to specific property exempted from the necessity of complying with the non-claim statute. Jurisdiction over the minor defendants, however, had not been properly obtained.

In McNeill v. McNeill, a property settlement agreement between a husband and wife pending divorce stipulated that the husband should receive real estate owned by the entireties upon his paying the wife one half of their "equity" in the realty. After the agreement was reached, the dwelling burned, and the chancellor did not include the provision for the property settlement in his final decree. The appellate court analogized the position of the husband to that of a purchaser, and employed the doctrine of equitable conversion to determine that he was entitled to the insurance proceeds subject, however, to the prior claim of the wife to payment of the agreed purchase price.

G. Installment Sales—Contract or Security?

The interplay of contract and security principles in the resolution of controversies involving installment land contracts continues to relegate these instruments into an amorphous status of uncertainty. Hence, it is difficult to determine in advance which set of principles will be emphasized by the courts in a particular case. Nevertheless, there appears to be a groping, perhaps an unconscious groping, toward the position of treating such contracts as primarily security devices. The results of the cases are not uniform, and the trend can hardly be considered pronounced or vigorous since much of the support for this position can be explained away or regarded as dictum. And, of course, the terms of the precise contract and the precise issue before the court are the most significant in settling any particular controversy. However, it would seem that there are common features applicable to most installment land contracts and that prima facie, at least, a preference for one position or the other might be expected. An analysis of the recent cases follows.

Riehl v. Bennett purportedly followed the principle that on the

44. 139 So.2d at 737. Quoting from 33 C.J.S. Executors and Administrators § 118, at 1073 (1942), the court said:

Property which a decedent held as trustee or in any other fiduciary capacity does not at his death properly constitute part of his estate; title to the property may pass to decedent's heirs or personal representatives, but it does so clothed with the fiduciary obligation. Such property cannot be charged with the debts of decedent, or with the expense of administering the estate. The fact that the fiduciary treated the property as his own does not alter the rule; so decedent's wrongful act in selling trust property does not make the proceeds of the sale part of his estate.

45. The minor defendants were grantees in the unrecorded deed. The decree was not entered as to them until jurisdiction was properly obtained. Service had been made on the minors themselves but not upon their guardian.

46. 135 So.2d 785 (Fla. 1st Dist. 1961).

47. Id. at 788.

48. 142 So.2d 761 (Fla. 2d Dist. 1962).
purchaser's default on an installment contract, the seller has a choice of remedies: he may proceed under the forfeiture clause usually included in such contract, or he may sue the defaulting purchaser for full compensatory damages.\textsuperscript{49} In the particular case, however, the second remedy was denied because of the application of the principles of election of remedies and estoppel. It was held that the vendor by accepting a quitclaim deed from the defaulting purchaser waived his right to the latter remedy. In this case the defaulting purchaser, apparently for the purpose of relieving himself of further liability, voluntarily executed and recorded a quitclaim deed conveying the subject property back to the seller. Thereafter, the seller resold the property for an amount less than the original purchase price. In denying the seller the right to recover the difference between the original price and the amount for which the land was later sold, the court held that the "tender"\textsuperscript{50} of the deed required an election on the part of the seller either to refuse the benefits of the tendered deed or to accept it in full satisfaction of the contract along with the forfeited payments. In reality, the court's discussion of the seller's right to hold the purchaser to full damages may be regarded as a dictum since the seller was not accorded such right in the instant case. Similarly, any suggestion that the seller would have the right in any case to declare a forfeiture regardless of how much was paid by the purchaser is likewise obiter since in the instant case the purchaser acquiesced in and actually desired that result. In short, it was not determined whether or not the vendor would have had to treat the contract as a security device and foreclose in the event the purchaser had insisted.

\textit{Mid-State Inv. Corp. v. O'Steen}\textsuperscript{51} held that the particular installment contract was a mortgage and that the vendor had no legal right to repossession the realty after a default by the purchaser. Accordingly, the vendor was liable for trespass and conversion of personalty when he repossessed the land and exercised dominion over the personalty.

The facts of O'Steen are most significant and very conducive to the result reached by the court. They involved a husband and wife who purchased a house and paid for it with the money which they borrowed from the defendant investment company. As part of the loan transaction, the husband and wife "assigned"\textsuperscript{52} their deed to the company and took back

\textsuperscript{49} See generally Chace v. Johnson, 98 Fla. 118, 123 So. 519 (1929); Riehl v. Bennett, supra note 48. Actually the quotations from Chace v. Johnson stated the second option of the vendor as "bringing action upon the unqualified agreement of the purchaser to pay." Might this not be a legal action substantially equivalent to specific performance?

\textsuperscript{50} The \textit{Riehl} court stated that the critical point was when the vendors became aware of the recorded quitclaim deed. At that point they were obligated either to refuse the deed or to accept it in full satisfaction of the contract. 142 So.2d at 763.

\textsuperscript{51} 133 So.2d 455 (Fla. 1st Dist. 1961), \textit{cert. denied}, 136 So.2d 349 (Fla. 1961); discussed in 16 U. \textit{MIAMI L. REV.} 493 (1962).

\textsuperscript{52} These are the words of the court. Certainly, "assignment of the deed" is not the usual method of conveying or mortgaging property. Compare the English procedure of
an unrecorded contract for deed, or an installment land contract. Upon a default by the purchasers, the defendant's representative entered the premises, took possession of the realty and personalty and resold the property. Under these circumstances, it was held that the contract for deed was intended as security for the payment of money and was a mortgage under the Florida statute. Since there was an actual borrowing of money by the purchasers from the investment company, the analogy to a mortgage is particularly strong. Viewed in terms of its facts, the case is scant authority for the proposition that all installment land contracts are in fact devices to secure the payment of money and hence should be treated as security devices similar to mortgages. But as a matter of fact, are not installment contracts essentially that?

The case of Huguley v. Hall extended the rationale of the O'Steen case by citing it and stating that a purchaser "[under] a contract for deed . . . is ordinarily entitled to an equity of redemption . . . subject to the protection of a court of equity." However, the statement is purely dictum because in the instant case the purchaser was not afforded protection of his equity of redemption. The supreme court, in discharging a writ of certiorari, affirmed the trial and appellate court decisions forfeiting the rights of the vendee. In this case, the seller had brought an action in equity to declare the contract null and void after alleging his election to "rescind" and terminate the contract.

The supreme court in Hall gave as a basis for its decision the fact that the vendee had failed to assert affirmatively his equity of redemption and thus was deemed to have abandoned it. Unfortunately, the case was creating an equitable mortgage by the deposit of title deeds. See generally Osborne, Mortgages 70 (1951).

53. Most of the furniture in the house was subject to a purchase money mortgage executed by the plaintiffs to a local store. The defendant's representative called the store to repossess the furniture, which they did. He then gave some tools found in the house to a neighbor to hold for the plaintiffs and sold the property to the neighbor's half-brother. All this occurred while the plaintiffs were away on a trip, so that when they returned all they found was a box of rags and a washing machine. The remainder of their personal effects were "lost."

54. Fla. Stat. § 607.01 (1961). This statute provides:

All conveyances, obligations conditioned or defeasible, bills of sale or other instruments of writing conveying or selling property, either real or personal, for the purpose or with the intention of securing the payment of money, whether such instrument be from the debtor to the creditor or from the debtor to some third person in trust for the creditor, shall be deemed and held mortgages, and shall be subject to the same rules of foreclosure and to the same regulations, restraints and forms as are prescribed in relation to mortgages. (Emphasis added.)

55. 157 So.2d 417 (Fla. 1963), affirming by discharging writ, 141 So.2d 595 (Fla. 1st Dist. 1962).

56. 157 So.2d at 418.

57. The attorneys and the courts apparently used the term rescind as a synonym for terminate or cancel. There was no attempt to return to the purchaser amounts paid on behalf of the purchase price or otherwise restore the parties to status quo. What was sought and obtained was a forfeiture of the purchaser's interest.

58. Supra note 56.
involved in issues of procedure; the supreme court stated that if the action were regarded as in the nature of a quiet title suit by a seller not in possession, the purchaser’s failure to demand a jury trial would constitute a waiver. The case is therefore unsatisfactory from a substantive viewpoint.

The Hall case was instituted as a suit in equity. There is a maxim that he who seeks equity must do equity. Seeking a bald declaration of forfeiture is hardly doing equity. Further, if the court really meant that the purchaser had an equity of redemption, the easy abandonment of it in the case at hand seems inconsistent with centuries of equity jurisdiction in mortgage cases wherein the courts go to great lengths to protect the equity of redemption. Of course, it is possible that the purchaser had paid only a small portion of the purchase price and was not in a position to redeem. The purchaser had filed a motion to dismiss and later an answer preserving the attack upon the sufficiency of the complaint, and the trial court granted a summary judgment in favor of the plaintiff. If, in reality, the vendor’s legal title is retained, as the court stated, simply for security purposes, then must not the vendor enforce his claim by foreclosing the vendee’s interest? And, on the other hand, if the vendor should be accorded the right to terminate the contract and forfeit the rights of the vendee, after his election to do so should not his proper remedy be ejectment to recover possession of the land?

The nature of an installment land contract has also received judicial scrutiny in the area of its liability to taxation. The cases here also point toward the security approach. The first case during this biennium took a contrary view, but it was later restricted to the peculiar terms of the contract in question. In State v. Green the supreme court held that an agreement for deed, containing details for executing a purchase and sale agreement and relating to a promissory note, was not a written obligation to pay money and thus was not subject to the documentary stamp tax. It should be noted, however, that the instrument in question pro-

59. Ibid.
60. Although not directly in point, the promulgation of rules prohibiting clogging of the equity of redemption indicates the extent to which the equity courts protect the mortgagor. See generally Osborne, op. cit. supra note 52, at 233. Perhaps the judgment or decree in the instant case could be considered a strict foreclosure—a really strict foreclosure in which the vendee is given no time at all in which to redeem.
61. See the dissenting opinion of Justice Sturgis in Huguley v. Hall, 141 So.2d 595, 597 (Fla. 1st Dist. 1962). The supreme court’s statement of the proceedings, see notes 56 and 57 supra, minimize the efforts of the defendant to raise the procedure issue but emphasize the defendant’s failure to raise an equitable defense. The complaint did allege the contract and also default by the vendee so it probably was sufficient to withstand a motion to dismiss. See statement of facts in the two opinions cited note 55 supra.
62. This was one of the principal points in Justice Sturgis’ dissent in Huguley v. Hall, supra note 61. Of course, if the contract is recorded, then an action in equity is necessary to have it cancelled of record or removed as a cloud on title.
63. 132 So.2d 761 (Fla. 1961).
64. The tax is imposed by Fla. Stat. § 201.08 (1961).
vided specifically that it imposed no personal liability on the buyer, and that the seller would look only to the land itself for payment of the balance of the purchase price.

In *Gulf American Land Corp. v. Green*, on the other hand, the contract for deed did not specifically restrict the seller to a recovery of possession of the land although the vendors had testified that in their many years of experience in the use of thousands of such contracts they had never sought personal judgments against the vendees. Both the court of appeal and the supreme court, nevertheless concluded that the contract was a device to secure the payment of money and was subject to the documentary tax stamp. Another tax case, *Jasper v. Orange Lake Homes, Inc.*, also held that contracts for deed constituted obligations for the payment of money secured by vendors’ liens on realty, and accordingly were taxable only once as class C intangible personality and not as class D intangible personality requiring yearly taxation.

Thus, there seems to be a discernible trend toward the recognition of the installment contract as in fact a security device. Unfortunately, the courts have not as yet forthrightly stated so in unequivocal terms so as to protect fully the rights of a vendee to the same extent accorded a mortgagor. Until there are further developments in this area, the happenstance application of either security or contract provisions, along with preoccupation with pleading issues possibly created because of substantive uncertainty, will probably result in continued ambiguity. A fresh and definitive judicial analysis of the installment land contract is long overdue.

II. DEEDS—RECORDING, DESCRIPTION, PARTIES, CANCELLATION

A. Vendee Protected by Recording Act

The Second District Court of Appeal, apparently unaware that it was doing so, extended the protection of the recording act to the holder of an equitable interest, namely a vendee under a contract to purchase. Previously, the Florida cases had restricted such protection to innocent purchasers of legal interests.

In *Buck v. McNab*, the owner, by unrecorded deeds, conveyed two parcels of realty to his minor grandsons, in consideration of their love and

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65. 149 So.2d 396 (Fla. 1st Dist. 1962), *cert. denied*, 157 So.2d 70 (Fla. 1963). The tax was held not applicable during the first six months when the purchasers had an unqualified right to rescind, but the obligation to pay was obligatory after the six months passed and the purchasers no longer had the right to rescind. The tax became due at that time.


67. 151 So.2d 331 (Fla. 2d Dist. 1963).

68. See Fla. Stat. §§ 199.02(3)-(4) (1963) as to the difference.


70. See note 72 infra.

71. Bauman v. Peacock, 80 So.2d 365 (Fla. 1955); Myers v. Van Buskirk, 96 Fla. 704, 119 So. 123 (1928); Boyer, Florida Real Estate Transactions § 28.05 (1959).

72. 139 So.2d 734 (Fla. 2d Dist. 1962), *cert. denied*, 146 So.2d 374 (Fla. 1962).
affection. Later, the original owner entered into a written contract to convey the same parcels to Buck. Sometime after the owner died, his executor-son discovered the unrecorded deeds and decided that a clear title could not be conveyed. During several years of delay resulting largely because of procrastination or equivocation on the part of the executor, the land increased in value. In an action for specific performance, the trial court dismissed the complaint and ordered return of the deposit. In reversing, the appellate court classified the vendee a purchaser entitled to the protection of the recording act. This conclusion does not seem to be justified. Traditionally, the recording act has been utilized to resolve disputes between competing legal interests. In the ordinary commercial transaction, the purchaser normally does not rely on the recording act at the time he enters into the contract; rather, it is after the contract is signed that the purchaser examines the title and then decides whether or not to complete the purchase. If before the closing the vendee learns of unrecorded deeds, inconsistent possession or other circumstances, he usually cannot qualify as a bona fide purchaser without notice. Further, even when the purchaser has acquired the legal title, if he receives notice of a defect in the title before paying the entire consideration, he is only entitled to pro tanto protection. In the instant case, by obtaining specific performance, the vendee acquired as full protection of the recording act as if he had paid the full price and received a deed before obtaining notice.

