Real Property Law

Ralph E. Boyer
The promulgation of uniform title standards,1 the judicial adoption of the "civil law rule" relative to nonconsumptive uses of owners abutting a nonnavigable lake,2 the assertion of priority of a federal tax lien over a mechanic’s lien earlier in point of time under Florida law,3 and the acceptance of the American viewpoint that options in leases do not violate the Rule Against Perpetuities,4 were some of the highlights in the ever developing Florida law of Real Property during the period of this survey.5

Estates by the entirety6 and the Florida homestead7 continued to be a prolific source of litigation. The courts recognized, at least sub silento, an easement in gross and the transferability of such an easement,8 and there were also important decisions relative to submerged sovereignty land.9

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

I. Vendor and Purchaser
II. Deeds—Description, Parties, Recording
III. Estates, Dower, Homestead and Future Interests
IV. Rights In Land
V. Special Titles
VI. Mechanics’ Liens and Mortgages
VII. Landlord and Tenant

No special section is provided to discuss new legislation as that material is incorporated into the principal divisions listed above with the word

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1. See text accompanying notes 10-12 infra.
2. See text accompanying notes 202-203 infra.
3. See text accompanying notes 308-314 infra.
4. See text accompanying notes 130-133 infra.
5. The material, subject to a few exceptions, includes the cases reported in 97 So.2d (1957), through 112 So.2d (1959), and the enactments of the 1959 legislature. Owing to the large number of decisions and the breadth of the subject matter, some selection in the presentation of the material was found necessary. This article represents a rather large selection, but it is expected, if the growing trend continues, that even more selection will be necessary in the future. Zoning cases are excluded.
6. See text accompanying notes 108-123 infra.
7. See text accompanying notes 141-158 infra.
8. See text accompanying notes 191-196 infra.
9. See text accompanying notes 214-224 infra.

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* Professor of Law, School of Law, University of Miami.
Legislation appearing in the appropriate subheading. Access to particular material is provided by the generous use of headings and subheadings.

I. Vendor and Purchaser

Introduction. This article deals only with those problems of the vendor and purchaser relationship that are peculiar to land transactions. Usual questions concerning the inception of the relationship or the formation of the contract are omitted. Thus, matters of offer and acceptance, the sufficiency of the terms and conditions, and similar items applicable to contracts generally are omitted in deference to the companion article on Contracts. Similarly, questions concerning brokers' commissions are excluded in favor of treatment in the Contracts article.

 Marketable Title and Title Standards. The promulgation and publication of uniform title standards by the Real Property, Trust and Probate Section of the Florida Bar was one of the most significant developments in this area during the past biennium. These standards, although voluntary and not having the force and effect of law, are nevertheless expected to result in a high degree of uniformity of treatment in the everyday disposition of frequently recurring problems concerning the marketability of titles. Common defects of title, real or apparent, are delineated in the standards. Thus, there is provided an available standard for an examining attorney to base his decision, and a common ground is afforded opposing attorneys for negotiation and the reconciliation of differences. Since the standards are voluntary rather than formally enacted legislation, revisions can be readily made to accommodate new decisions and legislative changes.

Sales Contracts, Necessity of Witnesses. The formalities required for the proper execution of a sales contract have been the subject of a number of cases in recent years. It now appears to be well established that for a sales contract executed by a single male vendor involving non-homestead property, compliance with the Statute of Frauds, section 725.01, only need


11. A voluntary standard has been defined as "a voluntary agreement, uniform in nature, either statutory or decision, to be used by the examiner, in considering whether or not the evidence of title under consideration, supplies the quantity and quality of title required in that particular instance." Carmichael, Florida Title Standards—Why?, 31 FLA. B.J. 133, 135-136 (1957). It has also been defined as "a voluntary agreement made in advance by members of the Bar on the manner of treating a particular title problem when and if it arises." Catsman, Uniform Title Standards, Foreword, 33 FLA. B.J. 221 (1959).

be satisfied. This simply requires a sufficient writing or memorandum signed by the party sought to be charged. For contracts involving the sale of homesteads, the separate property of a married woman, the interest of a married woman in an estate by the entireties, and the relinquishment of dower, however, the contract must conform also to the statute regulating the conveyance of real property, namely section 689.01. The court has construed applicable constitutional and statutory provisions as requiring such contracts to be witnessed. Thus, in these instances, part performance of an oral contract will not be a sufficient predicate for a decree of specific performance. Although most of the cases involved the question of specific performance, it would appear that such defectively executed contracts would be null and void and unenforceable in any action. Thus, as a practical matter, except where the vendor is a single male selling non-homestead property, the contract must be signed in the presence of two witnesses to be valid.

Statute of Frauds; Agency. Except in those instances delineated above requiring witnesses to contracts for the sale of realty, equity will enforce oral contracts for the conveyance of real estate on the basis of part performance. Similarly, it will enforce parol gifts of land under certain circumstances. These circumstances were again delineated in a recent case which stated that a parol gift will be enforced when the donee can furnish conclusive proof (1) of the gift; (2) of possession taken in reliance on the gift; and (3) that the donee made permanent and valuable improvements on the faith of the gift with the donor's acquiescence.

In a suit for specific performance brought by a married woman and her husband for the conveyance of the wife's property, it was held that the fact that the wife did not sign the sales contract did not prevent

13. Zimmerman v. Diedrich, 97 So.2d 120 (Fla. 1957); Lente v. Clark, 22 Fla. 515 (1886).
14. Petersen v. Brotman, 100 So.2d 821 (Fla. App.) (dictum), cert. denied, 104 So.2d 594 (Fla. 1958); Zimmerman v. Diedrich, supra note 13. See Boyer, op. cit. supra note 10, at 27 n. 11.
18. Fla. Const., art. X, §§ 1 and 4, as to homesteads; art. XI, § 1, as to separate property of a married woman.
20. Cases cited notes 14-17 supra.
21. Wexler v. Griffith, 107 So.2d 147 (Fla. App. 1958), cert. denied, 109 So.2d 573 (Fla. 1959), affirming a decree that an unwitnessed contract to convey executed by tenants by the entireties was null and void.
22. See generally, Boyer, Florida Real Estate Transactions § 1.03 (1959).
24. Id. at 126. See also Boyer, op. cit. supra note 22, at 16 for further cases and discussion.
enforcement of the contract since her joining in the suit showed a ratification of the husband's agency and amounted to an offer of performance, thus creating mutuality of remedy at that time.25

Specific Performance; Damages, Liquidated and Otherwise. Some of the differences between legal and equitable remedies generally, and particularly the differences between an action for specific performance and an action for damages, were depicted in the case of Miller v. Rolfe.26 In this case the vendors brought suit against the vendees for specific performance. After the suit was filed, but before trial, the vendors voluntarily conveyed to a third party. Under these circumstances, it was held error for the trial court to retain jurisdiction and grant damages as incidental relief. Since the vendors had conveyed, they were no longer in a position to perform, and the equity court was divested of jurisdiction since it no longer could grant specific performance. Thereupon, the vendees were entitled to have the question of damages determined by a jury in a court of law if they so desired.27

The problem of the enforceability of provisions for liquidated damages was again considered in the case of O'Neill v. Broadview, Inc.28 In this case a contract provision calling for the forfeiture of a down payment of $1,500 when the total purchase price was $10,400 was enforced. The court stated that the amount was not sufficient to shock the conscience of the chancellor,29 and therefore, the case was controlled by Beatty v. Flannery30 and not by Haas v. Crisp Realty Company.31

The vendors are not entitled to recover from a defaulting vendee "a deposit" provided for in the contract but never actually made.32 In such a case, the vendees may sue for actual damages and may have the cause

27. Ibid. The case may also be an application of the principle that one who seeks equity must do equity. Since the plaintiffs were the ones who prevented the equitable relief sought, they were not entitled to any relief. Had the action been by the vendees against the vendors for specific performance, and the vendors prevented such relief by a voluntary conveyance, the equity court could retain jurisdiction and grant damages. See the above case, 97 So.2d 132 at 134-135; Winn & Lovett Grocery Co. v. Safford Bros. Produce Co., 121 Fla. 833, 164 So. 681 (1935).
28. 112 So.2d 280 (Fla. App. 1959). See also note 29 infra.
29. The general rule is that provisions for liquidated damages will be enforced whereas penalty provisions will not. However, the rule that a purchaser in default is not entitled to recover money paid his vendor is also frequently applied except in cases of fraud or fortuitous misfortunes which would give the vendor a benefit shocking to the court's conscience. These rules, along with the cases cited in the next two footnotes and others, are discussed in more detail in Boyer, Survey of Real Property Law, 8 Miami L.Q. 389, 390-392 (1954); and in Boyer, Florida Real Estate Transactions 48-49 (1959).
30. 49 So.2d 81 (Fla. 1951). See also note 29 supra.
31. 65 So.2d 765 (Fla. 1953). See also note 29 supra.
transferred to the appropriate court having jurisdiction over the amount claimed.\textsuperscript{35}

The discretionary nature of specific performance was the basis for the decision in \textit{Mayer v. Willis},\textsuperscript{34} the final result of which was tantamount to a decree of rescission. In this case the contract described the land as containing approximately 58 acres and provided for a price adjustment in the event of a discrepancy in the size of the tract. The land was bordered on the north by a river, and the dispute concerned the amount of acreage, the vendor asserting that the payment should be for 58 acres while the vendee claimed that it should be for only 44, making a difference of approximately $10,000. Under these circumstances, the court concluded that the chancellor was warranted in denying specific performance, but found that there was no satisfactory basis for the forfeiture of the deposit and concluded that it should be returned.

The recovery of an additional sum paid by the vendee to induce the vendor to complete the transaction after the vendor's refusal has been allowed on the basis of statutory provisions. In \textit{Lord v. Die Polder},\textsuperscript{38} there was a brief written agreement and complete payment by the vendee of the $10,000 stipulated. Then the vendor refused to deliver a deed, and the vendee eventually agreed to pay an additional $5,000. After delivery of the deed, the vendee was allowed to recover the additional $5,000 paid to induce performance. The court stated that the defense of a voluntary payment would have been valid except for the statute\textsuperscript{36} prohibiting such a defense when pursuant to a contract there is no enforceable obligation to make it.\textsuperscript{37}

The amount of damages recoverable by a vendee for breach of a contract to convey depends upon the good or bad faith of the breaching vendor,\textsuperscript{38} and this principle was reaffirmed in \textit{Gassner v. Lockett}.\textsuperscript{39} It was reasserted that where the breach is not occasioned by bad faith (in the particular instance it was caused by senility and forgetfulness), the proper measure of damages is the recovery of any purchase money paid, together with interest and expenses of investigating title, and any profit made by the vendor as a result of the subsequent sale. In case of a bad faith breach, or in case the vendor had no title but was acting on the supposition

\begin{footnotesize}
\begin{enumerate}
\item Ibid.
\item 104 So.2d 675 (Fla. App. 1958).
\item 113 So.2d 440 (Fla. App. 1959).
\item FLA. STAT. \S 52.24 (1957).\textsuperscript{36}
\item Lord v. Die Polder, \textit{supra} note 35.
\item The rule is referred to in \textit{Boyer, Florida Real Estate Transactions} 312 (1959), in discussing Eaton v. Hopkins, 71 Fla. 615, 71 So. 922 (1916), involving breach of warranty and authorizing, contrary to the usual rule, recovery of the loss of bargain where the grantor's breach consisted of his subsequent conveyance to a bona fide purchaser for value who prevailed under the recording act.
\item 101 So.2d 33 (Fla. 1958).
\end{enumerate}
\end{footnotesize}
that he might acquire title, then he is liable for the value of the land at the time of the breach with interest from that date.40

Provisions Construed; Questions of Performance. A number of cases concerned the construction of particular provisions, and are worthy of note. In Kubicek v. Way,41 the contract contained two provisions concerning the effect of the vendor's inability to convey at the time of performance. The one clause was the more or less usual provision calling for a marketable title and giving the vendor an additional 120 days to cure the defects, and upon his inability to do so, affording the vendee the option of demanding the return of his money and terminating the contract. The other provision was inserted at the insistence of the vendor and provided that upon the seller's inability to "deliver title" within the time specified, then the deposit should be returned and the contract rendered void.

The contract called for the conveyance of 600 acres. The vendor, not owning 60 acres of that described in the contract, and being unable to acquire it, sought to return the deposit. The land had increased in value, however, and the vendee brought an action for specific performance. The court resolved the dispute by deciding for whose benefit the above respective clauses were inserted.

It was decided that the first of the above clauses, giving the vendee an option to rescind should the vendor be unable to convey a marketable title, was for the benefit of the vendee. Thus, the vendee can waive any defects and elect to take whatever title the vendor has. This is in accord with the usual interpretation,42 as to hold otherwise would allow a defaulting vendor to take advantage of his own breach of not being able to furnish a marketable title. The court then concluded that the second clause for voiding the contract if the seller "is unable to deliver title" was inserted for the benefit of the seller, and thus he could take advantage of it as to the sixty acres. The court did not stress the distinction between an unmerchantable or unmarketable title and no title, but the two clauses are so worded, and by thus construing them, they can be reconciled and the decision of the court sustained. The decision was that the vendee had a right to specific performance of that land to which the vendor had title (the first clause being inserted for the benefit of the vendee), but that he had no action for breach of contract as to the sixty acres to which the vendor had no title (that clause being inserted for the benefit of the vendor), and therefore he was not entitled to damages.43

40. Gassner v. Lockett, supra note 39. The damage recoverable in this instance is apparently the loss of the vendee's bargain. Hence, from the value of the land at the time of the breach, presumably there should be deducted the amount still owing on the purchase price.
41. 102 So.2d 173 (Fla. App. 1958).
42. BOYER, op. cit. supra note 10, at 223-224.
Provisions in a contract specifying that the sellers would secure a release of a right of redemption from the United States, or fully indemnify the buyer from all damages resulting therefrom, and to convey by general warranty deed free from all incumbrances required judicial construction in Suncoast Building of St. Petersburg v. Russell. At the closing, the sellers tendered a deed conveying the land subject to the right of redemption but containing also a clause to the effect that the sellers would warrant and guarantee to save the grantee harmless from all damages which might accrue from the exercise of such a right of redemption. In a suit by the vendee's assignee against the seller for return of the deposit and damages, a summary judgment for the defendant was rendered. This was affirmed on appeal, the court concluding that the provision in the contract afforded the sellers an alternative method of performance, that is, by either securing a release or by indemnifying the buyer. That the seller chose the latter method gave no cause of action to the grantee. The conclusion seems sound from the legal viewpoint, although pragmatically the contract of indemnity may be worth considerably less to the grantee than the release and perfected title. This, however, is not the fault of the court; the vendee should not have consented to this provision if it was not satisfactory to him when the contract was made, and the assignee, of course, is likewise limited to the terms of the contract.

Parties, of course, may waive their rights under contracts, and this, in effect, is what occurred in the case of Country Life Construction Corp. v. MacCormack. At the time of the closing, the vendor did not have title to a specified tract and, although at this time the vendee could have rescinded, nevertheless he went ahead with the transaction. The particular tract in question was to be purchased from the city, but before the city would convey, certain improvements had to be made. At the closing, the parties further agreed that if the purchaser could not thereafter obtain title to the particular tract, the transaction could be rescinded. The vendee went into possession and began making improvements. In a later action for rescission brought by the purchaser, a decree for the defendants was affirmed. The court concluded that the agreement made at the time of the closing envisioned that the purchaser should have the duty of securing title to the particular strip, and that there was no showing that he was unable to secure the land, the evidence, in fact, suggesting that he could have secured it since the town had offered an extension of the original agreement.

Voidable Contracts; Fraud and Incompetency. Contracts entered into because of fraudulent misrepresentations are, of course, voidable, but there

44. 105 So.2d 809 (Fla. App. 1958).
45. Suncoast Bldg. of St. Petersburg v. Russell, supra note 44.
46. 107 So.2d 763 (Fla. App. 1958).
47. County Life Constr. Corp. v. MacCormack, supra note 46.
still remains a considerable amount of *caveat emptor* in Florida cases dealing with a vendee's right to rescind a realty transaction because of fraud. Fraud is never presumed but must be proved by clear and convincing evidence. Further, in order to justify rescission, the complaining party, usually the vendee, must show, among other things, not only that he relied on the misrepresentations but also that he was justified in so relying. This factor of justifiable reliance has been the crucial issue in several cases during the period of this survey. A frequently recurring situation involves exaggeration of the amount of profits being realized from the operation of business property which is the subject of sale. The rule in Florida, reaffirmed in *Welbourn v. Cohen*, seems to be well established that as long as the vendor does not prevent an independent investigation and the parties are dealing at arm's length, the purchaser is not justified in relying on such statements and cannot predicate an action to rescind thereon. In the *Welbourn* case the circumstances were such that the purchaser was aware that some of the statements in the prospectus were not as represented; he was also advised to investigate further and in fact he did engage an accountant to make an examination of the seller's books. Thus, he could not rescind.

The principle of unjustifiable reliance was also significant in *Sutton v. Crane*. In this case, the vendee, unable to read because of poor eyesight, relied on the vendor's reading the contract to him, and then later, aware of previous misrepresentations by the vendor, entered into an amended contract, without independent advice, specifically confirming the first one. Thus, the vendee's action for rescission was denied.

Deeds and contracts by mental incompetents not under guardianship are also voidable, but in granting relief the chancellor will endeavor to reach the most equitable result. This was illustrated in the case of *Abshier v. Etter*, in which certain instruments were cancelled and the transactions rescinded, but as to a transaction involving a shopping center under construction by the defendant, financed by a large institutional mortgage, the chancellor decreed the incompetent to be owner of an undivided one

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50. For additional cases see the articles cited in note 48 supra.
51. 104 So.2d 380 (Fla. App. 1958).
52. On a visit to the premises, the vendee ascertained, for example, that one building was not 90 x 90 ft. as represented but was in fact only 20 x 20 ft.
53. This was the advice of his attorney.
54. The seller did not provide the accountant with an accounts payable ledger, but the accountant was advised to call the oil distributing company from which he could have ascertained the extent of the vendor's sales. The call was never made.
55. 101 So.2d 823 (Fla. App. 1958).
56. Deeds by an insane person under guardianship are generally held void. BOYER, *FLORIDA REAL ESTATE TRANSACTIONS* § 10.04 (1959), particularly at pp. 169-170.
57. 102 So.2d 853 (Fla. App. 1958).
half interest subject to the mortgage, and impressed a lien on the other half to secure the payment of $10,000. The decision was affirmed, the court concluding that the decree resulted in no unjust enrichment to either party.58

The case of Baroudi v. Hales60 involved the right to rescind of an incompetent vendee. The vendee entered into the contract during a lucid interval and a restoration,60 but he was again adjudged incompetent prior to the time of performance. Time was of the essence and the downpayment was to be forfeited in case of nonperformance. Eight months later the curator offered to close, and then brought suit for rescission and recovery of the down payment on the vendor's refusal. Since time was of the essence, no further notice was necessary after nonperformance in order to put the purchaser in default. Since there was no showing that the incompetency made the vendee unable to perform, and in fact no showing of inability to close at all, the inference arising from the belated tender suggesting, rather, quite the contrary, the defaulting vendee was entitled to no relief.61

Legislation. It may be noted that 1959 legislation has provided for automatic restoration of competency under certain conditions.62

Prorations. In Gelb v. Aronovitz,63 prorations at the closing were made on the basis of the taxes for the previous year. After current taxes were levied at a considerably higher figure, the purchaser brought suit against the vendor for his prorata contribution of the additional taxes. The court held that it was error to grant the defendant's motion to dismiss, and that the purchaser may be entitled to such sums, but it did not foreclose the possibility of the defense of an accord and satisfaction on trial of the cause.

Options; Time of the Essence. Although time is not considered of the essence in equity unless specifically so provided in cases involving contracts to convey realty,64 the rule is otherwise as to options. Time is of the essence in option contracts both in law and equity whether specifically so provided or not. Generally, an optionee must conform to the exact terms and conditions specified as to the time and manner of exercising options.65 Noncompliance with the terms specified for the exercise of the option on or before its expiration date results in its loss although the parties may be negotiating for an extension or modification at that time.66

58. Abshier v. Etter, supra note 57.
59. 98 So.2d 515 (Fla. App. 1957).
60. Transactions during lucid intervals where there is no guardianship are generally valid since the competency at the time of the transaction determines its validity and not the competency at other times. See Boyer, op. cit. supra note 56 at 170-171.
63. 98 So.2d 375 (Fla. App. 1957).
66. Ibid.
II. Deeds — Description, Parties, Recording

Description; Legislation. Chapter 59-375 of the 1959 Florida Acts provides that the word “minerals” in any deed, lease or written contract shall be construed to exclude topsoil, muck, peat, humus, sand and common clay unless otherwise expressly provided.