B. Description and Boundaries—Accretion

During the period covered by this survey, two cases involving water boundaries were decided and a number of well settled principles

73. That the grantees under the first or prior deed are donees is immaterial. They obtain title as a result of being first, and they are divested only if their deeds are unrecorded, and only in favor of subsequent bona fide purchasers without notice under the recording act Fla. Stat. § 695.01 (1963). The subsequent grantee, however, cannot obtain priority over earlier unrecorded instruments unless he is a purchaser, that is, unless he pays value. 74. 139 So.2d at 736.
75. Id. at 738-39.
76. See generally 6 POWELL, REAL PROPERTY 283 (1958), and 5 TIFFANY, REAL PROPERTY § 1279 (1920), for the proposition that some states extend the protection of the recording act to purchasers of equitable interests. If the rule is to be extended, it should be done so forthrightly, with accompanying reasons. The purchaser in the instant case suffered additional detriment by clearing the lots and planting trees, but he did not pay the full purchase price or receive the legal title.
77. 8 THOMPSON, REAL PROPERTY § 4322 (1963 repl.).
78. In Trustees of Internal Improvement Fund v. Toffel, 145 So.2d 737 (Fla. 2d Dist. 1962), cert. denied, 153 So.2d 305 (Fla. 1963), the appellate court held that the natural boundary of public lands on a river controlled and not the meander line of the original government survey. Thus, under the holding of the chancellor that the original grantees in the chain of title owned to the high water mark, title to any accretion accrued to the plaintiff. There were 386 acres involved.
In Lopez v. Smith, 145 So.2d 509 (Fla. 2d Dist. 1962), the appellate court sustained the lower court's findings that the river involved was navigable and had been so at the time of statehood and the original survey. Thus, the high water marks and not the meander lines constituted the boundaries of the lots in question.
were reaffirmed: (1) a meander line is generally not a boundary but merely defines the general contour of the shore; (2) in the absence of exceptions or reservations, patents and other conveyances shown to border on a navigable stream or body of water carry title to the ordinary high water mark and include the unmeasured strip which usually exists between the water’s edge and the meander line; (3) a meander line may constitute a boundary where it is intended or where discrepancies between the meander line and the ordinary high water line leave an excess of unsurveyed land so great as to clearly and palpably indicate fraud or mistake in the survey.

Travis Co. v. City of Coral Gables\(^7\) involved a rather unusual application of the rule that a conveyance of a parcel of land according to a plat, which parcel is bound by a street or other right of way, carries with it title to the center of such street or right of way. The unusual factor in the case was that the “right of way” was an undug canal that had never been dedicated. The court applied the rule and held that the owners of the abutting lots were the fee simple owners to the center line of the canal.

In an ejectment suit occasioned by a boundary controversy, it was held that the cost of a survey is not an element of allowable damages.\(^8\)

The tremendous length of Florida coastline and the constant changing of the numerous islands or keys by various methods of accretion, alluvion, erosion, reliction and avulsion,\(^8\) create myriad title problems, and as the land becomes more valuable, litigation increases. In Ford v. Turner,\(^8\) land formerly facing the Gulf of Mexico was almost completely blocked off by the lateral southerly extension of an island with only a navigable channel separating the island from the mainland. The court concluded that the island had grown by accretion, not avulsion, and that title to the accreted lands belonged to the owner of the island lots to which they were attached.\(^8\)

C. Trusts and Trustees

Purported conveyances in trust may have varied consequences: they may result in the creation of a valid trust with separation of legal and equitable title,\(^8\) in the entire interest vesting in the “trustee” where the

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79. 153 So.2d 750 (Fla. 3d Dist. 1963).
81. The terms are defined in Boyer, Florida Real Estate Transactions § 13.07 (3) (1959).
82. 142 So.2d 335 (Fla. 2d Dist. 1962). This case, as well as others discussed in a former survey, 16 U. Miami L. Rev. 145 (1961), illustrate the difficulty of tracing the physical contours of the land over a period of years and of determining whether the changes were gradual and imperceptible or sudden and perceptible as a result of a hurricane or other pronounced phenomenon.
84. Boyer, op. cit. supra note 81, § 10.05.
words "as trustee" are considered simply as words "descripto personae," in the entire interest vesting in the named beneficiary as the result of a dry or passive trust being executed by the Statute of Uses, or it may result in an Illinois type land trust under the recent statute. Or, when the draftsman is sufficiently inept, none of these results may follow. Thus, in Watson v. St. Petersburg Bank & Trust Co., a purported conveyance in trust was so defective that it was decreed a nullity. The reservation by the settlor in favor of himself and successors, of the power to revoke the trust in whole or in part, and the instruction to the trustee not to pay taxes, collect or disburse rents or care for the estate in any way, failed to indicate a trust intent and rendered the whole conveyance illusory because the reserved powers amounted to retention of ownership.

Extensive analysis of the nature of a resulting trust is contained in the two opinions of Mitchell v. Grapes, wherein the supreme court declared the existence of such a trust, reversing the District Court of Appeal. In that case three daughters transferred their interest in their mother's estate to their father on his oral agreement to manage it for them. The father married again and so arranged his affairs that on his death all his assets passed to the second wife either by will or as surviving tenant by the entitlies.

An express trust involving realty is required by statute to be created in writing, but resulting and constructive trusts are excepted from its terms. The court of appeal, after a historical review back to the Statute of Uses, concluded that the facts did not correspond to the typical modern day purchase money resulting trust.

The appellate court explained that a purchase money resulting trust arises when property is conveyed to one person and the purchase price is paid by another; however, when an owner of land makes a gratuitous conveyance, a gift rather than a resulting trust is presumed. The court then indicated that relief in the nature of a constructive trust can be ob-

86. McGriff v. McGill, 62 So.2d 28 (Fla. 1952); Elvins v. Seestedt, 141 Fla. 266, 193 So. 54 (1940); Boyer, op. cit. supra note 84, § 10.05.
88. 146 So.2d 383 (Fla. 2d Dist. 1962).
89. Ibid.
90. 146 So.2d 591 (Fla. 3d Dist. 1962), quashed, 159 So.2d 465 (Fla. 1964).
92. Mitchell v. Grapes, supra note 90. Both opinions agree on this proposition, and they are obviously correct.
93. 146 So.2d at 594-95. The court listed three circumstances as giving rise to a resulting trust: (1) failure of an express trust; (2) creation of an express trust which does not exhaust the trust estate; and (3) a purchase money resulting trust. The authorities are generally in accord. See 4 Powell, Real Property § 590 (1954).
94. 146 So.2d at 595. Cf. 4 Powell, op. cit. supra note 93, at 555: "When no payment has been made, as for example, when the transfer has been gratuitous, the essential basis for a resulting purchase money trust is absent."
tained on "clear and convincing proof,"96 but stated that since a constructive trust was not relied on, no relief should be granted.

The supreme court, in reversing, stated that the section of the statute of frauds relating to trusts was inapplicable since the trust involved here was not of real estate as such but, rather, of an undivided share in the proceeds from a decedent's estate, and that no question as to the validity of any of the deeds was involved.96 The court pointed out that the father had abused his confidential relation and noted the injustice of permitting the second wife to be enriched at the expense of the plaintiffs.97 The tone here is descriptive of a constructive trust, utilized to prevent unjust enrichment,98 but the supreme court did not use that term. Instead, it spoke generally in terms of a resulting trust and finally stated: "Even were it not so that this case involves personalty rather than real property, a resulting trust has been established . . ."99

Although the ultimate decision has reached a just result, it is lacking in precise analysis and clear delineation of principles. The opinion discusses with undifferentiated facility many principles of trust law, but it is difficult to ascertain whether the discussed principle pertains to oral express trusts of personalty, resulting trusts of personalty, or to constructive trusts generally. The court stated that there was a resulting trust, and that the subject was personalty, but the emphasis upon breach of the father's confidential relationship which led to the unjust enrichment of his second wife suggests that the real basis of the decision was a constructive trust. The opinion would have been more desirable had it forthrightly been predicted on this latter theory.100

D. Cancellation and Reformation; A Void Deed Is a Void Deed

By far the most significant decision in this area during the past two years was Reed v. Fain.101 In that case a sister brought an action in equity

95. 146 So.2d at 595.
96. 159 So.2d at 467.
97. Id. at 468.
98. See 146 So.2d at 595 for the comment of the district court of appeal. For discussion of constructive trusts see 4 POWELL, op. cit. supra note 93, ¶¶ 594-97.
99. 159 So.2d at 469.
100. Why this was not done is subject only to speculation. The question of the district court of appeal emphasized that the theory of the complaint was predicated solely on a resulting trust. It apparently felt obligated to reverse the trial court in the event no resulting trust were found, although the facts might permit the imposition of a constructive trust. Mitchell v. Grapes, supra note 90. Perhaps this idea persisted in the supreme court to avoid its acknowledging the employment of a constructive trust device. Such an attitude is unwarranted. Every complaint is considered to pray for general relief. FLA. R. CIV. P. 1.8 (b). Facts must be pled and not theories of law. Ibid. If a judgment or decree is proper it should not be reversed simply because of an erroneous reason. Escarra v. Winn Dixie Stores, Inc., 131 So.2d 483, 485 (Fla. 1961). Thus, if the appellate court felt, as it and the supreme court apparently did, that the decision for the plaintiffs was sustainable on the basis of a constructive trust rather than a resulting trust, the decision of the trial court should have been affirmed.
101. 145 So.2d 858 (Fla. 1962). See also 17 U. MIAMI L. REV. 643 (1963), and text accompanying notes 138 & 234 infra.
against her brother to obtain cancellation of two deeds executed twenty-seven years earlier. The deeds were void as unauthorized conveyances of homestead property.\textsuperscript{102} The brother defended by asserting the twenty-year statute of limitations which provides that after the passage of twenty years from the recording of any deed, such deed becomes valid and effectual against all persons who have not asserted by competent record title an adverse claim.\textsuperscript{103} The Florida supreme court, overruling its decision in \textit{Thompson v. Thompson},\textsuperscript{104} held that the statute is not applicable to a void deed or to a deed transferring homestead in violation of the constitutional provisions regulating homestead conveyances.\textsuperscript{105}

A number of other less significant cases during the two-year period held: that both the incompetency of the grantor at the time of the execution of the deed and the grantee's undue influence on the grantor in obtaining the deed may be alleged in the same complaint;\textsuperscript{106} that a mutual mistake of the parties in describing the property is cause for reformation;\textsuperscript{107} that while love and affection may be sufficient consideration to validate a deed, it is not sufficient to support an action in equity by the grantee to reform the deed;\textsuperscript{108} that the evidence needed to establish a mutual mistake need only be clear and convincing and need not prove the mistake beyond a reasonable doubt;\textsuperscript{109} that a deed executed by an incompetent grantor is subject to cancellation;\textsuperscript{110} and that a deed will not be cancelled because one of the two subscribing witnesses signed the document after delivery.\textsuperscript{111}

\textsuperscript{102} The deeds were considered void apparently because they were executed gratuitously in order to circumvent the descent of the homestead equally to the son and daughter. The court considered the original conveyance void in its inception, but added that if not void ab initio, the transaction was void as to the "inchoate interest" of the daughter.

\textsuperscript{103} FLA. STAT. § 95.23 (1963).

\textsuperscript{104} 70 So.2d 555 (Fla. 1954). The perplexity of the problem and the unsatisfactory status of the homestead law is evidenced by the fact that the supreme court first wrote an opinion adhering to \textit{Thompson v. Thompson}, and then wrote another opinion overruling it. 145 So.2d at 860 & 864. Both opinions were by a 4:3 majority.

\textsuperscript{105} 145 So.2d at 871. The court, summarizing, held that the 20 year statute of limitations was not applicable because: (1) the critical deed was void; (2) if not void ab initio it was void as to the "inchoate interest" in the homestead which became "vested" at the death of the father; (3) the Legislature did not intend statute § 95.23 to apply to deeds or wills transferring homestead property; and (4) statute § 95.23 would be unconstitutional if construed so as to validate instruments executed in contravention of constitutional inhibitions. This raft of reasons and the general reluctance of the courts to re-examine basic constitutional provisions in preference to adherence to lines of troublesome homestead decisions are more likely to produce than allay litigation.

\textsuperscript{106} Mather-Smith, II v. Fairchild, 135 So.2d 233 (Fla. 2d Dist. 1961).

\textsuperscript{107} Bevis Constr. Co. v. Grace, 134 So.2d 516 (Fla. 1st Dist. 1961).

\textsuperscript{108} Harrod v. Simmons, 143 So.2d 717 (Fla. 2d Dist. 1962).

\textsuperscript{109} Goodstone v. Shamblen, 141 So.2d 8 (Fla. 2d Dist. 1962).

\textsuperscript{110} Brion v. Raymond, 134 So.2d 507 (Fla. 3d Dist. 1961) (chancellor's finding of competency affirmed).

\textsuperscript{111} Medina v. Orange County, 147 So.2d 556 (Fla. 2d Dist. 1962). The deed in this case had been voluntarily executed by the grantors in the presence of four witnesses, one of whom signed the deed before delivery and one of whom signed the deed after delivery to the grantee. FLA. STAT. § 689.01 (1961) requires that a deed be executed in the presence of two subscribing witnesses, but the court held this does not mean that such witnesses shall subscribe in the presence of the grantors or in the presence of each other.
III. Estates, Dower, Homestead and Future Interests

A. Defeasible Estates, or the Case of the Not-So-Absolute Fee

In Genet v. Florida East Coast Ry.,112 the court affirmed a decree of specific performance of "a condition subsequent in a deed which gave the grantor [an] option to repurchase . . . upon the failure of the grantees to perform the condition."113 The deed recited that as part of the consideration the grantees would construct a warehouse and business facilities, and that in the event the property was not so developed within two years, the property, at the option of the grantor, would be re-sold to the grantor for the original purchase price plus taxes paid.

It is submitted that although the decision is sound, the case raises some troublesome problems of proper classification of the interests created. The deed provision was perhaps a little unusual, and the defendants further complicated the issues by contending that the additional provision specifying "for grantees' own use and for no other purpose" constituted an invalid restraint on alienation.114 The court specifically referred to the condition subsequent in the deed and to the grantor's right of re-entry. In the typical fee simple subject to a condition subsequent, the grantor has the right to re-enter without paying for or repurchasing the property. Of course, the form of the instant provision is in the nature of a condition subsequent:115 "In the event . . . said property shall become at the option of the grantor . . . ."116 However, instead of a simple right to re-enter or power to terminate, the grantor was given an option to repurchase.

The rule against perpetuities was not discussed, nor was the date of the deed indicated. If the deed was dated after 1951, then presumably the "right of re-entry" could not last longer than 21 years.117 If this were treated as a simple option in gross, then presumably it must conform to the rule against perpetuities.118 In the instant case, the condition was that

112. 150 So.2d 272 (Fla. 3d Dist. 1963), cert. denied, 155 So.2d 551 (Fla. 1963).
113. 150 So.2d at 273.
114. Id. at 274. No contention was made that the option in itself or provision for repurchase constituted an unlawful direct restraint on alienation. See the comments as to preemptive options in Boyer, Real Property Law, 16 U. MIAMI L. REV. 139, 155 (1961). Whether the option in the instant case should be classified as a pre-emption may be questioned since, although it is in favor of the grantor, the condition giving rise to its exercise is not the desire of the grantee to sell but rather the grantee's breach of the condition as to improvements.

As to restraints on alienation generally, see BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 22.08 (1959).
115. See generally BOYER, op. cit. supra note 114, § 18.03 (1959).
116. 150 So.2d at 273.
117. FLA. STAT. § 689.18 (1963); BOYER, op. cit. supra note 114, § 22.03 (3). Rights of re-entry and possibilities of reverter created before the statutory restriction were excepted from the rule against perpetuities and could last indefinitely.
118. BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 35.07 (2) (1959). However, see also note 114 supra.
the property be developed within two years, a period of time well within both the rule against perpetuities and the period restricting the duration of reverter rights. However, the deed did not expressly impose any time limit on which the option of re-sale to the grantor had to be exercised. A sensible construction, of course, would limit this period to a reasonable time after the breach of condition so as to validate the option or re-entry. The court made no reference to the time factor, but it is to be noted that if the "option" were held exercisable beyond the period of the rule and hence void, then the grantees' fee simple would have become absolute.  

Insofar as the restriction to the grantees' own use was concerned, the court easily disposed of it on alternative bases, stating that the chancellor might have construed it as only requiring construction for the grantees' use without later prohibiting alienation, or that he might have construed it as indeed prohibiting alienation, in which case the restriction would be void as an unlawful restriction and the grantees' estate would be free from the illegal restraint. In either event, the provision would be enforceable against the grantees.

B. Dower—A Plaintiff Plea For Male Equality; Continued Female Favoritism

The conclusion reached in Judge Shannon's opinion is justified by the facts of this particular case and is consistent with the literal provisions of the dower statute and the clear preponderance of decisions in point. At this juncture, however, I reaffirm my dissatisfaction with the present status of dower in Florida.

In view of modern realities and the abundant emancipation of married women, I have long since ceased to be impressed by solemn references to the historical sanctity of dower as a perennial favorite of the law; for dower, as presently defined and implemented in Florida, too often results in gross inequity.

Any suggestion that our current version of dower is somehow firmly imbedded in righteousness and justice comes with poor grace in a state which withholds from a surviving husband reciprocal rights by way of curtesy in his deceased wife's estate.

Dower in Florida needs a thorough reappraisal and overhauling, under sponsorship of the Florida Bar, to remove its grave imbalances and give it a place of deserved respect in the property law of our state.

119. See generally 5 Powell, Real Property § 789(2) (1962).
120. Genet v. Florida East Coast Ry., 150 So.2d 272, 274-75 (Fla. 3d Dist.), cert. denied, 155 So.2d 551 (Fla. 1963).
121. Robison v. Krause, 136 So.2d 373, 375 (Fla. 2d Dist. 1962) (White, J., concurring specially).
Thus spoke Justice White, concurring specially in *Robison v. Krause*, another incident in the long history of solicitude and beneficence bestowed on the "poor surviving widow." The decision itself is not surprising, and may not even be important, in view of present statutes and previous decisions in the area. It simply held that a separated wife who, after a ceremonially innocent but bigamous second marriage, lived with her second "spouse" for a period of ten months and then left upon discovering that her first husband had not divorced her, was not estopped from claiming dower in her first husband's estate. The court indicated that an estoppel might be raised in some cases but declined to bar the widow under the circumstances recited.

Justice White's recognition of the tremendous favoritism exhibited toward surviving widows is believed most significant. Before reform can be achieved, there must be recognition that reform is needed. The whole area of property rights of spouses should be re-examined in the light of modern circumstances.

Two recent cases held that a widow is entitled to dower upon the full value of securities held by a broker on a margin account for the deceased husband. Hence, in computing the amount of dower no allowance need be made for the obligation owed by the husband to the broker. The case is a logical application of *In re Payne's Estate* and *Murphy v. Murphy,* previously discussed in an earlier survey, but Justice Barns, in a dissenting opinion, shows how the contrary case (arising when the statute was worded differently) of *Henderson v. Usher* could still be applied to reach perhaps a fairer result. Under this approach, the husband is considered to "own" not the stock or the value of it at the time of his death, but rather the right to redeem the stock from the pledge; in other words he owns only the value of the stock less his debt secured by the pledge.

122. Ibid.
124. Rubin v. Rubin's Estate, 144 So.2d 527 (Fla. 3d Dist. 1962); Smith v. Marmer's Estate, 144 So.2d 870 (Fla. 3d Dist. 1962).
125. 83 So.2d 109 (Fla. 1955).
126. 125 Fla. 855, 170 So. 856 (1936).
128. Ibid.
129. In 1933, the dower statute was changed so that the interest extended to property "owned" instead of "possessed" by the husband at the time of his death.
130. 125 Fla. 709, 170 So. 846 (1936).
131. As indicated in the following textual paragraph, presumably the dower interest will not defeat the rights of a secured creditor. However, by giving the widow a 1/3 interest in the gross estate, including items whose purchase price is secured by a security transaction, it is obvious that the rights of children and heirs generally, devisees and unsecured creditors may be substantially diminished.
The dower statute was amended in 1963, perhaps in consequence of the above two cases. It is doubtful, however, that the legislative amendment changes the law in this particular. The amendment appears designed to protect more clearly and effectively the rights of pledgees, mortgagees and similar holders of security interests; not to diminish the dower rights or to enlarge the rights of unsecured creditors, heirs, or devisees. The former statute contained a brief reference to protecting the security of a mortgage and the lien of any person in possession of personal property, and *Rubin v. Rubin's Estate* pointed out that there was no allegation that the payment of dower would leave insufficient assets to pay the broker's indebtedness. The amended statute still provides for the computation of dower on the gross estate, but the provision concerning the non-impairment of security interests is more detailed and it expressly includes pledgees. Further, the security interest is protected whether or not possession is transferred to the security holder.

Other noteworthy cases involving dower or married women generally include: (1) a decision that a simple endorsement on her husband's note is not sufficient to authorize a judgment against the wife since consent must be given in writing with the same formalities applicable to conveyances of real estate, and specific property must be pledged in the instrument; (2) a determination that the husband has no property right to be adjudicated in a free dealership proceeding, and that allegations for publication of notice to the husband are mandatory but not jurisdictional; and (3) a holding that a lease for three years signed only by a married woman as lessor without the joinder of the husband is ineffective to obligate the tenant for a three year term.

The case of *Del Vecchio v. Del Vecchio* indicates, perhaps, a less rabid obsession with granting dower at any cost and authorizes the validation of ante-nuptial agreements under a number of circumstances. The court stated that a valid agreement contemplates (1) a fair and reasonable provision for the wife; or (2) in the absence of such a provision, a full and frank disclosure of the husband's worth to the wife before her signing; or (3) if no such disclosure is made, a general and approximate knowledge by the wife of the prospective husband's property.

133. 144 So.2d 527, 531 (Fla. 3d Dist. 1962).
134. Kovens v. Bluestone, 134 So.2d 547 (Fla. 3d Dist. 1961), appeal dismissed, 145 So.2d 473 (Fla. 1962).
135. Application of Jensch, 134 So.2d 285 (Fla. 2d Dist. 1961). Query: What is the effect of non-compliance with mandatory requirements which are not jurisdictional?
136. Frazier v. Hart, 140 So.2d 610 (Fla. 2d Dist. 1962), cert. denied, 146 So.2d 753 (Fla. 1962).
137. 143 So.2d 17 (Fla. 1962). Additional proceedings on other matters: 152 So.2d 457 (Fla. 1963); 157 So.2d 530 (Fla. 3d Dist. 1963).
C. Homestead—Reaffirmation of Outmoded Principles

The recurring frequency with which various aspects of homestead law has been litigated suggests the inability of that creature as currently constituted to satisfy the needs of our modern, urban and unstable society. This is particularly true in the alienation and descent areas where the fortuitous circumstances relating to the manner of taking title originally can have such serious consequences on the substantive rights of spouses and children years later.

Reed v. Fain,\textsuperscript{138} already mentioned,\textsuperscript{139} reaffirmed all the judicial restrictions encrusted on the constitutional provisions, and held void an intra-family conveyance more than twenty years later. There, a daughter was successful in setting aside transactions which would have resulted in the entire property's vesting in her brother at the death of both parents. Although the constitutional provisions only require the joinder of husband and wife for a conveyance of the homestead,\textsuperscript{140} the courts have added the requirement of consideration and have protected the "inchoate" or expectancy rights of the children whether adult or minor, dependent or independent, respectful or disrespectful.\textsuperscript{141} Although in the Reed case no rights of innocent third parties intervened, it is difficult to see how that would make any difference if the court really means, as it has said so often, that the deed is void. The case and the subject in general defy brief comment, but it is doubtful whether such alienation restrictions on the part of the home owner serve any useful purpose.

The combination of divorce and rigid homestead provisions often produce results of questionable social utility. Thus, in Moorefield v. Byrne,\textsuperscript{142} the court invalidated a purported conveyance between husband and wife to create an estate by the entireties and held ineffective as to the homestead the deceased husband's will, which had devised everything to his second wife. The decision is undoubtedly "correct" according to established law, but note the circumstances. The decedent had lived in another state at the time of his divorce; he moved to Florida, acquired the property in question, and then re-married. Apparently the only occupants of the Florida homestead were the decedent and his second wife. Nevertheless, at the death of the decedent, his children of a prior marriage who had never lived within the state, acquired a vested remainder in his homestead and he was powerless to prevent it.

In Johnson v. Johnson,\textsuperscript{143} an apparent case of first impression, an

\footnotesize{\textsuperscript{138} 145 So.2d 858 (Fla. 1962), affirming 122 So.2d 322 (Fla. 2d Dist. 1960).
\textsuperscript{139} See text following note 101 supra and text accompanying n.234 infra.
\textsuperscript{140} FLA. CONST. art. X, \S\ 4.
\textsuperscript{141} See the discussion and review of the many cases in Reed v. Fain, supra note 138; Boyer, Florida Real Estate Transactions \S 21.03(2) (1959).
\textsuperscript{142} 140 So.2d 876 (Fla. 3d Dist. 1962), cert. denied, 147 So.2d 530 (Fla. 1962).
\textsuperscript{143} 140 So.2d 358 (Fla. 2d Dist. 1962).}
ante-nuptial agreement based upon a full and fair disclosure was held valid and effective to relinquish the widow’s homestead rights.

D. Homestead Immunity, or Nobody Loves A Creditor

The immunity afforded the homestead from the clutches of creditors has been extended to the proceeds realized from a voluntary sale of the homestead realty when such proceeds are intended to be reinvested in another homestead. There are limitations, however. To be entitled to the exemption the debtor must show by a preponderance of the evidence a bona fide intention prior to and at the time of sale to reinvest the proceeds in another homestead within a reasonable time. The immunity is also limited to only so much of the proceeds as are intended to be reinvested in a home. Further, the funds must not be comingle with other monies of the vendor but must be segregated and held for the sole purpose of acquiring another homestead.

This decision prompted a severe criticism by Justice Drew, whose dissenting opinion characterized the case as “clear and unmistakably judicial legislation” which “poses far more questions than it answers.” It is submitted that the decision indeed may be litigation-producing, but, on the other hand, it may prevent an indebted homeowner from being forever immobilized in his present abode.

E. Headship and Ownership Requirement; The Case of the Amorous Debtor

Headship and ownership must be united in one individual for homestead status to attach, and there can be only one head of the family for creditor immunity purposes. In Barnett v. Pan American Sur. Co., a divorced woman and judgment debtor with the custody of her two children claimed a homestead exemption from execution. During pendency of the litigation the debtor remarried and the new husband moved into the debtor’s home. Instead of completing the cozy family circle and affording added protection to the impoverished mother and her helpless charges the new husband and father, simply by joining the family circle, shattered the homestead status, and presumably all four were rendered homeless. The reason, of course, supported by cold logic and a raft of decisions, is that the new husband and father became the new head of the family. The wife lost her status as head of the family on her remarriage, and hence her property was no longer exempt.

144. Orange Brevard Plumbing and Heating Co. v. La Croix, 137 So.2d 201 (Fla. 1962); noted in 17 U. MIAMI L. REV. 99 (1962).
145. Orange Brevard Plumbing and Heating Co. v. La Croix, supra note 144.
146. 137 So.2d at 207.
147. 139 So.2d 192 (Fla. 3d Dist. 1962), appeal dismissed, 150 So.2d 444 (Fla. 1963).
148. Ibid.
Can the result of the Barnett case possibly be avoided in future instances if on marriage the wife conveys the property to the husband? The situation is tricky. Difficulties with intra-family conveyances are quite common and have already been noted. Marriage may be a sufficient consideration to sustain the conveyance, but it is to be noted that the children of the wife, the former head of the family, will not take a homestead interest as lineal descendants of the new husband and foster father. However, if such conveyance is considered void, the children lose to the attaching creditors not only their future inheritance rights to the homestead but also the present benefit of a family shelter. A clear dilemma!

Other problems also exist. The wife may not want to lose the security and control she has experienced by having the title in her name. It is a loss, however, which, unless she gives up marriage, she will have to accept if she wants to insulate the property from creditors. The time of the conveyance presents additional difficulties. If she conveys the homestead before marriage, she no longer has the ownership to support a claim of exemption, and her creditors might seek to levy on the property in the hands of the intended spouse. Further, there is the practical hazard that the wedding possibly might not materialize. A conveyance made after the marriage is presumably too late, because the wife loses her headship on acquiring a husband; hence, the immunity is lost. It would seem that a possible way out of this last difficulty would be to deliver a fully prepared deed in escrow to a depositary, the deed to the intended husband to become effective immediately upon the marriage of the parties.

Other creditor cases decided during the period of this survey held that the failure to resist a forced sale of the homestead does not constitute a waiver of the exemption, and that a divorced wife living with her minor son is entitled to the exemption although the father also contributes to the son’s support.

149. See text accompanying note 138 supra.
151. The possibility of conveying so as to create a remainder interest in the children with a life estate in either one or both of the spouses should be considered. See Jones v. Equitable Life Assur. Society, 126 Fla. 527, 171 So. 317 (1936), upholding a conveyance via a straw creating a life estate for the husband and wife with remainder to some of the children, pointing out laches and slighting the fact that not all the children were getting a remainder interest. If the “wife” on her impending marriage should make such a conveyance creating a life estate in her alone, the interest of the children would practically be the same as if she had not married and had remained the head of the family. This results from the fact that in either event on her death the children would take the land equally. However, as the principal case points out, the “wife” does lose her homestead status on marriage; hence her life estate should be subject to execution for her debts, and there is the further possibility that the conveyance of the remainder interest might be regarded as in fraud of creditors and void.
152. White v. Posick, 150 So.2d 263 (Fla. 2d Dist. 1963), holding also that the exemption extends to a detached garage with an unrented overhead apartment, and to an attached swimming pool and screened patio although on a lot adjacent to the dwelling, since the two lots were improved as a unit and consisted of less than half an acre.
153. Vandiver v. Vincent, 139 So.2d 704 (Fla. 2d Dist. 1962).
F. Tax Exemption and Separate Residences

The Supreme Court of Florida, in reversing a district court of appeal, held that a wife was entitled to a homestead tax exemption on a Florida residence although her husband had established a Washington domicile and she was not separated from him. The Washington, D. C., domicile was necessitated by the husband's membership on the board of directors of a District corporation, and there was apparently no disruption of the marital relationship or abandonment of the Florida home. The attorney general has cautioned, however, that this case would not entitle a husband and wife, each maintaining a residence within the state, and maintaining a congenial marital relationship, to have separate homestead tax exemptions.

G. Superiority of Federal Tax Lien

The case of Weitzner v. United States recognized the superiority of federal tax liens over the homestead interest of the surviving spouse and children. Hence, the tax lien which was perfected under federal law before the death of the taxpayer could be foreclosed and the surviving widow and children divested of any interest in the homestead. This result is in accord with established precedent.

H. Destructibility of Contingent Remainders—Exceptions and an Unwise Will

In re Rentz' Estate reaffirmed the principle of destructibility of contingent remainders in Florida but found the principle inapplicable to the facts under consideration. The decision was obviously correct, and the law was enunciated clearly and with a thorough understanding of the concepts involved. The end result is unfortunate, but this is the fault of the testator or draftsman, not the court.