Description; Sufficiency. It is axiomatic that a deed to be effective must adequately describe the parcel of land to be conveyed. The description is inadequate when a surveyor on the basis of the information contained in the deed cannot point to any parcel as being the one intended, and the deed is therefore a nullity. Conveyances in reference to a plat incorporate the courses and distances of the plat by reference, but if the plat does not make the description sufficiently definite, the deed is not aided thereby. Further, extrinsic evidence may be used to explain a latent ambiguity but not a patent ambiguity. Thus, where the deed did not contain the section, range and township number, and the plat to which it referred contained over 100 tracts of the same number, the deed was a nullity.

Accretion and Reliction. The general principles of accretion and reliction were reaffirmed in several decisions during the period of this survey. Thus, in Mexico Beach Corporation v. St. Joe Paper Company the question arose as to the ownership of alluvial land. According to the original government survey, the particular fractional section consisted of 624.23 acres and was bordered by the Gulf of Mexico. This land was conveyed to the State of Florida by patent and later conveyed by the state to private individuals. All of the conveyances simply referred to the land as the designated section or fractional section. In the course of time alluvial deposits were sufficient not only to fill in a complete section but also to leave a considerable amount of excess land. The court held that since the state did not survey and designate or otherwise identify and except alluvial land formed after the original survey, the conveyance by the state and the subsequent conveyances passed title to all the land, including the alluvial, to the edgewaters of the Gulf of Mexico.

67. For a general and more complete discussion of land description and disputed boundaries, see Boyer, FLORIDA REAL ESTATE TRANSACTION, ch. 13 (1959).
69. Bishop v. Johnson, 100 So.2d 817 (Fla. App.), cert. denied, 104 So.2d 596 (Fla. 1958); Connelly v. Smith, supra note 68.
70. Connelly v. Smith, supra note 68.
71. Ibid.
72. 97 So.2d 708 (Fla. App. 1957), cert. denied, 101 So.2d 817 (Fla. 1958).
73. Ibid. See also Paxson v. Collins, 100 So.2d 672 (Fla. App. 1958), also recognizing the right of abutting owners to accreted lands. This case also held that in a suit for quiet title and an injunction against the Trustees of the Internal Improvement Fund where it was alleged that the Trustees had granted an easement over accreted land, the proper venue of the suit was the county in which the land was located.
A similar problem relating to relicted lands[74] and also involving the proposition that a conveyance in reference to monuments having width carries title to the center of the monument was involved in Feig v. Graves.[75] In this case the conveyance was in reference to a plat, and the plaintiff’s land was separated from a lakeshore by a “walkway.” It was held that when the lake receded, the plaintiff’s title continued to extend to the center of the walkway with his implied easement[76] of access to the waters likewise extending over the balance of the walkway, including the relicted lands.

A number of other important cases involving land titles and water arose during this period. Lopez v. Smith[77] is noted at this time, and the others in other sections of this article.[78] In this case, a number of well settled principles were reaffirmed: (1) a meander line ordinarily does not constitute the boundary of land bordering on navigable waters although it may be made the boundary where so intended or where the discrepancy between the meander line and the ordinary high water line leaves an excess of unsurveyed land so great as to indicate clearly and palpably fraud or mistake; (2) ordinarily the high water mark and not the meander line constitutes the boundary to land bordering navigable waters; (3) navigable waters do not extend to all waters merely because they are affected by the tides; and (4) the test of navigable water is its capacity for navigation and not its usage for that purpose.[79]

Disputed Boundaries; Resurveys; Adverse Possession; Acquiescence and Estoppel. The general rule that the original survey controls when there is a conflict between it and a resurvey was reaffirmed in Bishop v. Johnson.[80] This rule as to conflicting surveys, however, has been held during the same period inapplicable to sovereignty land underlying navigable waters.[81]

The doctrines of acquiescence and estoppel as to the location of boundaries were reaffirmed. Under Florida law, for the principle of acquiescence to apply, there must have been a dispute or at least uncertainty as to the location of the boundary prior to its establishment and acquiescence. Principles of estoppel may be applied in defense of a title but not to establish one. Further, the same case[82] applied and clarified

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74. Alluvial or accreted land refers to that which was built up by gradual or imperceptible deposits; relicted land refers to that which was formerly covered by water but which became dry land by the imperceptible recession of the water.
75. 100 So.2d 192 (Fla. App. 1958). See also the discussion of this case and two others in the text accompanying notes 242-246 infra.
76. See also text, Easements by Implication, following note 174 infra.
77. 109 So.2d 176 (Fla. App. 1959).
78. See text, Water Rights, following note 197 infra.
79. Lopez v. Smith, note 77 supra.
81. See Ruyle v. Dolly, 110 So.2d 467 (Fla. App. 1959). See also text, Submerged Sovereignty Land, following note 213 infra.
82. Blackburn v. West Coast Land and Dev. Co., 109 So.2d 413 (Fla. App.), cert. denied, 114 So.2d 3 (Fla. 1959).
the doctrines of adverse possession to such disputes. It was held that an
encroacher could not acquire title by adverse possession under present
statutes unless he complied with the requirements for adverse possession
without color of title. Specifically, that requires a return of the disputed
strip for tax purposes and thereafter the payment of taxes annually on
such land. The suggestion that fencing the disputed strip in with the
adjacent land constitutes color of title to the encroached area so that
one can acquire title by adverse possession by complying with those statutes
was rejected. This position seems sound as otherwise the legislative intent
would appear to be thwarted.

Delivery. It is elementary that a deed or other instrument must
be delivered to be effective, and a true escrow delivery passes no title until
the happening of the condition. Thus, a lease delivered in escrow but
which never became effective was a nullity, and an architect attempting
to assert a lien against the fee as a result of a contract with the anticipated
lessee was unsuccessful. The instrument, of course, is effective or not as
of delivery; thus a subsequent interlineation to correct the legal description
and a re-recording by the grantee has no effect, and the deed originally
invalid because of defective description remains a nullity. The admissibility
of parol evidence to show a condition precedent and that the instrument
never became operative was reaffirmed in a case involving a sales contract,
the court indicating that if the proposed vendee could prove the parol
condition, he would be entitled to a return of the purchase money.

Parties to Deeds; Legislation. That a deed in which the name of the
grantee is left blank is ineffective to convey title was reaffirmed in a case
involving a claimed satisfaction of a mortgage by merger. The merger
principle was recognized but not applied because of the ineffectiveness
of the uncompleted blank deed. The most significant developments
concerning parties to deeds, however, occurred in the field of legislation.

83. Adverse possession without color of title is governed by FLA. STAT. §§ 95.18 and
95.19 (1957). See also Lykes Bros. v. Brautcheck, 106 So.2d 582 (Fla. App. 1958),
holding that where plaintiff had acquired title by actual adverse possession in a disputed
boundary situation prior to 1939, his failure to return the land thereafter for taxes and
to pay the taxes resulted in his loss of title to the adjoining landowner claiming under
a tax deed pursuant to a 1945 tax foreclosure suit embracing the land in controversy.

84. Adverse possession under color of title is governed by FLA. STAT. §§ 95.16 and
95.17 (1957).

85. This suggestion was also made in Day, The Validation of Erroneously Located
Boundaries by Adverse Possession and Related Doctrines, 10 U. FLA. L. REV. 245, 262
(1957).

86. See Boyer, Florida Real Estate Transactions 221 (1959).
87. Id. at 135, 148-152.
89. Connelly v. Smith, 97 So.2d 865 (Fla. App. 1957), cert. denied, 101 So.2d
811 (Fla. 1958).
92. Ibid.
Trusts and Trustees. Under a Florida statute, a conveyance to a named grantee "as trustee" without designating any beneficiary and without other reference to a trust, and there being no recorded declaration of trust at the time of recording the deed or conveyance, vests the full fee simple estate in the named grantee with full power and authority in the named grantee to sell, convey and grant the complete title. This statute, formerly relating only to conveyances, was amended by the 1959 legislature to apply also to mortgages and other instruments.

Foreign Limited Partnerships. Foreign limited partnerships, under new legislative provisions, are precluded from acquiring, holding and disposing of property, and from doing business within the state, until qualified.

Reservations, State Releases. A statutory enactment removes limitations on the powers of the Trustees of the I.I.F. and the State Board of Education to release mineral and similar reservations in parcels of land larger than one acre.

Cancellation. The "clean hands" doctrine was invoked to affirm a dismissal and summary judgment for the defendant in Spector v. Ahrenholz, which was a suit by the grantor to void a deed and recover an undivided one half interest in certain property. The deed was issued at a time when the grantors were in financial difficulty and, according to the grantors, was for their protection, and, according to the grantee, as security for money advanced and for his protection. The chancellor denied relief on the basis that one executing a deed to hinder or defraud creditors was not entitled to maintain a suit to regain the property, and this conclusion was affirmed. Exceptions to this doctrine permitting the grantor to obtain relief when the parties are not in pari delicto were held inapplicable.

In two cases seeking cancellation of a deed on the basis of the grantor's incompetence, the chancellor's decree denying relief on the basis of an insufficient showing of the incompetency was affirmed, the court reiterating the rule that where there is evidence to support the decree, or where there is conflicting evidence, the decree will be affirmed unless clearly erroneous. Relief was granted in another case, however, where it was

93. FLA. STAT. § 689.07 (1957).
98. Spector v. Ahrenholz, supra note 97. Examples given in the case for application of the exception include instances where the grantee obtains the deed by fraud, duress or abuse of confidential relationship. The dissenting judge thought that whether or not the parties were in pari delicto could be better determined in the trial and not on a motion for summary decree.
established that the grantor at the time was in a weakened mental condition, and the consideration was inadequate. 100

**Notice and Recording.** The general principles of notice and priorities were applied in a few cases not indicating any particularly significant development. In *Doyle v. Tutan*, 101 for example, the plaintiff in a quiet title suit purchased the realty after notice of a lis pendens had been filed by the executor and former beneficiary of the sole owner. Normally, the purchaser under such circumstances would take with notice, although without actual knowledge or notice, and subject to the decree subsequently rendered in the suit. However, the doctrine of equitable estoppel may apply, and would apply in the instant case if the allegations of the complaint should be established. The allegations were that the executor and sole beneficiary, plaintiff in the suit pendente lite, participated in the negotiations and purchase transactions of the present plaintiff, approved the sale and personally benefited therefrom, and remained silent for more than a year following the purchase during which time the plaintiff made monthly payments on an outstanding first mortgage. Hence, the complaint stated a cause of action and it was error to dismiss it. 102

Possession inconsistent with the record title normally constitutes notice of the rights of the possessor, and hence the purchaser of such lands takes subject to the rights of the possessor. 103 There is an exception in case of estoppel, however. Thus, in *Roberts v. Bass*, 104 it was held that a grantor in possession was estopped from disputing the record title of the grantee, and was precluded from asserting the limited rights of the grantee under an unrecorded collateral agreement. Under these circumstances, the possession of the grantor, in the absence of actual notice to the bona fide purchaser for value, did not constitute notice of the grantor's interest under the unrecorded instrument. 105

The usual rule of notice was applied in the case of *Denco, Inc. v. Belk*, 106 involving the right of a lessee of first refusal should the land be sold during the term of the lease. The executor and all of the beneficiaries of the estate of the lessor joined in conveyances to the defendant grantee, each deed being made subject to existing leases with person or persons

100. Snyder v. Limbeck, 108 So.2d 783 (Fla. App. 1959). Voidable deeds by mental incompetents not under guardianship generally can be set aside only on a showing of inequitale advantage, fraud or lack of consideration. [BOYER, FLORIDA REAL ESTATE TRANSACTIONS 168 (1959)]. See also Webb v. Webb, 145 Fla. 267, 199 So. 343 (1941), setting aside two deeds but upholding an agreement for deed because it was fair.

101. 110 So.2d 42 (Fla. App. 1959).


103. BOYER, FLORIDA REAL ESTATE TRANSACTIONS 722 (1959), discussing also the proper characterization of such notice.

104. 111 So.2d 455 (Fla. App. 1959).

105. Roberts v. Bass, supra note 104. The case followed Reasoner v. Fisikelli, 114 Fla. 102, 133 So. 98 (1934).

106. 97 So.2d 261 (Fla. 1957), and 109 So.2d 201 (Fla. App. 1959).
in possession. It was held that the lessee was entitled to enforce his option against the purchaser who was charged with notice of all the terms of the lease, not only by the lessee's possession, but also by the very terms of the deeds by which he took title. The non-claim statute barring belatedly filed claims against a decedent's estate was held inapplicable since the action was in reality against the purchaser from the estate to enforce the lessee's rights, those rights, including the option, being a part of the lease and subject to which the purchaser acquired the land.107

III. Estates, Dower, Homestead and Future Interests

Estates by the Entireties. Tenancies by the entireties continue to be a fruitful source of litigation. Although the characteristics of the estate are well established, the application of these characteristics to new factual situations seems unlimited. At least some of the difficulty is occasioned, it is believed, by the recognition of this estate in personalty and the attempt to apply equally the more or less rigid real property concepts to the many varied and flexible personal property structures.

The case of Tingle v. Hornsby108 is illustrative of the problem that may be raised. In this case real property was owned by a married man. He entered into a contract of sale, and, quite naturally, his wife joined in executing the contract. The vendor and his wife were simply designated as the "sellers." During the continuance of the contract, the vendor-husband died, and a dispute arose as to the ownership of the proceeds of the contract between the surviving wife and the step-daughter. The widow claimed the entire proceeds as a surviving tenant by the entireties, and her adversary claimed that she had no interest other than that of surviving widow of the decedent.

The District Court of Appeal held that a wife's joinder in a contract of sale of her husband's real estate may, under the doctrine of equitable conversion, make the husband and wife tenants by the entireties in the proceeds of the sales contract. Whether or not such an estate results depends upon the intent of the parties; thus it was error for the trial court to grant a summary final decree for the step-daughter since the matter of intent and the interest created should be determined on trial.109

It is difficult to disagree with the reasoning of the court, but cognizance should be taken of standard conveyancing practices in Florida. It is obvious, of course, that the wife had to join in the contract in order for the purchaser to obtain an enforceable instrument not only against the husband, but also against the wife. No special significance should be

108. 111 So.2d 274 (Fla. App. 1959).
attached to the fact that the wife was designated a co-vendor since it is believed that this is the customary way for husband and wife to execute such contracts in Florida. The contract could, of course, specify that the wife was joining simply for the purpose of conveying or releasing her dower right, but it is doubtful if many contracts in Florida do in fact so specify. Further, by statute, it is provided that a wife may release her dower by joining as co-grantor in a deed with her husband, and it is believed that this is the customary way in which dower is released in Florida. It is doubtful that many deeds in Florida spell out, where such is the case, that the wife is joining for the purpose of releasing her dower, and, in fact, the statutory warranty deed contains no specific recitals for the release of dower.

Nevertheless, and in spite of the fact that no special significance should be made of the wife's simply joining as co-vendor, it is possible, as long as there is general recognition of such an estate in personal property, for the husband to have intended a gift to his wife at the time of sale and to have in fact made her a tenant by the entireties. In cases like this, however, it would seem fair to put the burden of proof on the surviving alleged co-tenant. Otherwise, and perhaps sound practice requires it anyway, the normal conveyancing instruments should be modified to specify the exact interests of the parties thereto and indicate clearly the purpose of each one in joining in the execution of each particular instrument.

**Partnerships and Estates by the Entireties.** A partnership between two marital communities owning real estate required judicial clarification of the proper relationship between the principles of partnership and the characteristics of the entireties estate in *Lacker v. Zuern.* An action was brought by a wife who, with her husband, owned an undivided one half interest in the partnership as tenants by the entireties. The action was against her husband and the other partners for dissolution and other relief on the grounds that she had been forced out of participating in the business and that the other partners, including her husband, were draining off profits and salaries.

The chancellor dismissed the case on the ground that the right to dissolve the partnership was in irreconcilable conflict with the status of the plaintiff as tenant by the entirety. The case was reversed on the proposition that the two principles were not necessarily mutually exclusive, and that the plaintiff alleged facts under which she should be entitled to equitable relief.

The court stated that the partnership could be dissolved without destroying the estate by the entirety existing between the plaintiff and her

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110. *Fla. Stat.* §§ 693.02 and 689.03 (1957).
112. 109 So.2d 180 (Fla. App. 1959).
husband as to their interest in the partnership. Since the estate is recognized in personality as well as in realty, the estate by the entireties will attach to the partners' interest as it is withdrawn in whatever form such withdrawal may take. Further, each tenant by the entireties owes the other the highest degree of confidence and trust, hence equitable relief may be granted against the husband where he is draining off the profits of the property so held.118

Entireties: Other Problems. A number of other problems concerning estates by the entireties also arose during this period. A few are noted at this point, but the survey article on Domestic Relations should be consulted for additional cases. Construction of the statute114 permitting a direct conveyance between husband and wife to create the estate was a principal issue in *Little River Bank & Trust Company v. Eastman.*115 The conveyance was by the husband of an undivided half interest to his wife in order to create an estate by the entirety. A creditor of the deceased husband claimed that the deed was effective to create the entireties estate only in a one half interest of the property.

In holding that the wife was entitled to the entire parcel, the court concluded that the deed was ineffective to create an estate by the entireties, presumably because some of the four unities were lacking110 but that it created a tenancy in common with a right of survivorship in the whole estate, the phraseology, "... the intention ... to create an Estate by Entireties. ..." being equivalent to the expression of a right of survivorship.117 The result is sound, but the reasoning may be unduly technical. Has not the legislature evidenced an intent to minimize or disregard the requirement of unity of time, title, interest and possession in the creation of tenancies by the entireties?118 Is not form being elevated above substance? To the contention that the result is the same, the reader is reminded of the differing rights of creditors, and of the differing rights of the parties themselves in conveyancing, applicable to other co-tenancies110 with the right of

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113. Lacker v. Zuehn, supra note 112.
116. At common law, the four unities applicable to joint tenancies, time, title, interest and possession, plus also the unity of husband and wife, were necessary in tenancies by the entireties. Boyer, Florida Real Estate Transactions 435, 439 (1959).
117. Fla. Stat. § 689.15 (1957), provides that, except in cases of estates by the entirety, the right of survivorship shall not be recognized in joint tenancies unless it is specifically expressed.
118. The reference is to Fla. Stat. § 689.11 (1957), permitting direct conveyances between the parties to create such an estate.
119. Joint tenants can separately destroy the right of survivorship by individually conveying their separate interest, and their respective creditors can attach their separate interest. Tenants by the entireties are powerless individually to convey or incumber the estate, and separate creditors are unable to attach the separate interests of a tenant by the entireties. See Boyer, op. cit. supra note 116, §§ 20.01 (1) and (2), 22.02 (3). See also a note on the principal case relative to the rights of creditors by Hamm, 34 Fla. B.J. 40 (1960).
survivorship as compared to those rights applicable to tenancies by the entireties.

Other cases involving this estate held: that on divorce the parties become tenants in common and that this result is not affected by a property settlement vesting rights in the wife to other property but not mentioning that held as tenants by the entireties;\textsuperscript{120} that a purchase money mortgage payable to the husband and wife on sale of the husband's property raises a presumption of a gift and makes the parties tenants by the entireties therein unless there is clear proof to the contrary;\textsuperscript{121} and that in a suit against the wife for the balance due on a contract for building materials, the contract having been made for the improvement of property held by the husband and wife as tenants by the entireties, there are raised questions of fact concerning the alleged agency of the husband and the issue of whether or not the wife contracted jointly with him so that the entry of a summary judgment is not warranted;\textsuperscript{122} and a contract for the conveyance of entireties property must be witnessed to be enforceable.\textsuperscript{123}

**Joint Tenancies with the Right of Survivorship.** The ability to create joint tenancies with the right of survivorship has been expressly recognized by statute since 1941.\textsuperscript{124} Prior to that time, the statute in question simply provided that the doctrine of the right of survivorship in real and personal property held by joint tenants should not prevail in this state.\textsuperscript{125} In construing the effect of a deed, executed before the statutory amendment, conveying lands to a mother and daughter, or the survivor, a District Court of Appeal held that it created a valid joint tenancy with the right of survivorship, and that the statutory amendment in 1941 was simply declaratory of the common law as it then existed.\textsuperscript{126} As thus construed, the only right of survivorship that was not recognized was that incident to a joint tenancy without a specific expression of the characteristic, and specific provisions for the right of survivorship were valid.