The will devised "all the rents and profits from the rest of my estate to my wife and children...for life with remainder to my grandchildren, per stirpes." The testator was survived by a widow, three minor children ranging in age from 9 to 20, and no grandchildren. When the estate was liquidated, the sum of $52,385.38 was made available for distribution. Since the will provision created a joint life estate in the widow and children with a remainder in the grandchildren, and since there were no grandchildren in existence, the remainder was clearly contingent. The widow renounced her life estate and took dower. This may have reduced the estate's value.

154. Judd v. Schooley, 158 So.2d 514 (Fla. 1963), reversing 149 So.2d 587 (Fla. 2d Dist. 1963).
158. 152 So.2d 480 (Fla. 3d Dist. 1963), cert. denied, 156 So.2d 859 (Fla. 1963).
the fund at least $17,461.77. Thus, there would be a little less than $35,000 to support the three life estates of rather young children and to be preserved for the unborn remainders.

It was urged that the destructibility rule defeated the interests of the unborn grandchildren, on the theory that the reversion left in the testator descended to his children who were his heirs, and that the merger of the life estate and reversion destroyed the contingent remainder. While recognizing that the principle of destructibility was the established law of Florida, the court found the instant case within two exceptions to the rule: (1) the destructibility rule does not apply to personal property; and (2) merger does not apply initially to destroy contingent remainders when the life estate and next vested estate in reversion or remainder vest simultaneously in the same person or persons at the instant the interests are created. In such a case, the holder of the reversion and life estate must convey both interests to a third person before contingent remainders are destroyed.

The law of the case is correctly articulated but the result is unfortunate. Life estates for three young persons were created in a sum of money which was not particularly substantial. The income yield would not be great: possibly $700 per year per person if a straight 6% were realized and nothing were lost in fees and expenses. Further, administration problems are presented. The property was not devised in trust, and one of the children was to remain a minor for 12 years after the death of the testator. Will each child be given 1/3 of the corpus on becoming 21? Will he have to account to the court, or will he or his guardian have to post security for the protection of the remaindermen? And irrespective of the resolution of these procedural difficulties, the fact remains that the young children of the testator, presumably along with his widow the chief objects of his bounty, are being provided for rather poorly, particularly in their younger years when needs are great for educational and marriage expenses, while the funds must be preserved for the benefit of unknown and unborn grandchildren, the procreation of which might even be impeded by the impecunious position of their potential parents, the poorly provided for life tenants.

159. Since dower is calculated on the gross amount of the estate—see text following note 124 supra; Fla. Stat. § 731.34 (1963)—it is possible that the dower interest is even greater. On the other hand, the statement in the case is not too clear and it may mean that the $52,385.38 is available for distribution and that the widow's dower and other claimants have already been paid. Regardless of the exact amount left for the children and grandchildren, the general observations as to the unwisdom of the provisions are applicable.

160. As to the destructibility rule generally, see Boyer, op. cit. supra note 115, at § 22.04(3). The widow is likewise an heir but since she elected dower her rights as an heir were also probably barred. See Fla. Stat. § 731.34 (1963), granting dower when the widow is dissatisfied with her share under the will, or under the law of descent and distribution, or both.

161. In re Rentz' Estate, supra note 158, at 482-84, and authorities cited therein.

162. But see note 159 supra as to the size of the fund.
I. Entireties—Application of Familiar Rules

Litigation involving property held by the entireties, both real and personal, largely involved the application of familiar principles. Of course, such an estate can only exist between husband and wife. Hence, in *Higgins v. Higgins* a tenancy in common resulted when both grantees knew that the man had a different living spouse at the time the title was vested in both their names. This is the usual rule, but occasionally a different result is reached where the grantees are in fact not husband and wife. As long as the marriage exists between the parties, there can be no severance of the estate by the act of either, and no partition of the property will be granted. This is true although the parties may be separated pursuant to a separate maintenance decree and the husband has failed to make monthly payments towards the mortgage indebtedness. However, a home owned by a husband and wife as an estate by the entireties can be awarded to a wife in a suit for separate maintenance unconnected with divorce as long as the decree does not affect the title to the property.

As a general rule, an estate by the entireties exists in the proceeds or derivatives of real property held by the entireties. This means that the income or proceeds of a sale of entireties real estate is entireties property, that rentals from entireties real property are entireties property, and that funds resulting from a mortgage of entireties real estate is entireties property. Accordingly, such funds are not subject to levy by a judgment creditor of one of the spouses unless there has been a termination of the estate by both spouses.

A note and a mortgage can be held by a husband and wife as tenants by the entireties. In *Burke v. Coons*, the evidence established an attempted gift of the debt by the husband to the mortgagors, but there was no attempted gift by the wife who had an equal interest in the debt and mortgage as tenant by the entireties. It was accordingly held that

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163. 146 So.2d 122 (Fla. 3d Dist. 1962).
164. See generally *Boyer*, *op. cit.* supra note 115, at § 20.02(5), mentioning a joint tenancy with right of survivorship and an estoppel to deny a tenancy by the entireties.
173. 136 So.2d 335 (Fla. 2d Dist. 1961), *cert. denied*, 140 So.2d 115 (Fla. 1962).
there was no gift, and after the husband’s death the wife was entitled to
foreclose the mortgage on default.

Upon the granting of a final decree of divorce the parties to an
estate by the entireties become tenants in common, and a chancellor
generally has no jurisdiction to order a division of the property. In
Rudolph v. Rudolph, the court granted a divorce decree placing owner-
ship of the house in the former husband and wife as tenants in common.
Peculiarly, however, the court provided in the decree that “each party
shall be restrained from transferring his or her interest in the property
until such time as the chancellor may find the conditions have so changed
that such a transfer is in the best interest of all concerned.” The
validity of such a judicial restraint on alienation may be questioned.

IV. EASEMENTS, COVENANTS, WATER LAW AND ZONING

A. Dedication and Prescription—The Road of Questionable Origin

The most interesting easement case during this period was Lovey v.
Escambia County, in which it was held that the county’s maintenance
of a road for more than four years raised a conclusive presumption of
dedication although the four year period commenced while the land was
owned by the United States. The case makes a fine distinction between
statutes of repose and statutes of limitations, and concludes that the ap-
pplicable four year statute effectively barred the government’s successor
from closing the road.

In 1942, the federal government had acquired the land by eminent
domain as a naval reservation and retained it until 1956, when the
government conveyed it by quitclaim deed to private owners subject to
all existing easements and rights of way for roads, highways and public
utilities. The federal government had permitted the road to be used by
the general public in the same manner as it had been used prior to govern-
ment acquisition, and in 1953 the county reconstructed the road and
thereafter maintained it. In 1959, the county passed a resolution recog-
nizing that it was maintaining the road as a permissive easement and that

174. Weinstein v. Weinstein, 148 So. 2d 737 (Fla. 3d Dist. 1963); Wilburn v. Wilburn,
143 So. 2d 518 (Fla. 2d Dist. 1962).
175. Ibid.
176. 146 So. 2d 397 (Fla. 3d Dist. 1962).
177. Id. at 400.
178. 141 So. 2d 761 (Fla. 1st Dist.), cert. denied, 147 So. 2d 530 (Fla. 1962.)
179. FLA. STAT. § 337.31 (1963), providing that when a county, municipality, or the
state road department maintains or keeps in repair a road continuously and uninterruptedly
for four years, such road shall be deemed to be dedicated.
180. This fact is brought out by the dissent, 141 So. 2d 761, 768, pointing out that as a
result of the condemnation the federal government acquired an absolute and unqualified fee
simple title so that no significance should attach to the fact that there was a roadway existing
on the premises prior to the government’s acquisition.
it would be closed at the request of the owners furnishing a specific right of way.\textsuperscript{181}

Under these facts a divided appellate court upheld the chancellor’s determination that there was a completed dedication of the road to the extent that it had been actually improved and maintained by the county.\textsuperscript{182} The four-year statute\textsuperscript{183} was the basis of the decision, but reference to the deed by which the government divested itself of title may indicate an alternative basis of either estoppel or prior recognition by the government of the public’s right and a conveyance subject thereto.\textsuperscript{184}

The court stated specifically that the statute did not depend upon adverse possession or prescription but instead provided an alternative method of dedication.\textsuperscript{185} It classified the statute as one of repose and then stated that the ultimate effect of both statutes of limitations and of repose is the same. However, the court then explained that if the sovereign’s rights depended upon the right to plead a statute of limitations, such right inures to the benefit of the sovereign’s grantee or successor, but if the sovereign’s defense rests upon sovereign immunity (as in the instant case), such immunity is personal to the sovereign and does not inure to its successor.\textsuperscript{186}

This “novel” interpretation of the statute was the subject of a vigorous dissent by Justice Sturgis.\textsuperscript{187} He asserted that implicit in the majority’s construction was the proposition that the statute might be invoked against the federal government, a consequence unsupported by existing case law. He criticized the majority’s attempt to distinguish the statute on principles of dedication, rather than prescription or adverse possession, as a subtle distinction “more apparent than real, a child of legal legerdemain and gobbledygook.”\textsuperscript{188} Justice Sturgis concluded that the principle that when title to land is in the United States, no rights by prescription or adverse possession can be acquired by the legislation of a state, was an overriding principle applicable to dedication as well.

\textsuperscript{181} This act of disclaimer is also brought out by the dissent. See 141 So.2d 761, 767. The chancellor nullified this county resolution on the basis that it did not conform to the procedure for closing existing public roads. 141 So.2d 761, 770. This is also criticized by the dissent on the basis that there was no actual or existing dedicated public road and the county resolution acknowledged as much.

\textsuperscript{182} Lovey v. Escambia County, supra note 178.

\textsuperscript{183} See note 179 supra.

\textsuperscript{184} These propositions are also disputed by the dissent on the basis that the recitation in the deed is routine and would not be effective to create roads which did not exist, and because there was no proof of dedication of this road effective against the United States, the recital in the deed would have no effect.

\textsuperscript{185} Lovey v. Escambia County, 141 So.2d 761, 763-64 (Fla. 1st Dist.), cert. denied, 147 So.2d 530 (Fla. 1962).

\textsuperscript{186} 141 So.2d at 764-65.

\textsuperscript{187} Id. at 767.

\textsuperscript{188} Id. at 774.
The dissent appears to be the sounder opinion. Although the majority's interpretation of the statute may be acceptable in an action where the federal government is not a defendant, it seems quite doubtful if the same rationale would prevail in a proceeding against the United States directly. Since the statutory "presumption of dedication" depends upon overt acts by a local governmental authority plus the passage of time, the analogy to an ordinary statute of limitations seems strong.

B. Miscellaneous Easements and Licenses

Additional cases involving easements and licenses held that: (1) an implied easement of necessity was created in favor of plaintiff's land when a common grantor had conveyed both plaintiff's and defendant's adjoining land and plaintiff's land had no access to a public road, such easement being limited to reasonable length and width; (2) the statutory easement of necessity cannot be created unless the land is used for one of the purposes specified in the statute; (3) the width of a prescriptive roadway easement includes shoulders and ditches actually used but not shoulders and ditches needed but not used; (4) a mandatory injunction may issue to compel the removal of a dwelling in violation of a set-back covenant; and (5) a license granted to a power company to install anchors, although conditionally revocable, required the owner to inform the company of the owner's building plans so that the company could intelligently relocate the anchors.

C. Covenants—The Case of the Fairly Permanent Depot

After previously having lost in an attempt to recover the land following the grantee railroad's removal of its depot, the plaintiff, the successor in interest to the original grantor, brought an action for damages for breach of covenant. The deed had recited a consideration of "one dollar and the permanent maintaining of a passenger and freight depot." The deed did not contain a reverter clause. After adhering to the stipulation for seventy-five years, the railroad moved the depot to a more suitable location. The appellate court, in affirming a summary decree for the defendant, agreed that "permanent" does not mean "perpetual," and hence the plaintiff was not entitled to any relief.

189. Indeed, the majority seems to recognize this in their discussion of sovereign immunity. See text accompanying note 186 supra.
191. Hunt v. Smith, 137 So.2d 232 (Fla. 2d Dist. 1962). The purposes specified in Fla. Stat. § 704.01(2) (1963), are: dwelling, agricultural, timber raising or cutting, or stockraising.
193. Daniel v. May, 143 So.2d 536 (Fla. 2d Dist. 1962).
194. Herschberg v. Florida Power & Light Co., 137 So.2d 834 (Fla. 3d Dist. 1962).
D. Covenants—Permissible Use and Termination Problems

A number of cases dealing with restrictive covenants addressed themselves to the problem of the type of use permitted under the particular covenant. These cases held that: (1) a prohibition against garages except on the rear one-third of the lot was not violated by carports or garages constructed as integral parts of dwellings and conforming architecturally thereto, but in the instant case there was insufficient evidence that the carports and garages were in fact integral parts of the building and conformed architecturally;\(^{197}\) (2) a municipality was authorized to divert for roadway purposes portions of land which had been deeded to the municipality for park purposes;\(^{198}\) (3) a prohibition against business except as "directly concerned with and incidental to each individual apartment house, apartment hotel, hotel club, or pool and cabana" precluded an apartment house owner from using a restaurant, cocktail lounge, cabana and swimming pool for the benefit of the general public;\(^{199}\) and (4) a lease restriction prohibiting the landlord from leasing to a tenant whose principal business was a bakery was not violated by a prior lease to a supermarket which subsequently granted a concession to a bakery.\(^{200}\)

Among the cases involving the termination of covenants, *Harwick v. Indian Creek Country Club*\(^{201}\) held ineffective an attempt by some of the owners of a subdivision to release by mutual agreement single family restrictions in their deeds. The purported release was held ineffective because it was not executed by all the owners of the subdivision. This result is sound, since the imposition of such restrictive covenants benefits and burdens all the lots to the same extent. In another case,\(^{202}\) the court also indicated, in accordance with general equitable principles, that violation of a covenant by the plaintiffs constituted reason for non-enforcement in equity on the basis of waiver, unclean hands, or, possibly, estoppel.\(^{203}\)

E. Water Law—Erosion and Related Doctrines

The legal principles which relate to changing land boundaries occasioned by the action of the water are relatively simple, but the applications are rather difficult because of the problem of determining whether the changes were sudden and perceptible or gradual and imperceptible. In *Municipal Liquidators, Inc. v. Tench*,\(^{204}\) the critical issue was whether land formerly bordering Tampa Bay became submerged by avulsion or

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199. *Ball-Hamilton Corp. v. Jones*, 147 So.2d 610 (Fla. 3d Dist. 1962).
200. *Norwood Shopping Center, Inc. v. MKR Corp.*, 135 So.2d 448 (Fla. 3d Dist. 1961).
201. 142 So.2d 128 (Fla. 3d Dist. 1962).
204. 153 So.2d 728 (Fla. 2d Dist.), *cert. denied*, 157 So.2d 817 (Fla. 1963).
erosion. If by avulsion, the title of the former owner was not lost; if by erosion, the title was lost. The appellate court, in affirming the trial court, held that the evidence sustained the finding that the land was lost by erosion, that it thus became vested in the Trustees of the Internal Improvement Fund and that the Trustees were authorized to convey the eroded land up to the bulkhead line to the present upland owner.