**Remainders.** The construction of a devise to a husband for life and at his death to be divided equally between a son and daughter was the principal issue in *In Re Martin's Estate*.\textsuperscript{127} Since one of the remaindermen, the daughter, died before the life tenant, a problem arose as to the disposition of the deceased daughter's share. It was held, and quite correctly, it would seem, that the will created a life estate followed by

\textsuperscript{120} Quick v. Leatherman, 96 So.2d 136 (Fla. 1957).
\textsuperscript{121} Lauderdale v. Lauderdale, 96 So.2d 663 (Fla. App. 1957). See also text discussion accompanying note 108 supra.
\textsuperscript{122} Anderson v. Carter, 100 So.2d 831 (Fla. App. 1958).
\textsuperscript{123} Petersen v. Brotman, 100 So.2d 821 (Fla. App.), cert. denied, 104 So.2d 594 (Fla. 1958).
\textsuperscript{124} Fla. Stat. § 689.15 (1957).
\textsuperscript{125} Fla. Laws 1927, ch. 5482.
\textsuperscript{126} Florida Nat'l Bank of Jacksonville v. Gann, 101 So.2d 579 (Fla. App. 1958).
\textsuperscript{127} 110 So.2d 421 (Fla. App. 1959).
vested remainders, and therefore, upon the death of the daughter, her
remainder interest passed under her will to her husband. The decision
is perfectly sound and consistent with well recognized principles, the only
thing that is difficult to see is why it should have caused any difficulty
in the first place. No other construction seems plausible. There is clearly
no contingency expressed; no condition of survivorship, either precedent or
subsequent, is indicated in the language of the will.

Restrains on Alienation. The policy favoring the free alienation of
land and the invalidation of restrictions on the alienation of fees simple
has its roots in early common law. The principle, however, is still very
much a part of our law and may arise in unexpected ways. Thus, in Kass v.
Lewin,128 the Supreme Court invalidated certain provisions of a special
act of the legislature applicable to Dade County on the basis in part that
it acted as an invalid restraint on alienation. The act related to plats and
subdivisions and, among other things, prevented the conveyance of certain
lands without preparing and recording a plat. This was an unreasonable and
unconstitutional restraint on alienation.520

Perpetuities. Two cases during the period of this survey involved the
application of the Rule Against Perpetuities to options in leases. Sisco v.
Rotenberg130 avoided the major perpetuities issue by holding that where
a lease for five years contained both an option to renew and an option to
purchase, the renewal provision was satisfied by one renewal. Hence, there
could be no perpetuity problem arising from successive renewals inde-
finitely with the concomitant prolongation of the option to purchase. Wing,
Inc. v. Arnold,181 on the other hand, came to grips with the problem, and
held specifically that an option to purchase contained in a 99 year lease did
not violate the Rule. It further indicated that the option to purchase would
follow the lease into its renewals, and that such an extended or revived option to purchase would likewise not violate the Rule Against
Perpetuities. This is in accord with the weight of American authority132 and
is supported by the fact that such options stimulate improvement of the

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128. 104 So.2d 572 (Fla. 1958).
129. Other grounds for the decision were that the titles to the act and its amendment
were deceptive and misleading, and that it was discriminatory and violative of the equal
For a succinct synopsis of the rules concerning the validity of restraints on alienation, see
BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 22.08 (1959).

In MacGregor v. Florida Real Estate Comm'n, 99 So.2d 709 (Fla. 1958), the
supreme court approved disciplinary proceedings against a broker because of deception,
bad faith, and false representations in negotiating a sale to a non-Christian in violation
of the condition imposed in the listing agreement. The court rejected the contention
that this was an attempt to enforce a discriminatory covenant within the prohibition of
Shelley v. Kramer, 334 U.S. 1 (1948), but regarded it simply as a disciplinary proceeding
against the broker.

130. 104 So.2d 365 (Fla. 1958).
131. 107 So.2d 765 (Fla. App. 1958).
132. See the authorities cited in the case, 107 So.2d 765 at 769.
land and promote alienation rather than hinder it. Thus, the result differs from that applicable to options in gross.\textsuperscript{133}

Dower; Legislation, Election. Chapter 59-123 of the 1959 Florida Laws adds a subsection to section 731.35 to allow a widow sixty days to elect to take dower from the date to which the county judge extends the time for filing creditors' claims, from the date of a final judgment of a litigated claim, or from the time allowed a personal representative to file objections to a claim. The existing subsection 3 of the same statute was repealed.

Dower, cases. A number of interesting cases concerning dower arose during the past biennium. It was held, for example, that a wife's voluntarily leaving her husband did not bar her claim to dower as the statute of Westminster II is not a part of our common law.\textsuperscript{134} It was also reaffirmed that a wife need not join in a purchase money mortgage since her dower in such land is subject to the mortgage whether she joins or not; hence refusal of the wife to join in such a transaction is no excuse for the nonperformance of the husband vendee to perform a contract calling for such financing.\textsuperscript{135}

A voluntary conveyance by a man prior to marriage to defeat his prospective wife's dower may be avoided, but only if the evidence is clear and convincing. Thus, in a particular case involving remarriage with his former wife, the court refused to grant her relief and refused to impose a constructive trust on the grantee because of insufficient proof.\textsuperscript{136} The court similarly refused to impose a constructive trust in another case\textsuperscript{137} which involved a conveyance without the wife's joinder of a married man to another woman with whom he apparently lived in an unorthodox relationship. The wife, however, was entitled to dower, but the court of equity had no power to assign it after it was concluded that there was no basis for equitable relief. Assignment of dower is the province of the County Judge's Court.

In a suit involving specific performance on the exercise of an option in whose execution the optionor's wife did not join, the court stated that the optionee was entitled to equitable relief.\textsuperscript{138} The exact nature of the relief was held to be dependent upon the issue of notice. If the optionee had notice that the optionor was married, then he was entitled only to specific performance subject to the wife's dower interest, but if

\textsuperscript{133} Such options are subject to the Rule. These two cases are discussed more completely in Boyer, \textit{Florida Real Estate Transactions} § 35.07 [2] (1959).
\textsuperscript{134} Wax v. Wilson, 101 So.2d 54 (Fla. App. 1958). Cf. Kreisel v. Ingraham, 113 So.2d 205 (Fla. App. 1959), permitting the husband to inherit from the wife although he had been separated and long in arrears in payments under a separate maintenance decree.
\textsuperscript{135} Lewis v. Belknap, 96 So.2d 212 (Fla. 1957).
\textsuperscript{136} Davis v. Davis, 98 So.2d 777 (Fla. 1957).
\textsuperscript{137} Coleman v. Davis, 106 So.2d 81 (Fla. App. 1958).
\textsuperscript{138} Paradise Pools v. Genauer, 104 So.2d 860 (Fla. App. 1958).
he had no such notice, he would be entitled to such specific performance but with an abatement of the purchase price.\footnote{130}

The effect of a settlement agreement was determined in Youngelson v. Youngelson's Estate.\footnote{140} It was therein held that a settlement agreement entered into between the widow and the executor and heirs of the husband after his death was a sufficient basis for denying her application for dower although she changed her mind within the period allowed for filing such an election. The court held that such an agreement is presumptively valid and can only be set aside on a showing of fraud or overreaching.

Homestead; Tax Exemption, Legislation. Chapter 59-270 of the 1959 Laws of Florida enacted section 192.141 providing that the rental of an entire dwelling shall result in the loss of the homestead taxation exemption. Certain exceptions and limitations on the doctrine are also provided.

Homestead; Incumbrance, Conveyance and Descent. Homestead problems continued to be a rather prolific source of litigation during the period of this survey. The proposition that a mortgage to be effective as an incumbrance against the homestead must be executed in the presence of two subscribing witnesses now appears to be well established.\footnote{141} The factual determination of the necessary elements for the acquisition of the homestead status were predominant issues in several cases. In Solomon v. Davis,\footnote{142} the principal issue was whether realty of the wife on which she resided with her husband and two minor grandchildren constituted the homestead. Both the husband and wife were employed, and the wife's earnings were the sole support of herself and the grandchildren. While recognizing that a wife may be head of a family for homestead purposes if the facts substantiate her claim, the Supreme Court, in denying her claim, stated: “...we find no case in which an able-bodied, continuously employed husband has been found to have abdicated his presumptive position as head of the family, where the primary family relationship of husband and wife remains intact with all the attendant duties and obligations thereby imposed upon him under our law.”\footnote{143} Thus, the homestead law did not apply, and the property was subject to forced sale to satisfy the creditors' claims.

In Engel v. Engel,\footnote{144} the principal factor relative to the homestead status was the requirement that the decedent had resided there as his permanent home. The court, analogizing the permanency requirement to that of domicile, added that “The only proper concept of permanency when used in this sense means the presence of the intention to reside at

\footnotesize{\textsuperscript{130}} Ibid.
\footnotesize{\textsuperscript{140}} 114 So.2d 642 (Fla. App. 1959).
\footnotesize{\textsuperscript{141}} Lieberman v. Burley, 100 So.2d 89 (Fla. App. 1958); Perry v. Beckerman,
97 So.2d 860 (Fla. 1957), amended decree rev'd on other grounds, 106 So.2d 185 (Fla. 1958). See note 14 supra for a similar requirement relative to sales contracts.
\footnotesize{\textsuperscript{142}} 100 So.2d 177 (Fla. 1958).
\footnotesize{\textsuperscript{143}} Id. at 179.
\footnotesize{\textsuperscript{144}} 97 So.2d 140 (Fla. App. 1957).}
that particular place for an indefinite period of time." The court then concluded, after a review of the evidence which was quite sufficient, that the land was homestead. Hence, the devise to the second wife was invalid, and his children were entitled to the remainder subject to the life interest of the widow.

The proposition that a gratuitous conveyance of the homestead to defeat the rights of living children or lineal descendants is void was recognized or followed in a number of instances. Thus, in Marsch v. Hartley, it was held that a gratuitous conveyance of a homestead through a conduit to create an estate by the entireties was ineffectual, and hence on the death of the head of the family, the property descended to the second wife for life with a remainder to the children. The problem of abandonment because of prolonged absence prior to a return several years before death was raised but resolved in favor of the continuing status of the homestead.

In Banks v. Banks, the husband, in a divorce action sought to have a previous conveyance to create a tenancy by the entireties held void as a gratuitous conveyance of the homestead. The court denied his claim on the basis that he failed clearly to allege and prove facts sufficient to show the homestead character of the property.

Issue might be taken with the court's statement, "Property held by the entireties does not and cannot constitute a homestead under Article X, Section 4, of the Florida Constitution," in Kinney v. Mosher. The court went on to explain, however, that entireties property is not subject to the homestead descent provisions but instead vests in the surviving tenant by the entireties. There is no dispute as to the end result; the only question is as to the characterization. Since entireties' held property can qualify for the creditor exemption from forced sale, and since it can

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145. Id. at 142.
146. The requirement of consideration in the conveyance of homestead property is discussed in Boyer, Florida Real Estate Transactions § 21.03 (1959), and in Boyer, Survey of Real Property Law, 10 Miami L.Q. 389, 397-398 (1956).
147. 109 So.2d 34 (Fla. App. 1959).
148. The statute regulating the descent of homesteads is Fla. Stat. § 731.27 (1959).
149. 98 So.2d 337 (Fla. 1957).
150. Kinney v. Mosher, infra note 151 at 646.
151. 100 So.2d 644 (Fla. App. 1958).
152. The following excerpt discussing the homestead exemption to entireties held property:
"Our bench has accordingly established two definite principles: the surviving spouse takes all upon the death of the other, but the exemption from forced sale attaches as a shield by virtue of the property interest of the spouse serving as head of the family during his or her life. This result is not merely practical; it is also logical, once one admits that the protected homestead interest need not be so extensive as sole ownership in fee." (Footnotes omitted.) Crosby & Miller, Our Legal Chameleon: The Florida Homestead Exemption, 2 U. Fla. L. Rev. 12, 34-35 (1949).
also qualify for tax exemption,153 might it not be preferable and less misleading to characterize such property, where the factual tests are met, as homestead but with the qualification that the usual homestead descent provisions are inapplicable?

The usual rules as to the descent of homesteads and the non-applicability of adverse possession against the holders of future interests were reaffirmed in the case of *Wagner v. Moseley*,154 involving a rather extreme set of facts. The land was acquired under a contract of purchase in 1929; the husband died in 1935; the widow remarried in 1936; the widow and her second husband paid the balance of the contract and secured a deed in 1940 naming them both as grantees; the widow died in 1950; and her second husband died in 1952. Suit was brought by children of the first marriage in 1953. In holding for plaintiff children, it was concluded that the land was homestead at the death of the first husband, that the widow acquired a life estate with remainder to the children, that adverse possession did not run against the remaindermen prior to the death of the widow, and that the deed to the widow and her second husband should be cancelled.

The case of *Perry v. Beckerman*155 involved the application of the constitutional exception to the doctrine of homestead immunity from forced sale. Under this exception,156 the homestead can be sold to satisfy an obligation contracted by the homestead owner for the erection or repair of improvements on the homestead real estate. The court concluded that to come within the exception, the obligation must be one contracted directly for labor and materials used in the construction of the improvement. An advance of money borrowed to purchase materials or to pay for labor is not within the scope of the exception. In such case the contract is to repay money loaned or expended and it is not in the nature of a contract to pay for the erection of the improvements or for the labor. Thus, the court concluded that the holders of the makers' note, by their purchase, merely advanced money to the original payee, supposedly for use in completing a construction contract on makers' homestead, and that a judgment on the note could not be enforced against the makers' homestead.157 The court indicated that in a subsequent trial, the liability of the homestead, if any, would have to be grounded on the construction contract supplemented by the written agreement between the parties rather than on the note and mortgage.

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154. 104 So. 2d 86 (Fla. App. 1958).
155. 97 So. 2d 860 (Fla. 1957), amended decree rev'd on the proposition that the entire parcel and not just that portion including one building constituted the homestead, 106 So. 2d 185 (Fla. 1958).
156. FLA. CONST. art. X, § 1.
157. *Perry v. Beckerman*, supra note 155 at 863. The mortgage was ineffective as a lien on the homestead because of lack of witnesses. See text accompanying note 141 supra.
A settlement agreement entered into between the widow and the executor and heirs of the husband after his death was held a bar to homestead rights in Youngelson v. Youngelson's Estate.  

**Free Dealer Law; Legislation.** Section 62.42 of the Florida Statutes was amended by the 1959 legislation in chapter 59-44, relative to service of process on the husband, and by the addition of section 62.421 providing for the mailing of a copy of the petition to the husband's residence.

**Partition.** In two suits involving partition some general principles were reaffirmed: (1) a partition suit is not the proper proceeding in which to settle a disputed title; (2) partition is not available to holders of equitable interests; (3) improper service upon minor defendants is not cured by the filing of an answer by the guardian ad litem, and the suit is ineffective to divest such minors of their property interests, if any, and (4) a decree in a partition suit without having jurisdiction over all interested parties does not void the proceedings as against those properly before the court, but those who are not properly before the court may bring a separate proceeding for the establishment of their rights.

**IV. Rights in Land**

**Covenants.** There were a number of cases concerning covenants running with the land during the period of this survey, but they were largely concerned with the application of settled principles. One case, dealing with the problem of a change in the neighborhood, upheld the chancellor's determination that there was an insufficient change to warrant a decree cancelling the restrictions. Other cases dealt primarily with the construction of particular covenants.

In *Frumkes v. Boyer,* the conveyance of a tract "less the North 30 feet thereof, which shall be dedicated within one year for a public street or road" was held to constitute a covenant running with the land obligating the grantor to dedicate said strip. The strip in question constituted a portion of the south half of a proposed but unopened street. The grantors based their non-dedication and claim to the strip on the fact that the city had acquired adjacent land for recreational purposes and had decided not to open the proposed street. The court concluded that the plain language of the deed could not be altered by engrafting thereon an exception that the city open the entire street, and that the grantee was

158. 114 So.2d 642 (Fla. App. 1959).
159. Rountree v. Rountree, 101 So.2d 43 (Fla. 1958), earlier report, 72 So.2d 794 (Fla. 1954).
164. 101 So.2d 387 (Fla. 1958).
entitled to equitable relief. The court recognized that for a completed dedication there must be an acceptance by the public or an appropriate governmental unit, and then declined to state the rights of the parties to the disputed strip should there be a completed dedication and later abandonment, or a refusal of the offer to dedicate.

In other cases, the court: construed an applicable plat and ordinance as not establishing building set back lines for a particular lot which was irregular in shape and at whose borders the indicated set back lines stopped;\textsuperscript{165} construed a covenant "to keep open railroad facilities" and to "provide adequate railroad facilities" as requiring the covenantor and his successors to actually provide the facilities and not simply to suffer use of the land for such purposes by the grantee;\textsuperscript{166} and concluded that operation of a motel on a track of land provided for laundry and clothes drying services for the inhabitants of a trailer park was a commercial enterprise prohibited by the terms of the restrictive covenant.\textsuperscript{167}

**Easements; Prescription.** The differences and similarities between the acquisition of title by adverse possession and the acquisition of an easement by prescription were delineated at length in \textit{Downing v. Bird}.\textsuperscript{168} The court noted that the trend of decisions is to abandon the notion of a presumptive lost grant as the basis for prescriptive easements,\textsuperscript{169} and to treat the acquisition of such easements as being perfected by methods substantially similar to those pertaining to the acquisition of title by adverse possession. The similarity of the two processes was furthered by the enunciation that the claimant in both instances must clearly show that the possession and user is adverse during the entire period, and that the presumption is in favor of the legal owner in both situations. This is somewhat of a change from earlier Florida decisions,\textsuperscript{170} but, to the extent of any conflict in this regard, the \textit{Downing} case will control.\textsuperscript{171}

The difference in the periods of time necessary for the acquisition of the respective interests was maintained; seven years for adverse possession and twenty years for prescription.\textsuperscript{172} The case involved the right to a portion of a paved roadway, the defendants claiming under the special

\textsuperscript{165} Town of Palm Beach Shores v. Doty, 100 So.2d 205 (Fla. App.), aff'd, 104 So.2d 508 (Fla. 1958).
\textsuperscript{166} Maule Industries v. Sheffield Steel Prod., 105 So.2d 798 (Fla. App. 1958).
\textsuperscript{167} Malcom v. Smith, 112 So.2d 395 (Fla. App. 1955).
\textsuperscript{168} 100 So.2d 57 (Fla. 1958).
\textsuperscript{169} For a succinct explanation and summary of the "lost grant" theory, see \textit{Boyer, Florida Real Estate Transactions} § 23.03(4)(a) (1959).
\textsuperscript{170} J. C. Verchen & Sons, Inc. v. House, 123 Fla. 641, 167 So. 45 (1936), quoting with approval Williamson v. Abbott, 107 S.C. 397, 93 S.E. 15 (1915), to the effect that the user itself may raise a presumption of adverseness. The case of Zetrouer v. Zetrouer, 89 Fla. 253, 103 So. 625 (1925), insofar that it indicated continuous use without being adverse would be sufficient, was overruled by the principal case.
\textsuperscript{171} Downing v. Bird, 100 So.2d 57, 65 (Fla. 1958).
\textsuperscript{172} Ibid. See also \textit{Boyer, Florida Real Estate Transactions} 523 (1959).
four year "deemed dedicated" statute173 and also by virtue of a prescriptive easement. Although there was some testimony to the effect that the road had been paved by the city more than four years prior to the controversy, the court concluded that such proof was not sufficiently established. Similarly, as to a common law prescriptive easement, the court concluded that the answer was insufficient in that it did not allege that the use by the public during the period was adverse, or of such a character as to charge the plaintiff or her predecessor with knowledge of such an adverse claim. Further, the answer was deemed insufficient in not properly identifying the route, termini, location and width of the claimed easement. Hence, the judgment of dismissal was reversed with both parties given leave to amend their pleadings.174