Conoley v. Naetzker,205 involved the opposite situation where formerly submerged land became dry and the Trustees of the Internal Improvement Fund, claiming title, conveyed it to plaintiffs pursuant to statutory procedure.206 The plaintiffs brought ejectment against their neighboring lakefront owners, who alleged that the withdrawal of the water was slow and imperceptible and that under the doctrine of reliction title to the land in dispute vested in them (the defendants).207 In affirming judgment for the plaintiffs, the appellate court held that since the defendants were not denied an opportunity to make a direct attack on the Trustee's determination that the parcel was reclaimed land208 rather than relicted land, they were not permitted to make a collateral attack on this determination by challenging the title of the Trustee's grantee.

F. Access Rights; Bulkhead Lines

The right of all riparian owners bordering a non-navigable lake to use the entire lake for boating and similar purposes was reaffirmed in Conrad v. Whitney.209 Accordingly, the court upheld a mandatory injunction requiring the removal of fill which had been placed across a bayou in such a way as to interfere with access rights.

In litigation involving bulkheads, Gies v. Fischer210 held that bulkhead lines could be established over privately held submerged lands so as to prevent filling, and that a bulkhead line could be established only at a point where further outward extension of land would constitute interference with the servitude in favor of commerce and navigation. In an-

205. 137 So.2d 6 (Fla. 2d Dist. 1962).
206. See note 208 infra.
207. Reliction refers to the gradual recession of water; accretion to the gradual building up of land. In either event title to the new land belongs to the adjoining owner. Boyer, Florida Real Estate Transactions § 13.07(2) (1959).
208. Title to reclaimed land is vested in the Trustees of the Internal Improvement Fund. Fla. Stat. § 253.36 (1963). The lake involved was navigable. Fla. Stat. § 253.37 (1963) confers upon the Trustees the power to dispose of such lands and provides that the right to purchase shall be first given to an adjacent owner who desired to complete or square up any fractional section which he owns.
209. 141 So.2d 796 (Fla. 2d Dist. 1962).
210. 146 So.2d 361 (Fla. 1962).

The civil law rule authorizing a riparian owner on a non-navigable lake to use the whole lake subject to the similar rights of other riparian owners was announced in Duval v. Thomas, 114 So.2d 791 (Fla. 1959), approving 107 So.2d 148 (Fla. 2d Dist. 1958). Duval v. Thomas is discussed in a note, 14 U. Miami L. Rev. 689 (1960).
other case,211 an upland owner’s request for the establishment of a bulkhead line and permit to fill was denied on the basis that the proposed fill would produce materially adverse effects; the constitutionality of the act as thus applied was upheld.

G. Zoning—Exception and Variance Distinguished—Rezoning

Several cases during the reported biennium involved the distinction between legislative and administrative action at the lower level and the proper procedure for seeking review from adverse initial decisions. In Mayflower Property, Inc. v. City of Ft. Lauderdale,212 the property owner sought review of the denial of a rezoning application. He did not seek an exception or variance from the Board of Adjustment.

Rezoning, as the court pointed out, is a legislative matter and is determined by the city commission or other legislative body. The Board of Adjustment, on the other hand, is an administrative body and may be empowered to grant a variance or exception when properly authorized to do so by statute.

In addition to noting this distinction, the Mayflower case also explained the difference between an exception and a variance. A variance is relief granted from the literal enforcement of a zoning ordinance permitting otherwise unauthorized use when literal enforcement of the ordinance as written would result in unnecessary hardship or practical difficulty to the property owner.213 An exception, on the other hand, is a departure from the general provisions of the zoning ordinance granted by legislative process under express provisions of the enactment itself. If the facts or circumstances specified in the ordinance are found to exist, then either on a direct application, or on appeal from an administrative order enforcing the ordinance, a Board of Adjustment may grant an exception.214

The court then concluded that although the applicable statute purported to give the Board of Adjustment power to grant special exceptions and variances, the only standards set forth were applicable to variances while no standards and guidance rules were provided for exceptions.215 Further, in the instant case the requested relief, if granted, would have

212. 137 So.2d 849 (Fla. 2d Dist. 1962).
213. Mayflower Property, Inc. v. City of Fort Lauderdale, supra note 212; Board of Adjustment of Ft. Lauderdale v. Kremer, 139 So.2d 448 (Fla. 2d Dist. 1962).
215. The standard for a variance is unnecessary hardship or practical difficulty. Mayflower Property, Inc. v. City of Ft. Lauderdale, supra note 212. The hardship or difficulty must be unique to the property involved. If the hardship is one that is common to the area, then a variance is not justified but the proper remedy is to seek a change in the zoning. Board of Adjustment of Ft. Lauderdale v. Kremer, 139 So.2d 448 (Fla. 2d Dist. 1962).
had the effect of placing the plaintiff's property in a different zone. The board has no such power, since such a drastic change can be made only by an amendatory ordinance. Hence, the plaintiff had exhausted his administrative remedies and judicial review was proper.210

H. Rezoning and Review

When the action at the lower level involves rezoning as distinguished from administrative determinations, as previously pointed out,217 judicial review can and should be obtained without first resorting to the Board of Adjustment. Thus, in Village of Pembroke Pines v. Zitreen,218 it was held that where the property owner was unsuccessful in an application for rezoning it was not necessary first to seek relief from the Board of Adjustment before attacking the ordinance by judicial proceedings. Further, in the extensively litigated case of Oka v. Cole,219 the supreme court upheld a rezoning ordinance applicable only to one parcel of land under the "fairly debatable" rule,220 and concluded that the "self-imposed" hardship limitation221 did not apply to legislative discretion and that the particular ordinance was not invalid as "spot zoning."222 A similar situation and result was reached in Sarasota County v. Walker,223 in which the court upheld the rezoning classification and stated that a change in the area or similar factors are not the only legitimate bases for rezoning.

I. Estoppel; Miscellaneous Applications

A limitation on the power of the municipality to change its decision and revoke a building permit was imposed in Sakolsky v. City of Coral Gables.224 Although the land in question had been zoned for apartments,

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216. Mayflower Property, Inc. v. City of Ft. Lauderdale, supra note 212.
218. 143 So.2d 660 (Fla. 2d Dist. 1962).
219. 145 So.2d 233 (Fla. 1962).

Earlier reports were: 107 So.2d 45 (Fla. 3d Dist. 1958); 131 So.2d 757 (Fla. 3d Dist. 1961), invalidating the amendatory ordinance as spot zoning.
220. The principle involved is that if the reasonableness of the legislative classification is fairly debatable, it should be upheld.

In the instant case the property involved was located on a zonal boundary, property on one side being zoned for apartments while the property on the other side was restricted to single family residences. The controversial parcel had remained vacant since enactment of the comprehensive zoning ordinance in 1930, and the evidence showed that the mortgage market for a single family residence on the site was extremely limited. The amendatory ordinance authorized a multiple-unit dwelling.

But when the court finds no basis for differentiating the plaintiff's land from that of his neighbors, then the classification is not fairly "debatable" but arbitrary, discriminatory and void. J. H. S. Homes, Inc. v. County of Broward, 140 So.2d 621 (Fla. 2d Dist. 1962).

221. Josephson v. Autrey, 96 So.2d 784 (Fla. 1957) stated that a zoning board, authorized to grant variances on the basis of unique or unnecessary hardship, was precluded from exercising such power when the hardship was self-created.

222. Oka v. Cole, 145 So.2d 233 (Fla. 1962). The district court of appeal had invalidated the ordinance as spot zoning. See note 219 supra.
223. 144 So.2d 345 (Fla. 2d Dist. 1962).
224. 151 So.2d 433 (Fla. 1963), quashing 139 So.2d 504 (Fla. 3d Dist. 1962).
the city had a long-standing policy of limiting the height of such buildings. After a public hearing, at which one hundred objectors by counsel were fully heard, the commission, by a majority vote, granted the petitioner a permit to build a twelve story luxury apartment building. In reliance on the building permit, the petitioner changed his position materially and expended considerable sums of money. Thirty-five days after the permit was authorized,\(^{225}\) the city commission, following a change in membership, voted to rescind the permit. The supreme court, concluding that its former decision in *Miami Shores Village v. William N. Brockway Post*,\(^{226}\) was erroneous, held that the principle of equitable estoppel should apply and that the city was precluded from rescinding the permit.\(^{227}\)

Other zoning cases, generally in accord with established principles, held that: (1) a private person is not entitled to enjoin or nullify a variance granted to another in the absence of a showing of a special injury differing in kind from that suffered by the public at large;\(^ {228}\) (2) an allegation that an adjoining landowner has violated side line setback restrictions so as to violate the open space requirements of the ordinance is a sufficient allegation of special damages differing from those of the community at large;\(^ {229}\) (3) a county rezoning resolution, being purely legislative and not quasi-judicial in character, is reviewable not by certiorari but by a suit in equity;\(^ {230}\) (4) review from the circuit court is by appeal and not by certiorari;\(^ {231}\) (5) a substantial change in the character of the neighborhood may render a ordinance void as to particular land;\(^ {232}\) and (6) an ordinance enacted to preserve the unique status of a town, which had existed for many years, as a peaceful and secluded community, and which restricted plaintiff's property to single

\(^{225}\) The shortness of the interval between the actions of the city commission, the knowledge that one commissioner was going to be replaced, and the heat of the controversy engendered are revealed in the opinion of the district court of appeal, supra note 224.

\(^{226}\) 156 Fla. 673, 24 So.2d 33 (1945), involving cancellation of a permit to build a Legion Hall six weeks after it was granted and finding no estoppel.

\(^{227}\) Sakolsky v. City of Coral Gables, 151 So.2d 433 (Fla. 1963). See also City of Miami v. State, 132 So.2d 474 (Fla. 3d Dist.), *cert. denied*, 136 So.2d 349 (Fla. 1961), holding that a building permit issued under a variance and pending litigation could be revoked.

\(^{228}\) Cf. Cotney v. Bd. of County Comm'r's of Brevard County, 140 So.2d 877 (Fla. 2d Dist. 1962), requiring removal of addition to existing building started prior to adoption of zoning ordinance and without a permit.

\(^{229}\) S. A. Lynch Inv. Corp. v. City of Miami, 151 So.2d 858 (Fla. 3d Dist.), *cert. denied*, 155 So.2d 695 (Fla. 1963).

\(^{230}\) Hudson v. Tabas, 136 So.2d 243 (Fla. 3d Dist.), *cert. denied*, 142 So.2d 95 (Fla. 1962), approving of the injunction requiring removal of the offending addition, but reversing the chancellor's decision to strike the allegations relating to damages.

\(^{231}\) Harris v. Goff, 151 So.2d 642 (Fla. 1st Dist. 1963). The court pointed out that chapter 176 of the Florida Statutes, relating to municipal zoning ordinances, is not applicable to counties and hence the statutory review of certiorari therein providing for a trial de novo is not applicable to zoning ordinances enacted by a county.

\(^{232}\) Phillips v. County of Dade, 133 So.2d 573 (Fla. 3d Dist. 1961), *cert. denied*, 138 So.2d 333 (Fla. 1962).
family residences was upheld as not being clearly arbitrary or unreasonable.\textsuperscript{233}

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

A. Adverse Possession and Limitations

The most significant case in this area, Reed v. Fain,\textsuperscript{234} held that a twenty-year statute of limitations did not apply to a void conveyance of the homestead. Other cases held that: (1) a title acquired by adverse possession must be established by a high degree of certainty, clarity and positiveness, and that payment of taxes alone is not sufficient;\textsuperscript{235} (2) adverse possession under color of title requires good faith and an honest belief in the validity of the purported conveyance,\textsuperscript{236} and (3) a twenty-year limitations period applied to the enforcement of special assessment liens of the city of Miami.\textsuperscript{237}

B. Dedication

As previously discussed,\textsuperscript{238} the most interesting dedication case involved the presumption of dedication arising from a county's road maintenance for four years,\textsuperscript{239} and held that an alternative method of dedication rather than prescription was involved and therefore the statutory four year period could commence while the land was owned by the United States.\textsuperscript{240} Other cases involved the application of traditional principles,\textsuperscript{241} and although an occasional disagreement may arise as to

\textsuperscript{233}Gautier v. Town of Jupiter Island, 142 So.2d 321 (Fla. 2d Dist. 1962). The ordinance authorized business uses on only a comparatively small area, and a large part of that was devoted to a golf course.

\textsuperscript{234}145 So.2d 858 (Fla. 1962). The case is discussed in text accompanying notes 101, 138-41 supra.

\textsuperscript{235}Culbertson v. Montanbault, 133 So.2d 772 (Fla. 2d Dist. 1961).

\textsuperscript{236}Simpson v. Lindgren, 133 So.2d 439 (Fla. 3d Dist. 1961).

\textsuperscript{237}Ware v. City of Miami, 132 So.2d 446 (Fla. 3d Dist. 1961), \textit{writ discharged}, 140 So.2d 302 (Fla. 1962). The city charter did not contain an express provision limiting the period for enforcing special assessment liens. The court concluded that FLA. STAT. § 95.021 (1963), applying provisions of existing law barring an action if not commenced within twenty years to actions by the state or municipal corporations, would be applicable in the absence of a specific provision. The court also concluded that § 95.28, limiting the lien of a mortgage to twenty years, would likewise apply where the assessment lien had attributes similar to those of a mortgage.

\textsuperscript{238}See text following note 178 supra.

\textsuperscript{239}FLA. STAT. § 337.31 (1963).

\textsuperscript{240}Lovey v. Escambia County, 141 So.2d 761 (Fla. 1st Dist.), \textit{cert. denied}, 147 So.2d 530 (Fla. 1962).

\textsuperscript{241}Roberts v. Town of Jupiter, 136 So.2d 233 (Fla. 2d Dist. 1961), \textit{acceptance of the offer to dedicate the streets in question by user of connecting streets}; West Hialeah Mfg. Co. v. City of Hialeah, 134 So.2d 505 (Fla. 3d Dist. 1961), \textit{cert. dism'd}, 142 So.2d 92 (Fla. 1962) (city had failed to accept offer to dedicate before there was a revocation); Highland Beach Realty Co. v. Turner, 139 So.2d 467 (Fla. 2d Dist.), \textit{appeal dismissed}, 146 So.2d 749 (Fla. 1962), \textit{cert. disch'd}, 148 So.2d 281 (Fla. 1962), also involving acceptance and revocation, and discussed in text accompanying notes 245 & 246 infra.
the effect of particular conduct, there should be no dispute as to the rules themselves.

Worthy of note is *Highland Beach Realty Co. v. Turner*, in which the developer filed a plat of a subdivision and posted a cash bond to guarantee construction of the streets and other public improvements indicated on the plat. The town "approved" the plat but did not formally "accept" the dedication of the streets. The land was mortgaged by a metes and bounds description and the mortgagee did not join in the execution of the plat. Upon default, the mortgage was foreclosed without the joinder of the town. Grantees from the purchaser at the foreclosure sale brought an action to declare the cash bond forfeited and to have either the town complete the construction or the plaintiffs acquire the benefit of the forfeited bond so that they could complete it.

In reversing a summary decree in favor of the plaintiffs, the appellate court stated that it was error to deny the developer's motion to dismiss. Because the opinion contained many statements relating to principles of dedication, it is a little difficult to determine the precise basis of the decision. Conceivably, its primary basis was the inadequacy of the plaintiff's pleading. For example, the court referred to the allegation that the town approved the plat, and added that there was no allegation of acceptance. If the dismissal was based on the non-allegation of acceptance, perhaps an amended pleading could have been filed and the suit commenced again. Since acceptance can be informal as well as formal, might not an acceptance be implied from the conduct of the city in attempting to guarantee completion of the street construction? If the city had not accepted the dedication, it would seem incongruous for it to require the developer to post a bond to guarantee performance of construction on strictly private land.