Easements by Implication. Many of the principles applicable to easements by implication were reviewed in a number of recent cases. The extent of the rights conferred in designated public or common lands on individual grantees whose conveyances described the land in reference to a plat were the focal issues in Wilson v. Dunlap175 and Feig v. Graves.176 The plat in the Wilson case showed a strip of land designated as "Beach" and as "Beach Parkway" bordering a bay. Of course, the grantees of individual lots in the platted lands obtained easements in the land set aside for public purposes,177 but the question arose whether they obtained an interest in the fee so as to enable them to prevent the common grantor from conveying the fee of the "Beach." It was pointed out that if the land in controversy were set aside only for street purposes, then at least a portion of the fee would pass to abutting owners, but that if it were set apart for park, recreational or similar purposes, then no interest in the fee would pass to abutting owners but that the owners of all the platted lands would have an easement for the purposes designated. After concluding that the "Beach" was set aside for multiple purposes, including ingress, egress and park purposes, the court decided that individual grantees acquired easements only and no interest in the fee; hence the common grantor had the right to convey the fee subject to the easement.178

173. Fla. Stat. § 341.66 (1953), providing that where a road had been constructed by a municipality and maintained continuously for a period of four years by a county or municipality, the road would be deemed dedicated. This statute has since been repealed, but similar provisions are found in Fla. Stat. § 337.31 (1957). Additional provisions stating under what conditions the filing of a map shall be prima facie evidence of ownership of the road by the particular governmental unit were inapplicable in the Downing case, supra note 171.
174. Downing v. Bird, supra note 171. The case of Kirmia v. Norton, 102 So.2d 653 (Fla. App. 1958), upheld the chancellor's decision based on conflicting testimony of a sewage easement based on prescription, but the requirements of an easement by implication were apparently also satisfied.
175. 101 So.2d 801 (Fla. 1958).
176. 100 So.2d 192 (Fla. App. 1958).
The Feig case involved a "walkway" interposed between certain platted lots and a lakeshore. It was held that the abutting owners acquired title to the center of the "walkway" with an implied easement of access to the waters of the lake. As the lake waters receded, the fee and easement were expanded accordingly so that the abutting owners continued to own to the center of the strip with an easement over the other half.

The general requirements for the implication of easements not attendant conveyances in reference to a plat were reaffirmed in Kirna v. Norton. These requirements are: a unity of title existing between the dominant and servient estates prior to the severance and implication of the easement in question; a conveyance at which time the easement is implied from circumstances making such easement necessary for the complete enjoyment of the estate granted or reserved; and, in addition, it is frequently held that a use must have been continuous, apparent, permanent and necessary when the unified title was severed. The claimed easement was a right of drainage through an established sewage line to a river, and the court expressed the opinion, correctly, it is believed, that an implied easement was created, the court noting, among other things, that the requirement of apparent is not synonymous with visible but only requires something that may be discovered by reasonable inspection.

The court, in Manning v. Hall, stating that easements can be created only by express grant, implication, or by prescription, went on to state in view of the law of "mutual drains" it was unnecessary to decide whether the chancellor's finding of an easement by implication was supported by the record. The court then quoted from two encyclopedias and an Iowa case concerning drains and licenses which become irrevocable, and concluded that the drainage ditches involved constituted a mutual drain which neither party could interrupt without the consent of the other. Although the writer is not desirous of engaging in a controversy over semantics or unduly prolonging this article, it is submitted that if one party has a right of drainage through another party's land which cannot be revoked or interfered with without the mutual consent of both, then an easement in

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179. Feig v. Graves, supra note 176.
180. 102 So.2d 653 (Fla. App. 1958).
181. Ibid. The decision, however, seemed to be actually bottomed on an easement by prescription. See note 174 supra.
182. 110 So.2d 424 (Fla. App. 1959).
183. Id. at 427 and citing other Florida cases to the same effect. The statement is believed too restrictive. See Boyer, Florida Real Estate Transactions § 23.03(5) (1959), dealing with "Additional Methods of Creating Easements." Much of the language of the Florida courts relative to easements and licenses can be criticized. See generally Boyer, supra, ch. 23, and particularly §§ 23.01 and 23.08. In Carson v. Tanner, 101 So.2d 811 (Fla. 1958), the supreme court held that the doctrine of part performance entitled grantees of a parcel of land to enforce an oral agreement for an easement of ingress and egress.
fact does exist, and the relationship is not changed by calling it the law of mutual drains, an irrevocable license, or some other appellation.

The extent of the easement acquired in delineated streets by grantees of platted land was the issue in *Haase v. Unity of The Palm Beaches, Inc.*\(^{186}\) It was therein reaffirmed that Florida follows in relation to streets\(^{187}\) the "intermediate" view which is also known as the "beneficial" or the "complete enjoyment" rule. This means that the grantee's private right of use is limited to such streets and alleys as are reasonably and materially beneficial to the grantee and of which the deprivation would reduce the value of his lot.\(^{188}\)

**Statutory Easement of Necessity; Miscellaneous Problems.** The statutory easement of necessity applies only to lands to which there is no accessible right of way; hence when a paved area was conveyed to the county for right of way purposes, and the county then by resolution confirmed the right of the plaintiff to use such area for ingress and egress, there was no necessity for the plaintiff to have an additional easement over adjacent land.\(^{189}\) On the other hand, however, a person claiming a statutory easement of necessity cannot be restricted to a trail across a slough which becomes impassable for three months when, by shifting the roadway a few feet to higher ground, a proper means of access would be obtained. Thus, allegations to this effect present a genuine issue as to the right to such an easement, and a summary judgment is not proper.\(^{190}\)

An easement may be lost by adverse possession or estoppel, but neither principle was held applicable in *Wiggins v. Lykes Brothers, Inc.*\(^{191}\) An interesting aspect of the case was that the assignee of the easement was also in possession as sublessee of the owners of the servient land. The court concluded that such possession was not adverse to the possessor's rights under his original easement, did not constitute an abandonment of his original easement, and did not work an estoppel.\(^{192}\) Other interesting aspects of the case, in light of earlier Florida decisions,\(^{193}\) are that it

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186. 107 So.2d 196 (Fla. App. 1958). See also the text accompanying notes 242-246 for related aspects of this problem.
188. See notes 186 and 187 supra.
189. Hewitt v. Menees, 100 So.2d 161 (Fla. 1958).
191. 97 So.2d 273 (Fla. 1957).
192. For a general discussion of these and other methods of terminating easements, see Boyer, *op. cit. supra* note 183, § 23.07.
193. Vereen and Sons, Inc. v. Houser, 123 Fla. 641, 167 So. 45 (1936); Burdine v. Sewell, 92 Fla. 375, 109 So. 648 (1926), both stating that an easement is incorporeal, imposed for the benefit of corporeal property, and that it requires two distinct tenements, the dominant and servient. Thus, all easements would seem to be appurtenant. For a criticism of this requirement, see Boyer, *Florida Real Estate Transactions* § 23.01(1) (1959).
appears to recognize, without expressly stating so, an easement in gross and that such an easement can be assigned. This is justified, however.\textsuperscript{194}

The case of Albury v. Central and Southern Florida Flood Control District\textsuperscript{195} also recognized an easement in gross in favor of the state for the purpose of constructing canals, and further upheld the transfer of such an easement or function from one governmental agency to another. The court also concluded, and correctly, it is believed, that the easement was not lost by estoppel or by abandonment, the general rule being that non-use, even forty-six years of non-use, does not constitute an abandonment.\textsuperscript{196}

The scope of a prescriptive easement is generally determined by the extent or scope of the use during the period of the acquisition of the easement. Thus, it was held that after the State Road Department had acquired a prescriptive easement of a designated location, it had no right to extend the easement and could not acquire an additional fifteen feet without compensation, and the property owner was entitled to a decree requiring the Department to remove the additional paving or resort to eminent domain to acquire the additional easement.\textsuperscript{197}

Water Rights. The increasing importance of the waters of Florida is reflected by the large number of cases and significant development in recent years. The cases on accretion and reliction,\textsuperscript{198} as well as cases involving water boundaries\textsuperscript{199} and a drainage easement,\textsuperscript{200} have already been discussed.\textsuperscript{201} Other important decisions are presented in this section.

Lakes. The rights of abutting owners to the use of the waters of a non-navigable lake for purpose of boating, bathing and fishing were clearly delineated for the first time in Duval v. Thomas.\textsuperscript{202} The Supreme Court of Florida, in adopting what it denominated the civil law rule, stated that the owner of property with portions of its boundaries under water of a landlocked non-navigable lake may use all of the lake for boating, bathing and fishing so long as he does not interfere with the rights of others, and he does not have exclusive dominion over the water overlying his land, and he is not confined to his own boundaries.\textsuperscript{203}

\textsuperscript{194} The assignability of easements in gross has apparently not been specifically discussed in Florida. See generally, Boyer, op. cit. supra note 193, § 23.06.

\textsuperscript{195} 99 So.2d 248 (Fla. App. 1957).

\textsuperscript{196} Ibid. See also notes 192-194 supra.

\textsuperscript{197} Broward County v. Bondin, 114 So.2d 737 (Fla. App. 1959).

\textsuperscript{198} Notes 72-76 supra and accompanying text; also note 179 and accompanying text.

\textsuperscript{199} Note 79 supra and accompanying text.

\textsuperscript{200} Note 182 supra and accompanying text.

\textsuperscript{201} See notes 198-200 supra.

\textsuperscript{202} 114 So.2d 791 (Fla. 1959), approving Duval v. Thomas, 107 So.2d 148 (Fla. App. 1958). For further elaboration on this interesting decision, see casenote immediately following this article.

\textsuperscript{203} Ibid.
The rights of riparian owners in regards to consumptive usage of lake waters was resolved on the basis of the common law doctrines of reasonable use in *Lake Gibson Land Company v. Lester*. In this case an injunction against pumping water from a lake for irrigation purposes was reversed because of insufficient proof that the defendant had substantially lowered the level of the water. In addition to "reasonable use," the court also spoke of the equal rights of owners and inferentially of a priority for domestic uses.

A number of interesting questions concerning the nature of riparian rights were raised but not decided because of contrary factual determinations in *McLaughlin v. Stier*. The case turned on whether the appellees had riparian rights, and the court concluded that there was ample evidence to support the chancellor's determination that they had.

**Riparian Rights; Right of Access.** The amount of waters to which a riparian owner's right of access extends was the crucial issue in the factually interesting case of *Carmazi v. Board of County Commissioners of Dade County*. It was therein held that the owners of land abutting on a navigable stream were not entitled to compensation for loss of right of access by boat to a nearby bay and other connecting navigable waters as a result of the construction of a dam. The court concluded that this asserted right of access was a right of navigation common to the public in general and not a riparian property right. The earlier case of *Webb v. Giddens*, holding that the right of a riparian owner on an arm of a lake to access to the main body of the lake could not be denied, was distinguished on the basis of unusual circumstances and equitable considerations in that case.