The court also stated that foreclosure of the mortgaged land under the metes and bounds description acted as a revocation of the offer to dedicate. It is obviously true that the platting could have had no obligatory effect on the prior mortgagee who did not join in the execution of the plat. However, it would seem that such purported platting and dedication should be regarded as voidable only and not void as to the mort-

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242. For a discussion of *Highland Beach Realty Co. v. Turner*, see text accompanying notes 245 & 246 infra.
243. 139 So.2d 467 (Fla. 2d Dist.), appeal dismissed, 146 So.2d 749 (Fla.), cert. discharged, 148 So.2d 281 (Fla. 1962).
244. Filing the plat in Florida is considered as an offer of dedication which must be accepted for the dedication to become complete. Approving the plat is not equivalent to acceptance under the general Florida law. See BOYER, *Florida Real Estate Transactions* 846, 851 (1959).
245. 139 So.2d at 471.
246. See, for example, *Roberts v. Town of Jupiter*, 136 So.2d 233 (Fla. 2d Dist. 1961), finding acceptance by user of connecting streets in subdivision.
247. 139 So.2d at 470.
gagee, thus giving the mortgagee the option of ratifying the plat and dedication. The significance of pleading may again be indicated by the court’s statement:

[W]hen the foreclosure was completed and the property sold, the purchaser acquired title and ownership to the entire property, including the streets and without any restrictions on account of the plat whatsoever. Therefore, when this purchaser sold the property to the plaintiffs, or their grantors, according to the plat, the purchasers at the foreclosure sale remained the owners of such streets, since there is no allegation in the complaint that such purchasers have conveyed or dedicated the streets, after having thus acquired title to them.\(^2\)

Though it may be admitted that the conveyance in reference to the prior plat by the purchaser at the foreclosure sale would not amount to an offer to dedicate the public lands appearing on the plat, it would seem that such conduct might estop the one so conveying from denying that he affirmed the prior offer to dedicate or that he is deemed to have ratified the prior plat.

The result in the *Turner* case, although perhaps sustainable on considerations of individual principles, leads to questionable cumulative results. The defaulting dedicator presumably will be able to recover his bond or deposit. The city, which attempted to guarantee street construction, ends up with neither easement nor title to the streets so that it does not have even the right to build them itself should it so desire. The purchasers at the foreclosure sale, apparently desirous of affirming the plat, and having conveyed platted lots, end up with long non-dedicated strips of land probably subject to private easements in favor of the grantees of the lots. The grantees of the individual lots may have private easements over the “platted” streets but they are just as powerless as the city insofar as compelling the construction of such streets or rendering the easements useable and practical. And the plat continues on record specifically unrevoked, with the result that even more purchasers might be misled.

C. Taxes and Tax Titles

Three tax titles having their respective origins in 1948, 1949 and 1957 proceedings were declared void on the basis of familiar principles.\(^2\)

The cases thus serve as a reminder of the risks involved and the necessity

\(^{248}\) Ibid.

\(^{249}\) Stewart v. Gadarian, 141 So.2d 289 (Fla. 1st Dist. 1962), invalidating a 1948 tax deed because the first date of publication of notice was less than 28 days from the date of the tax sale; Garner v. Larkin, 132 So.2d 298 (Fla. 2d Dist. 1961), invalidating a 1942 tax deed because the taxes had in fact been paid pursuant to an assessment under a different description; and Holmes v. Kiser, 138 So.2d 782 (Fla. 1st Dist. 1962), invalidating a 1957 tax deed because the legal description of the land was too vague for precise identification and also because of the clerk’s failure to follow statutory notice requirements.
for meticulous scrutiny in the checking of tax titles. In other litigation it was held that: (1) a tax deed destroys the separate mineral estate when the minerals were not separately assessed;\(^{250}\) (2) a levy for the operation of a fire prevention and control district was a general tax and not a special assessment, so that the homestead taxation exemption was applicable;\(^{251}\) (3) a tax certificate cannot be foreclosed when the land has been redeemed from the nonpayment;\(^{252}\) and (4) land leased from a port authority but used for private business purposes was not exempt from taxation.\(^ {253}\)

**D. Eminent Domain—Exercise of the Power**

A number of condemnation cases concerned the proper exercise of the power of eminent domain and its relationship to other governmental powers. In *City of Miami v. Wolfe*,\(^ {254}\) for example, it was shown that the real purpose behind the condemnation of waterfront land was to thwart the riparian owner in his attempt to purchase bay bottom land in accordance with the statutory policy\(^ {255}\) of selling such lands to the upland owner. Through condemnation, the city desired to become the fee simple owner with the concomitant right to purchase the bay bottom lands, and had refused a gratuitous offer of a permanent easement for road purposes on condition that it refrain from interfering with the landowner’s attempts to purchase the bay bottoms. It was accordingly held that the action was brought in bad faith, that it constituted a gross abuse of discretion, and should have been dismissed.\(^ {256}\)

Dade County sought to limit its liability for street expansion purposes by listing certain streets for prospective highway construction, and then passing a resolution and later an ordinance preventing abutting owners from erecting improvements within the bounds of the contemplated highway areas without waiving their right to compensation for the improvements in the event of a later taking for highway purposes. In *Cook v. Di Domenico*,\(^ {257}\) the landowner was held entitled to a writ of mandamus requiring the issuance of a building permit without waiver of a right to compensation when the resolution concerning prospective improvements had been passed nine years before and no plans had been made for the actual construction. The court concluded that there is surely some limit to the period that one can be deprived of the lawful use of his property without waiving compensation for new improvements. In effect,

\(^{250}\) Lee v. Carpenter, 132 So.2d 433 (Fla. 2d Dist. 1961).

\(^{251}\) St. Lucie County–Ft. Pierce Fire Prevention & Control Dist. v. Higgs, 141 So.2d 744 (Fla. 1962).

\(^{252}\) Skillman v. Baker, 142 So.2d 113 (Fla. 1st Dist. 1962).

\(^{253}\) Illinois Grain Corp. v. Schleman, 144 So.2d 329 (Fla. 1st Dist. 1962).

\(^{254}\) 150 So.2d 489 (Fla. 3d Dist. 1963).


\(^{256}\) City of Miami v. Wolfe, supra note 254.

\(^{257}\) 133 So.2d 243 (Fla. 3d Dist. 1961).
the action of the county was an unauthorized exercise of the police power in an effort to circumvent the necessity of condemnation.

In a case of apparent first impression, City of Dania v. Central & So. Florida Flood Control Dist. held that the fact that land was owned by a city did not itself exempt it from condemnation by a flood control district. The precise holding was on the technical ground that there was no showing that the use contemplated by the flood control district would materially interfere with the public use as a city dump, to which the land was subjected by the city. Previously, the majority of the court had indicated that if the intended use would destroy the existing public use, eminent domain could not be used to acquire such land in the absence of legislative authority conferred expressly or by necessary implication.

The police power was held paramount to the power of eminent domain in Dudley v. Orange County, a case in which the plaintiff landowners had sought injunctive relief because of flooding occasioned by civil defense dams and highway construction. The court noted some distinguishing features between the two sovereign powers, including the fact that a restriction or taking under the police power requires no compensation whereas a taking under eminent domain does, and also that in the exercise of the police power an owner’s right are taken or restricted because such unrestricted use or enjoyment is inimical to the public welfare, whereas under eminent domain the property is transferred to the public to be enjoyed and used by the public. The court then observed that mandatory injunctions are regarded with disfavor and the courts are reluctant to issue them, and finally concluded that the plaintiffs were not entitled to damages, either, since there was no showing that the flooding was permanent rather than temporary and caused by a natural disaster. In another case involving the condemnation of a utility easement, it was held that the condemnor could not take the right to cut future danger trees on land outside the easement boundaries without describing the particular land to which the right would apply.

E. Eminent Domain—Damages

The supreme court of Florida, in reversing a case noted in the previous survey, held that the property owner was entitled to inspect

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258. 134 So.2d 848 (Fla. 2d Dist. 1961).
259. Id. at 854-56.
260. Id. at 851-52.
261. 137 So.2d 859 (Fla. 2d Dist. 1962), appeal dismissed, 146 So.2d 379 (Fla. 1962), cert. denied, 372 U.S. 959 (1963).
262. Id. at 861-62.
263. Dudley v. Orange County, supra note 261.
264. Florida Power Corp. v. Griffin, 144 So.2d 104 (Fla. 2d Dist. 1962), motion denied, 150 So.2d 270 (Fla. 2d Dist. 1963).
265. A danger tree is defined as any tree in the proximity of a transmission line, which if felled, or upon falling, could fall within five feet of any conductor or other facility included within such transmission line. 144 So.2d at 104.
the work sheets of the appraisers hired by the condemning state road
department. This case, by making available the "work product" of the
condemnor, should greatly benefit the landowner and may lead to settle-
ment and avoidance of litigation. The court recognized that the rule ad-
vanced was contrary to the usual discovery rule applicable in ordinary
litigation, but concluded that policy considerations justify this contrary
rule. The defendant in condemnation cases is in no way at fault, and the
object of the litigation is to determine just compensation. The determina-
tion of a just amount should be of equal concern to both parties and the
government should not be permitted or encouraged to take advantage of
the property owner by making it more difficult for him to establish
value. The decision appears most salutary.

The determination of the proper amount of compensation is the
function of the jury, whose discretion is limited by the minimum and
maximum amounts set by the testifying experts. Further, the fact that
the jury awards an amount less than that which the condemnor was re-
quired to deposit in the court registry prior to trial does not render the
verdict so contrary to the manifest weight of the evidence that it should
be set aside when the amount awarded is higher than the minimum ap-
praisal of testifying experts. On the other hand, if the verdict is below
the lowest value fixed by the evidence, the award cannot be upheld.

Principles of surrender and termination in landlord and tenant law
were controlling in Orange State Oil Co. v. Jacksonville Expressway
Authority, a controversy over the apportionment of a condemnation
award. There was a partial taking of the land involved and substantial
damage to existing buildings so as to require a complete redesigning and
construction for continued use of the premises. The lease had no condem-
nation provision. The tenant abandoned the premises, notified the land-
landlord that he did not wish to reopen his business, assumed that his rental
obligations would cease, and offered to cooperate in the condemnation
proceedings. The landlord made no reply to the tenant's notice and both
the landlord and tenant were made defendants in the condemnation suit.

The court held that the landlord was entitled to all of the compensa-
tion award, and its decision seems justified. Contrary to the tenant's

267. Shell v. State Road Dep't, 135 So.2d 857 (Fla. 1961), quashing 122 So.2d 215
(Fla. 2d Dist. 1960).
268. Ibid.
269. Dade County v. Renedo, 147 So.2d 313 (Fla. 1962), approving by discharging writ,
139 So.2d 698 (Fla. 3d Dist. 1962).
270. Bainbridge v. State Road Dep't, 139 So.2d 714 (Fla. 1st Dist.), cert. denied, 143
So.2d 651 (Fla. 1962).
271. Garvin v. State Road Dep't, 149 So.2d 869 (Fla. 1st Dist. 1963). In this case the
jury award was the lowest amount fixed by an appraiser but his estimate did not include
gasoline tanks and pumps which were also taken; hence the court concluded that nothing was
awarded for the tanks and pumps and that therefore the defendants did not receive just
compensation.
272. 143 So.2d 892 (Fla. 1st Dist. 1962).
273. Ibid.
assumptions, a partial taking does not relieve the tenant of his rental obligations in the absence of a contrary provision in the lease.274 Thus, renunciation by the lessee amounted to a breach giving the landlord the right to consider the contract ended, and the abandonment by the tenant with the acquiescence of the landlord amounted to a surrender by operation of law, although the tenant in fact intended to claim damages for loss of his leasehold estate.275

In another case276 the court held that a tenant was considered an owner for purposes of being entitled to compensation under the damage to business statute.277 In the much litigated controversy involving Anhoco property,278 it was held that a property owner was entitled to damages for temporary destruction of his right of access caused by work prior to the condemnation of such property rights, and that he was entitled also to damages for destruction of access rights prior to establishment of a new frontage service road.279

VI. MECHANICS' LIENS AND MORTGAGES

A. Lien Law Revised

The mechanic's lien law was completely revised by the 1963 legislature.280 The changes were extensive both in substance and style. Because of the extent of the changes made, consideration of the new act is excluded from this article and the reader is referred to other sources for an exposition.281 Further, since the cases reported during this biennium were resolved under the former act,282 they are likewise excluded.283

274. See Boyer and Wilcox, An Economic Appraisal of Leasehold Valuation In Condemnation Proceedings, 17 U. MIAMI L. REV. 245, 264 (1963). See also Parks Bldg., Inc. v. Palm Beach County, 144 So.2d 830 (Fla. 2nd Dist. 1962), involving the apportionment of an award between landlord and tenant on a partial taking.

275. Orange State Oil Co. v. Jacksonville Expressway Authority, supra note 272. As to surrender by operation of law and related topics, see BOYER, FLORIDA REAL ESTATE TRANSACTIONS §§ 36.10-14 (1960).

276. State Road Dep't v. White, 148 So.2d 32 (Fla. 2d Dist. 1962), aff'd and writ discharged, 161 So.2d 829 (Fla. 1964).

277. FLA. STAT. § 73.10(4) (1963).

278. Previous litigation included Florida State Turnpike Authority v. Anhoco Corp., 116 So.2d 8 (Fla. 1959), modifying 107 So.2d 51 (Fla. 3d Dist. 1958), effectuated, 117 So.2d 15, 16 (Fla. 3d Dist. 1960).

279. Anhoco Corp. v. Dade County, 144 So.2d 793 (Fla. 1962), quashing 127 So.2d 464 (Fla. 3d Dist. 1961). It was also held that where the project was the cooperative effort between the county, state road department and the Turnpike Authority, the county was jointly and severally liable for the wrongs of the state road department.


282. FLA. STAT. §§ 84.01-35 were repealed by Fla. Laws 1963, ch. 63-135, § 2.

283. 2 BOYER, op. cit. supra note 281, correlates the former and new act, cites many of the decisions under the former act, and appraises the effect of the new act on those decisions.
B. Mortgages—Acceleration Clauses, or Watch Thy Language

Baader v. Walker[284] was a case of first impression involving the question of whether an acceleration clause, automatic in form, was in fact self-executing rather than simply giving the mortgagee an option to accelerate. The case involved an accelerated payment in full to a collecting agent who went into receivership, and the issue was whether the accelerated payment was properly made.

Under the facts of the case, the plaintiffs had taken an assignment of the mortgage executed by defendants; then the plaintiffs entered into a servicing agreement with a collecting agent. The servicing agreement provided that the agent should have sole authority as to matters of collection and should pay the plaintiffs a stipulated monthly sum whether or not payments by the mortgagor were actually received.

The acceleration clause[285] declared that on default of payment of principal or interest all notes so secured should forthwith become due and payable notwithstanding their tenor. A payment due on December 20 was not paid until January 10, on which date the defendant paid the balance of the entire indebtedness to the collecting agent. In March, without having remitted the payment to the plaintiffs, the agent went into receivership.

Finding no precise precedent in Florida, the court noted a conflict of authority in other jurisdictions: some jurisdictions enforce the contract as written, so that where no option is provided the entire sum is accelerated ipso facto on the happening of the condition specified; others regard the clause as in the nature of a penalty inserted for the benefit of the creditor, giving him an option to declare the whole sum due.[286] In deciding that the first alternative was the sounder view, the court concluded that the accelerated payment was properly made to the agent under the authority of the servicing agreement, and affirmed the chancellor’s decree that the mortgage should be satisfied of record.

In the instant case the sympathies were obviously with the mortgagor,[287] but the choice of construction is none the less valid. Although acceleration clauses are obviously inserted for the protection of the mortgagor, there is no compelling reason for not enforcing them as

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284. 153 So.2d 51 (Fla. 2d Dist. 1963), cert. denied, 156 So.2d 858 (Fla. 1963).
285. The case does not specify whether the clause was in the mortgage, the note(s), or both.
286. Citations to the two viewpoints are found in 153 So.2d at 54-55.
287. Id. at 55, pointing out that the mortgagor had a third grade education and was not versed in the niceties of the law of mortgages and negotiable instruments; that he used his savings to pay the debt in a good faith belief that it was due; and that the plaintiffs had clothed their agent with authority to promote collection and enforce the terms of the note and mortgage, which terms included the acceleration clause. Had the acceleration been optional, one might still wonder whether the court might have found that the agent had authority, actual, ostensible or by estoppel, to exercise the option on behalf of the plaintiffs.
written. The mortgagee can, of course, waive288 the acceleration on minor defaults, but he need not do so. In other ways, however, an automatic acceleration clause may be prejudicial to the mortgagee. In effect, it gives the mortgagor the power to accelerate by defaulting in a payment. The mortgagor may wish to do this if interest rates fall and he can refinance at a lower rate. He may also wish to satisfy the mortgage if he should fortuitously come into a sum of money. However, at the time the mortgage is executed, the mortgagee has bargaining power and he may avoid this pitfall by having the clause read "the entire sum shall become due and payable at the option of the mortgagee."

C. Mortgages—Deficiency Decrees

A number of cases involved deficiency decrees and the circumstances justifying their award. It was determined that under the alternative method of foreclosure by clerk's sale,289 although the final decree of foreclosure did not retain jurisdiction for the purpose of entering a deficiency decree, nevertheless the court has jurisdiction for at least ten days after the issuance of the statutory certificate of title to entertain a motion for such decree.290 This decision was partly based on the fact that a petition for rehearing may be filed within such ten day period.291 In another case292 involving foreclosure by clerk's sale, it was held that where the court reserved jurisdiction to entertain a motion for deficiency, such motion is timely filed if it is made either within the period within the limitation statute for institution of a cause of action under the note and mortgage, or within the one year period after which the cause could have been abated pursuant to statutory authority,293 according to whichever period occurred first.

The awarding of a deficiency is within the discretion of the court, but the discretion must be exercised in accordance with equitable principles.294

288. See Koschorek v. Fischer, 145 So.2d 755 (Fla. 2d Dist. 1962), holding that whether or not the mortgagees by their conduct waived or were estopped to assert an acceleration precluded a summary decree; Overholser v. Theroux, 149 So.2d 582 (Fla. 3d Dist. 1963), denying acceleration because the mortgagee's vacillation made it impossible for the mortgagor to know whether his account was current, past due or paid.


290. Katz v. Koolish, 142 So.2d 759 (Fla. 3d Dist. 1962).

291. Ibid., citing Maule Indus. v. Seminole Rock and Sand Co., 91 So.2d 307 (Fla. 1956); also citing Cole v. Heidt, 124 Fla. 264, 168 So. 11 (1936), stating that if jurisdiction is not reserved to adjudicate a deficiency, the case cannot be reopened for such purpose after the decree becomes absolute. Fla. Stat. § 702.02(3) (1963) provides that if no objections to the sale are filed within ten days, the sale shall be confirmed, and Fla. Stat. § 702.02(5) (1963) provides that if no objections are filed within ten days after filing by the clerk of the certificate of sale, the value of the property shall be conclusively presumed to be the amount bid therefor.


293. Fla. Stat. § 45.19 (1963), authorizing dismissal for want of prosecution when a case is permitted to be dormant for one year.

Thus, the denial of a deficiency will not be upheld when neither the record nor the order indicate the reasons justifying such refusal.\textsuperscript{295} When, however, the mortgagee purchases at the foreclosure sale and the equity in the property exceeds the mortgage debt, a deficiency is properly denied.\textsuperscript{296}

D. Usury

The proper method of determining the applicable interest rate was one of the knotty problems before the courts in \textit{Home Credit Co. v. Brown}.\textsuperscript{297} The complicated transactions between the parties developed from a home improvement construction and the execution of "non-interest" bearing notes in an amount sufficient to cover interest for the entire period the notes were to run. The notes contained acceleration provisions which were invoked after default.

The district court of appeal held that the assignee of the notes could not avoid the consequences of usury by its willingness to reduce its claim to the principal indebtedness plus interest to date rather than sue for the full amount of the notes when such willingness was not exhibited until after the trial was under way.\textsuperscript{298} The supreme court of Florida,\textsuperscript{299} although disagreeing with some of the lower court's reasoning, affirmed by discharging the writ of certiorari.

According to the supreme court, computations under the usury law must be based on a determination of the scope of acceleration rights which a note or contract purports to give a lender or holder and not upon the sums actually claimed by him. The vice of usury is said to be that which inheres in the agreement of the parties itself. The results of an exercise of an acceleration clause must be evaluated under the literal terms of the contract whether or not the plaintiff seeks recovery of all the sums.\textsuperscript{300}

The court then added, however, that the presence of the acceleration clause contingent on default did not alone warrant a finding of usury at the inception of the transaction. Further, in testing the results of the exercise of the option to accelerate, the reserved interest must be calculated as payment for the use of the borrowed money until the acceleration option becomes effective by entry of the decree. Note that the significant date is not the time of the election to accelerate, nor the filing of suit, but the entry of the decree.

The cumulative effect of these observations would seem to be that where the face value of the note is enlarged to include the total amount

\textsuperscript{295} Ibid.; Colmes v. Hoco, Inc., \textit{supra} note 292.
\textsuperscript{296} Kennedy v. Kay, 154 So.2d 345 (Fla. 3d Dist. 1963).
\textsuperscript{297} 148 So.2d 257 (Fla. 1963), discharging writ for \textit{Brown v. Home Credit Co.}, 137 So.2d 887 (Fla. 2d Dist. 1962).
\textsuperscript{298} \textit{Brown v. Home Credit Co.}, 137 So.2d 887 (Fla. 2d Dist. 1962).
\textsuperscript{299} \textit{Home Credit Co. v. Brown}, 148 So.2d 257 (Fla. 1963).
\textsuperscript{300} Ibid.
of interest accruing over the period of the loan, the agreement is not per se usurious, even when it provides for acceleration on default. If, however, the lender elects to accelerate, even if he does not seek all unearned interest, the effect so far as usury is concerned is the same as if he did, but the period will be measured not from the time of acceleration but from the entry of the decree. The lender presumably can protect himself from the usury pitfall by inserting in the note itself a provision reciting that in case of acceleration he may recover only the outstanding principal plus interest to the date of the decree.

Other cases involving usury held that: (1) although the scheme utilized to circumvent usury may have been suggested by the borrower, the lenders were not excused from the effects of the resulting usury; (2) usury is not applicable to a speculative risk; (3) a holder in due course is not subject to the defense of usury; and (4) the rule that the use of a corporate shell to cloak a loan to an individual borrower will not be allowed to defeat the usury laws was inapplicable to a particular loan to a corporation.

E. Mortgage Validity, or the Case of the Non-Estopped Owners and the Careless Lenders

In King v. L. & L. Investors, Inc., two Negro women conveyed vacant property which they owned to a construction company which was to re-convey the property to them after constructing an apartment house on it. The construction company mortgaged the property for

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301. See text following note 279 supra for another aspect of the importance of the language used in acceleration clauses. See also Olson v. Hirschberg, 145 So.2d 303 (Fla. 1st Dist. 1962), holding provision in acceleration clause for interest of 10% was inapplicable to the interest to be charged after maturity and that therefore the legal rate of 6% was applicable.


303. Diversified Enterprises v. West, 141 So.2d 27 (Fla. 2d Dist. 1962).

304. Harrison v. Consumers Mortgage Co., 154 So.2d 194 (Fla. 1st Dist. 1963). This rule was also recognized in Home Credit Co. v. Brown, supra note 297, but found inapplicable since the assignee there was a participant from the beginning and not a holder in due course.

305. Rosenhouse v. Kimbrig, 147 So.2d 354 (Fla. 2d Dist. 1962), cert. denied, 149 So.2d 47 (Fla. 1963). The interest charged was approximately 13%, thus under the 15% allowed to be charged corporations, Fla. Stat. § 687.02 (1963), the rate was valid, but was usurious as to individuals where only 10% is allowed, ibid. In the instant case the corporation had been in existence for three years and had owned the mortgaged property for six months, and all the parties had regarded the transaction as a loan to the corporation. Four days after the loan was closed, the mortgaged premises were conveyed to the endorser of the note. There was also no evidence to show that the attorney and loan broker who received a fee for his services was an agent of the lender or that any of his fee was received by the lender; hence no part of such fee could properly be regarded as interest so as to make the transaction usurious as requiring payment in excess of 15%.

306. 133 So.2d 744 (Fla. 3d Dist. 1961). In subsequent proceedings, 136 So.2d 671 (Fla. 3d Dist. 1962), it was held that after the court of appeal had issued a mandate to enter a decree for the defendants, the chancellor was without jurisdiction to do otherwise, and he exceeded his jurisdiction in granting a stay and ordering inquiry as to possible fraud.
60,000 dollars and later conveyed the property to the individual owners of the investment company which was the mortgagee. The day after conveying the property, the construction company purportedly executed a second mortgage to the investment company in the amount of 41,500 dollars. Upon completion of the improvements, the property was re-conveyed to the two women, subject to the two mortgages.

The investment company, as mortgagee, brought suit to foreclose the second mortgage, and the chancellor entered a summary final decree foreclosing the second mortgage. The appellate court in reversing held that the mortgage was invalid because the mortgagor did not have title at the time the second mortgage was executed. To the contention that the owners were estopped to deny the validity of the second mortgage because the deed reconveying the land specifically provided it was subject to the two mortgages, the court pointed out that such rule is applicable to purchasers only when the mortgages specified are part of the purchase price. In the instant case the grantees were not purchasers, but rather were the original owners at the outset, and were also the equitable owners while the title was held by others during the construction. On reacquiring the title, the owners took the property subject to valid encumbrances but not subject to invalid mortgages. Accordingly, it was held that the defendant-owners were entitled to a summary final decree of dismissal.

The record failed to establish either the price for which the building was to be constructed or the actual cost incurred. Thus, it is difficult to determine the fairness of the result. The legal principles evolved are sound enough, but one might wonder whether some form of relief—equitable, restitutionary, or otherwise—might have been invoked on behalf of the lenders had it been established that the combined mortgages were a fair price for the construction and the total amount was not disproportionate to the contract price.

F. Priorities, Leasehold Mortgages and Subordination

The proper method of foreclosing two mortgages, one on the fee and one on the leasehold, both held by the same mortgagee, was the issue involved in Applefield v. Fidelity Savings & Loan Ass'n. In that case a long term lessee executed a note and mortgage for improving the real property under lease, which lease permitted but did not require construction of the improvements. The lessor-fee owner executed an agreement to the lender subordinating all his interest in the property to the lien of the designated mortgage, which instrument was duly executed and recorded. Subsequently the lender loaned an additional 25,000 dollars taking a second mortgage without requesting an additional subordination agreement. Later, the lessor conveyed the reversionary fee title.

307. 137 So.2d 259 (Fla. 2d Dist. 1962).
After default on the note, the lender brought suit to foreclose both mortgages alleging that both mortgages were superior to the reversionary fee title. The chancellor held that the first mortgage was a valid lien on both the fee and the leasehold interest and that the second mortgage was a valid second lien on the leasehold interest and ordered payment of sums due on both mortgages. However, the holder of the reversionary fee title was allowed to redeem under the first mortgage, in which event the sale was to be limited to the leasehold interest for the purpose of satisfying the second mortgage. The appellate court, affirming, held that the chancellor correctly construed the agreement as subjecting the reversionary fee to the lien of the first mortgage and that the court had not abused its discretion in the manner in which the sale was to be made.

G. Statute of Limitations and Taxes

Freeman v. New Smyrna Enterprises\(^\text{308}\) was a suit to quiet title in which the defendant claimed an interest as a result of an old mortgage and the payment of taxes and the redemption of tax certificates. Noting that the general doctrine of unjust enrichment was one of the most nebulous fields of Florida equity jurisprudence, the court then proceeded on more specific grounds.

The original mortgagee was barred by the statute of limitations.\(^\text{309}\) An earlier case\(^\text{310}\) had held that although action on a mortgage might be barred by the then applicable statute of limitations, the statute did not apply to the amount paid by the mortgagee for taxes on the mortgaged property since that was not a part of the original debt, and the mortgagee was entitled to recover such amount. In the following year, however, the legislature amended the limitations statute to provide that a mortgagee shall have no right of subrogation to the lien of the state for taxes paid on the mortgaged property unless the mortgagee obtains an assignment from the state of the tax sale certificate, and that redemption of the tax sale certificate in itself is insufficient for subrogation purposes.\(^\text{311}\)

The court accordingly held that the mortgagee was entitled to an equitable lien for taxes paid on the mortgaged premises prior to June 23, 1955, the effective date of the statute and a time at which his mortgage was still effectual.\(^\text{312}\) He was not entitled to a lien for taxes paid

\(^{308}\) 135 So.2d 452 (Fla. 1st Dist. 1961).
\(^{309}\) An earlier case.
\(^{312}\) It would appear that the mortgage was effectual at such time only for enforcing the debt of taxes paid. See supra note 309.
thereafter, nor to a lien on an adjacent parcel for any taxes paid since he did not have a mortgage thereon or any other interest that would justify his paying the taxes. The court failed to mention the effect of section 95.021 of the Florida Statutes, which brings the state within the application of the twenty-year limitations statute.313

The decision affords a little relief to this apparently unlearned mortgagee who “paid taxes at least around 30 or 32 years”314 and otherwise looked after this vacant property. The present fee owner may or may not have acquired a windfall, since it was not shown when he purchased the property or how much he had paid for it. Clearly, though, the present owner and his predecessors collectively derived a substantial benefit from the defendant’s payment of their taxes. Of course, the defendant could have foreclosed at any time within twenty years, actually taken possession315 as an adverse possessor, or otherwise endeavored to protect himself. The decision aids marketability to a limited extent, but, in spite of the time involved,316 still makes it somewhat hazardous for the title examiner to rely completely on the statute of limitations to bar an action on a mortgage.

**H. Devise of Mortgaged Land**

In a case of first impression, the Third District Court of Appeal held that, since no statute had been enacted changing the common law rule of exoneration, a specific devisee of mortgaged real property was entitled to have the mortgage on the devised property paid at the expense of the residue of the estate unless the will expressly manifested a contrary intent, or unless an implied contrary intent could be extracted from the will as a whole.317

**VII. LANDLORD AND TENANT**

**A. Constructive Eviction, or Who's That Man In The Girl's Dormitory?**

In Richards v. Dodge318 the lessor, who had leased an apartment house to be used as living quarters for girls attending the lessee’s school, ceased her activities as housemother and leased her private apartment...
to a male tenant. In an action for rent after abandonment by the lessees, the trial court's judgment for the defendants was reversed on appeal. It was held that the lessees had waived any right to assert a constructive eviction by their failure promptly to notify the lessor of their objection to the male tenant and by their continuing in possession from February until April. The decision is in accord with the general rule that a tenant must abandon the premises within a reasonable time after the landlord's wrongful act in order to take advantage of the doctrine of constructive eviction.319

B. The Case of the Leaky Roof

In Berwick Corp. v. Kleinginna Investment Corp.,320 tenants were successful in asserting a constructive eviction because of a leaky roof. The case involved the lease of a motel in which the lessor covenanted to keep the roof in repair. The roof was in disrepair for the greater part of the year and the landlord made several attempts at repairs. Finally, the lessor decided to replace the entire roof. Then the rains came! The entire third floor was rendered uninhabitable and considerable damage was done to other parts of the motel. When the tenants vacated, the landlord resumed possession, and the subsequent litigation decided that there was sufficient interference with the tenant's enjoyment to constitute a constructive eviction. Accordingly, the tenants were entitled to a return of their security deposits.

C. Security—Damages or Penalty?

In construing provisions for the retention of a sum of money after default by the lessee, the courts followed established precedent to determine whether a given provision was a valid stipulation for liquidated damages or an unenforceable provision for a penalty. Stuco Corp. v. Gates321 followed Hyman v. Cohen322 and concluded that an ambiguous agreement for the forfeiture of a 90,000 dollar security deposit upon the lessee's breach of a motel lease was a valid stipulation for liquidated damages. The court noted that actual damages were difficult to ascertain in advance because the lease market for motels fluctuates constantly during the lifetime of the lease, that the sum specified was not disproportionate to any damages that might reasonably be expected, and that the presumption is in favor of liquidated damages rather than a penalty.323

On the other hand, although it might otherwise satisfy the liqui-

319. 32 Am. JUR. Landlord and Tenant §§ 245-64 (1955).
320. 143 So.2d 684 (Fla. 3d Dist. 1962).
321. 145 So.2d 527 (Fla. 2d Dist. 1962).
322. 73 So.2d 393 (Fla. 1954).
323. These three principles—presumption in favor of liquidated damages, the difficulty of advance ascertainment of actual damages, and the reasonableness of the amount stipulated—were set forth in Hyman v. Cohen, supra, note 322. The annual rental in the instant case was $91,000 for a ten year term, and the stipulated damages were $90,000.
dated damage test, the addition of a provision granting the lessor the option of either retaining the deposit as liquidated damages or applying it pro tanto against the actual damages renders the clause a penalty.\(^\text{324}\) This results from the fact that the lessor will elect to treat the stipulation as liquidated damages only if it were in excess of his actual damages. The lessee in effect would have to pay the greater of the sum stipulated or the lessor's actual damages; thus there would be no mutuality of agreement as to prospective damages.\(^\text{325}\)

The supreme court discharged the writ of certiorari in the controversial case of *Platt v. Mannheimer*,\(^\text{326}\) thus letting stand the decision\(^\text{327}\) allowing the landlord to recover past due rents, taxes and insurance in addition to the liquidated damages specified. As in the district court of appeal,\(^\text{328}\) there was a dissenting opinion\(^\text{329}\) on the merits as well as on the question of jurisdiction to take certiorari, and the opinion was expressed that the parties ought to be bound by their agreements.\(^\text{330}\)

The doctrine of anticipatory breach of contract was applied to a breach by the landlord in *Brewer v. Northgate of Orlando, Inc.*\(^\text{331}\) In that case the landlord, shortly after execution of the lease and apparently because of an opportunity for sale to a shopping center developer, notified the lessee that he could not construct the agreed upon building and returned the rental payments. In the resulting litigation, it was held that the tenant could regard the landlord's conduct as an anticipatory breach of the entire contract and could recover as general damages the difference between the rent stipulated and the present reasonable rental value for the term, the total sum being reduced to its present worth.

### D. Surrender by Operation of Law

Familiar principles of surrender by operation of law\(^\text{332}\) were reaffirmed in several cases involving some unusual factors. *Katz v. Kenholtz*\(^\text{333}\) held that a landlord who gave a three-day statutory notice to

\(^{324}\) Pappas v. Deringer, 145 So.2d 770 (Fla. 3d Dist. 1962), following Stenor, Inc. v. Lester, 58 So.2d 673 (Fla. 1951).

\(^{325}\) Pappas v. Deringer, *supra* note 324, at 772.

\(^{326}\) 149 So.2d 538 (Fla. 1963).


\(^{328}\) 124 So.2d at 504.

\(^{329}\) 149 So.2d at 538.

\(^{330}\) The only damages specified was the improvement erected by the lessee. Additional recovery was allowed on the basis of dicta in Kanter v. Safran, 68 So.2d 553 (Fla. 1953), later decisions, 82 So.2d 508 (Fla. 1955), and 99 So.2d 706 (Fla. 1958), to the effect that damage stipulations do not normally include past due rents, taxes and insurance because of their ascertainable characteristics.

\(^{331}\) 143 So.2d 358 (Fla. 2d Dist. 1962).

\(^{332}\) See generally 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 36.10(3) (1960); also Orange State Oil Co. v. Jacksonville Expressway Authority, *supra* note 272 and accompanying text.

\(^{333}\) 147 So.2d 342 (Fla. 3d Dist. 1962).
pay past due rent or vacate did not make an election of accepting a surrender on the tenant's vacation. Accordingly, it was held that the landlord's acceptance of the keys did not preclude him from holding the tenant for any deficiency resulting from attempting "to relet on his behalf" in accordance with the terms of the lease.

In *Babsdon Co. v. Thrifty Parking Co.* a lessee-sublessor, after default by a remote sublessee, notified the sub-sublessee either to pay or to deliver possession for the account of the sublessee. The sub-sublessee refused and the sublessor then brought an unlawful detainer action to recover possession. After recovering possession, the sublessor brought an action in the circuit court seeking a decree that its possession was acquired rightfully on behalf of the sublessee and that it could recover the difference between the stipulated rentals and what in good faith could be obtained by reletting, such sum to be applied against the security deposit which the sublessor claimed the right to possess. In reversing the chancellor's decree and holding for the sublessor, the appellate court stated that an unlawful detainer action was not inconsistent with the previously expressed intention of holding the sublessee responsible for the rents stipulated. The court further stated that the bringing of such action did not constitute an abandonment by the sublessor of his previously chosen course of action.

Though the decision appears justified, it unfortunately fails to discuss the significance of the fact that the action in effect was between a landlord and subtenant and not simply between a landlord and tenant. There is both privity of estate and privity of contract between a landlord and tenant, privity of estate only between a landlord and assignee, and generally no privity at all between a landlord and subtenant. Thus, it would seem that generally no direct action can be maintained between a landlord and subtenant in the absence of third party beneficiary principles of contract law. Of course, the subtenant is entitled to no greater rights than the tenant; hence, on the non-payment of rent the subtenant as well as the tenant can be evicted. In the instant case, the party occupying the position of tenant, as well as the one occupying the position of subtenant, was made a party to the action, and the relief requested and obtained was based on the theory that the landlord was acquiring possession as the agent of the tenant. Of course, the principal obligation fell on the subtenant, and the overall effect is seemingly a reduction of litigation—the rights of all the parties may be determined in one suit instead of permitting the landlord to sue only the tenant and then requiring the tenant in turn to sue the subtenant. However, in the event of differences in the amount of security and in rentals specified,

334. 149 So.2d 566 (Fla. 3d Dist. 1963).
335. *Ibid*.
336. See generally 2 Boyer, *op. cit. supra* note 332, at § 36.08.
it may be difficult to spell out the rights and obligations of all the parties in such an abbreviated action. Further, it could be possible that the sub-tenant might have a defense against the tenant which would be unavailable to the tenant in an action against him by the landlord.

In Arvantes v. Gilbert,337 the court gave effect to a written provision in a lease stating that no surrender should be valid unless accepted by the lessor in writing and affirmed a decree recognizing the tenant's continuing liability. A somewhat contradictory provision which seemingly authorized a cancellation if the tenants should abandon the premises, was mentioned but, construing the lease as a whole, the specific provision as to a written acceptance of surrender was held controlling.

E. Cov enants—Construction

A number of landlord-tenant cases involved the construction of covenants. These cases show no significant legal developments and are simply reported as indicating general techniques of construction. Among the decided cases, it was held that: (1) in accordance with the rule of strictly construing provisions restricting alienation, a lease provision against assignment without the written consent of the lessor did not preclude the lessee from mortgaging his lease hold without such consent;338 (2) a lease which contained both a covenant that the lessee would construct a valuable improvement and a provision that the tenant might assign to an assigning assignee with the transferor to be relieved of any liability, did not relieve the assignor from accrued liability to the landlord and did not permit the assignee to take free from liability for accrued defaults;339 (3) the landlords of a dock and buildings were not liable to subtenants for failure to repair damages caused by a hurricane when the original lease contained no covenant obligating the landlords to repair;340 (4) an agreement that a particular service station would handle one company's products exclusively was not intended to prohibit the dealer from selling a different brand of tire;341 (5) a lease calling for a minimum rental plus a percentage, providing that the premises were to be used for the operation of a jewelry store, and further providing that the tenant had the right to remove fixtures if it vacated the premises at

337. 143 So.2d 825 (Fla. 3d Dist. 1962).
338. Great So. Aircraft Corp. v. Kraus, 132 So.2d 608 (Fla. 3d Dist. 1961), appeal dismissed, 133 So.2d 788 (Fla. 3d Dist. 1961).
339. Sheldon v. Tierman, 147 So.2d 167 (Fla. 2d Dist.), motion granted, 147 So.2d 593 (Fla. 2d Dist. 1962). The court stated that to construe it otherwise, that is to relieve both the assignor and assignee from accrued default, would have the effect of relieving from liability all parties except the lessor. An agreement should not be interpreted as placing one party at the mercy of the others unless it is clear that such was the intention.
340. Fischer v. Collier, 143 So.2d 710 (Fla. 2d Dist. 1962). The court made no mention of the lack of privity between landlord and subtenant. See text following note 336 supra. Of course, if the landlord is not liable to the tenant, as the case stated, he is obviously not liable to a subtenant in the absence of a new agreement.
any time during the continuance of the lease, was held to contain neither an express nor implied covenant that the tenant should operate its jewelry business on the premises for the entire term; 342 and (6) a percentage lease requiring the payment of 50 per cent of the net profits as additional rent, did not specifically preclude the tenants' deduction of ground rent and taxes in the computation of net profits, and since the landlord had acquiesced in such deductions for four years, the court would accept the parties' practical construction of the lease and permit such deductions. 343

F. Holdover Tenant; Distress Liens

David Properties, Inc. v. Selk 344 was a case of first impression involving the right of the landlord to demand a greatly increased rent from the holdover tenant. The controversy originated in the sale of a large tract of land in which the seller took back a purchase money mortgage and was given permission to remain in possession of a simple dwelling for a period of time. Later this "license" to remain was formalized by the execution of a lease reciting consideration of one dollar and an expiration date seventy days later.

The purchaser-landlord later gave the seller-tenant notice to vacate at the end of the period or be charged rental at the rate of 300 dollars per month. The tenant failed to vacate and also failed to vacate on subsequent notices of similar import. The tenant sued to foreclose the mortgage, and the landlord counterclaimed for accrued rent at the rate of 300 dollars per month. At the time of the trial, the tenant was an 83 year old man who appeared senile. 345 The appellate court held that a landlord had the right to waive the wrong occasioned by a tenant's holding over and treat him as a tenant, at the same time demanding an increased rent if the tenant should elect to remain. It was accordingly held that the landlord-mortgagor was entitled to set-off against the mortgage a sum equivalent to the amount of increased rent. 346

The priority between a landlord's lien for rent and unrecorded federal tax liens was the point in controversy in United States v. Weissman. 347

342. Stemmler v. Moon Jewelry Co., 139 So.2d 150 (Fla. 1st Dist. 1962), cert. denied, 146 So.2d 375 (Fla. 1962).
343. Mileage Realty Co. v. Miami Parking Garage, Inc., 146 So.2d 403 (Fla. 2d Dist. 1962), cert. denied, 153 So.2d 307 (Fla. 1963).
344. 151 So.2d 334 (Fla. 1st Dist. 1963). This case has been noted in 18 U. MIAMI L REV. 219 (1963).
345. The appellate court, 151 So.2d at 338, pointed out this observation had no bearing on the matter since there was nothing in either the pleadings or evidence to indicate the tenant was irresponsible at the time he received the notices, and further, that even if he were incompetent at the time of the trial, it cannot be inferred that such condition existed two and one half years earlier.
347. 135 So.2d 235 (Fla. 2d Dist. 1961).
The federal lien prevailed in accordance with established precedent.\textsuperscript{848} The federal lien becomes effective from the time of assessment and if unrecorded is invalid only as to subsequent mortgagees, pledgees, purchasers and judgment creditors.\textsuperscript{849} Since the landlord is not within any of the four enumerated categories, all the unrecorded tax assessment rendered before default in rental payments had priority over the landlord's lien. Although the landlord's lien is effective from the commencement of the lease or the bringing of the chattels on the premises,\textsuperscript{360} such lien was regarded as inchoate or unperfected under federal law.\textsuperscript{351}

The landlord's lien has been characterized as a "lien of distress for rent" within the Bankruptcy Act limiting such liens to the amount of three months' rental.\textsuperscript{362}

G. Cooperatives

Although the legal principles involved are not particularly significant, two cases involving cooperative apartments within the period of this survey are noted because of the increasing popularity of such structures. In Willmont v. Tellone,\textsuperscript{352} a decree was affirmed rescinding the "sale" of a 99 year lease on a cooperative apartment when the project was frustrated because of the inability of the developers to sell the remaining units. The same case also decided that compliance with the Security Act was not necessary when the purpose of the corporation to be formed and the acquisition of a share of stock was purely incidental to the lease of the apartment.

Lexington Arms, Inc. v. Henrich,\textsuperscript{354} involved the right of the lessor, a cooperative apartment corporation, to terminate an apartment lease for violation of a covenant prohibiting occupancy by children under twelve years of age. Because the petition failed to allege compliance with terms of the lease as to termination after default, the court concluded that the lessor stated no grounds authorizing eviction, affirmed the order of dismissal, and declined to comment on the validity of the restriction against children.

\textsuperscript{349} INT. REV. CODE OF 1954, §§ 6322-23(a).
\textsuperscript{350} FLA. STAT. § 83.08(2) (1963).
\textsuperscript{351} United States v. Weissman, supra note 347.
\textsuperscript{352} City Bldg. Corp. v. Farish, 292 F.2d 620 (5th Cir. 1951).
\textsuperscript{353} 137 So.2d 610 (Fla. 2d Dist. 1962).
\textsuperscript{354} 153 So.2d 31 (Fla. 2d Dist. 1963).