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204. 102 So.2d 833 (Fla. App. 1958).
205. It was not stated whether the lake was navigable or not. The decision was based on *Taylor v. Tampa Coal Co.*, 46 So.2d 392 (Fla. 1950), however, wherein the lake involved was not navigable.
206. The level was lowered only 22/32 of an inch over several months.
207. The case stated that it did not give any priority to irrigation purposes, and then quoted from *Taylor v. Tampa Coal Co.*, supra note 205, which referred to a priority for domestic purposes. For a brief statement of the common law rules and Florida applications, see *Boyer, Florida Real Estate Transactions* 632-633 (1959).
208. The questions urged by the appellants included: (1) Whether riparian rights could be reserved upon sale of the upland; (2) whether a transfer of a noncontiguous portion of riparian land severs riparian rights from the portion transferred; and (3) whether non-riparian land acquires riparian rights when it is subsequently covered by water. The first of these propositions is discussed in *Boyer, Florida Real Estate Transactions* 629-630 (1959), and the third, insofar as accretion and reliction are concerned, in *Boyer, op. cit. supra*, at 207-208.
209. *Feig v. Graves*, 110 So.2d 462 (Fla. App. 1959), contains dicta that a dedicatory may reserve all riparian rights appurtenant to the land encumbered by the easement dedicated.
211. 82 So.2d 743 (Fla. 1955).
Drainage, Surface Waters. The right of an owner to drain his land through a natural watercourse, and the servitude of a lower owner to submit to the drainage of surface waters over his land were reaffirmed in Libby, McNeil & Libby v. Roberts. These propositions were also recognized and applied in the earlier case of Pearce v. Pearce.

Submerged Sovereignty Land. Several significant cases involved the title to submerged lands under non-tidal navigable lakes. Such lands are denominated sovereignty lands, and the superior rights of the state and the public have been recognized in spite of state issued tax deeds. The principle of estoppel has been held inapplicable. Thus, in Adams v. Crews, it was held that the fact that the Trustees of the Internal Improvement Fund had conveyed submerged lands by tax deed did not estop the state through the Trustees from asserting the invalidity of the tax title and from asserting the rights of the people of the state to the submerged land. The grantee in the tax deed was also unable to acquire any rights under former Riparian Rights legislation by bulkheading and filling since that act excluded lakes other than tidewater lakes from its operation.

The case of Ruyle v. Dolly, also involving the title to submerged sovereignty land, an invalid tax deed, and claimed estoppel, reached a similar result. In this case a tax title issued against a private chain of title whose inception was a seventy year old invalid conveyance of the State Department of Education was held a nullity. As a result of an erroneous survey in 1858, the land in question, actually situated in the bed of a lake, was shown as being at least partly along the shore and in a section which became vested in the Board of Education by act of Congress. In 1886, the Board conveyed the land to private ownership, thus starting a private chain of title which was eventually sold for nonpayment of taxes in 1907 by an administrative tax proceeding. One of the claimants derived title through these proceedings. In 1909, the lake was drained, and in 1926, a new government survey established the original meander line of the lake, and the actual shoreline of the lake was also meandered as it existed before the lake was drained. The 1926 survey showed that in fact the land in question had been in the bed of the lake and not upland as shown in the 1858 survey. Thus, the court concluded that the 1858 survey was false or fraudulent or grossly in

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212. 110 So.2d 82 (Fla. App. 1959). A decree ordering the defendant to remove a dam and enjoining him from interfering with the natural drainage of plaintiff's land was affirmed.
213. 97 So.2d 329 (Fla. App. 1957). The relief granted in this case was to compel the defendant to construct certain openings in his dike.
214. 105 So.2d 584 (Fla. App. 1958).
216. 110 So.2d 467 (Fla. App. 1959).
error, and that the true location of the lake controlled the lands in controversy. It was next decided that since the lands were in the bed of the lake, they were sovereignty lands, and as such, did not vest in the state by act of Congress, but rather vested in the state by virtue of its sovereignty on admission into the Union in 1845. Therefore, the deed by the State Board of Education in 1886 was void, subsequent taxation of the land was void, the tax title was void, and the claimant deriving his title through this chain of events had no title at all. The valid title was that asserted by the tax claimant's adversary who had secured a deed from the Trustees on July 20, 1956, that deed being the only one effective to divest the state of its title. 217

The case of Stein v. Brown Properties, Inc. 218 involved the question of marketable title to submerged tidal lands. It was concluded that as to such lands the seller had no marketable title since they had not been improved by filling and extension of the upland. Under former legislation, 219 the owner of the upland could acquire title to such submerged lands by making the necessary improvement. It was also held in this case that the patentee from the federal government obtained no peculiar right to that part of the land under tidal waters because of the fact that the original patent contained a description of a specific number of acres.

Two cases involved the sale of submerged sovereignty lands under procedures established by the 1957 legislation. In Bay Shore v. Steckloff, 220 it was pointed out that the new legislation repealing the Riparian Act, 221 excepted from its operation those instances where the riparian owners had made application to the U. S. Corps of Engineers for filling pursuant to the former Act, and therefore, such owners' rights were preserved. In Anderson v. Collins, 222 it was held that a complaint alleging that the Trustees of the Internal Improvement Fund were guilty of gross abuse of discretion amounting to fraud by failing to investigate the truth of representations of private applicants for deeds as to the ownership of uplands, which were actually owned by a city, failed to state a cause of action in the absence of allegations of any protest made by the city, or that any action was taken to enjoin the trustees from deeding the property within thirty days after the hearing.

The usual test of navigability was reaffirmed in Lopez v. Smith, 223 and cases involving the question of proper procedure for obtaining review of an administrative water and navigational control authority held that the

218. 104 So.2d 495 (Fla. 1958).
219. See note 215 supra.
221. See note 215 supra.
222. 111 So.2d 44 (Fla. App. 1959).
223. 109 So.2d 176 (Fla. App. 1959). The test is navigability in fact and capacity rather than actual usage. See also text accompanying note 77 supra.
proper method was by certiorari, but that the appropriate appellate court could treat an appeal as an application for certiorari and should not dismiss the action.\textsuperscript{224}

Public Lands, Beaches, Legislation. A 1959 statute prohibits the state sale of minerals in or under public beaches.\textsuperscript{225}

V. Special Titles

Adverse Possession. Except for the court's rejection of the argument in disputed boundary cases that fencing the encroached strip along with the adjacent owned parcel constitutes adverse possession under color of title,\textsuperscript{226} the cases on adverse possession show no significant development. The adverse possessor has been allowed to quiet title in a number of cases,\textsuperscript{227} in one of which the court recognized that navigable waters might form at least a part of the substantial enclosure for such purposes.\textsuperscript{228} The case of \textit{Downing} v. \textit{Bird},\textsuperscript{229} primarily concerned with prescription, reviewed a considerable amount of the law of adverse possession, another case held that one who acquired title to a disputed strip by adverse possession and did not pay taxes thereon could lose the title to a tax purchaser of the adjoining land whose tax deed included the disputed strip,\textsuperscript{230} another reiterated that the possession cannot be permissive,\textsuperscript{231} and some simply held that the evidence was sufficient to show adverse possession.\textsuperscript{232}

Dedication. Cases on dedication in recent years reaffirmed such general principles as: filing a plat operates as an offer to dedicate the streets, alleys, parkways and other public lands depicted thereon,\textsuperscript{233} the offer may be revoked before acceptance;\textsuperscript{234} acceptance may be shown by user as well as by an express act of acceptance;\textsuperscript{235} acceptance of one street in

\begin{itemize}
\item 225. Fla. Laws 1959, ch. 59-178.
\item 227. Tampa Mortgage & Title Co. v. Smythe, 109 So.2d 202 (Fla. App. 1959); Hopson v. Sanborn, 97 So.2d 200 (Fla. App. 1957).
\item 228. Tampa Mortgage & Title Co. v. Smythe, supra note 227.
\item 229. 100 So.2d 57 (Fla. 1958).
\item 230. Lykes Bros. v. Bruntcheck, 106 So.2d 582 (Fla. App. 1958). See also note 83 supra.
\item 231. Wiggins v. Lykes Bros., Inc., 97 So.2d 273 (Fla. 1957).
\item 233. Murrell v. United States, 269 F.2d 458 (5th Cir. 1959); Walton v. City of Clermont, 109 So.2d 403 (Fla. App. 1959); Laube v. City of Stuart, 107 So.2d 757 (Fla. App. 1958); Feig v. Graves, 100 So.2d 192 (Fla. App. 1958).
\item 235. Walton v. City of Clermont, \textit{supra} note 233.
\end{itemize}
a platted subdivision usually operates as an acceptance of all the streets shown thereon; adverse possession cannot operate to divest the public or governmental unit of rights in a dedicated street; a common law dedication vests only an easement in the public; and the collection of taxes by a municipality does not estop that entity from claiming a completed dedication. In a number of cases the evidence was held sufficient to support a finding of dedication, while in another it was held insufficient.

Three cases involving the title to the underlying fee in connection with conveyances in reference to a plat are worthy of note. In Feig v. Graves, the plaintiff's land was separated from a lakeshore by a "walkway." It was held that his title extended to the center of the walkway with an implied easement of access to the waters of the lake extending over the balance of the walkway.

In Wilson v. Dunlap, the plaintiff's land was separated from a bay by a strip of land designated alternately as a "beach" or "beach parkway." It was held that since the strip was set aside for multiple purposes rather than simply roadway purposes, the plaintiff, abutting owner, acquired no title to the fee but simply an easement.

In Murrell v. United States, a condemnation case involving the right to compensation for land taken, there was a strip of land interposed between building sites and the ocean. The federal court, approving but distinguishing the Wilson case, held that the strip was intended to be used only for street or roadway purposes. Thus, under the Wilson case, the title of the abutting owners extended at least to the center of the strip, but the court went on to decide, since there was no evidence of a contrary intent, that the title of the abutting owners extended the entire width of the strip to the ordinary high water mark of the Atlantic ocean. Since the "street" had been vacated, the abutting owners were thus entitled to the award for this strip of land.

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236. Ibid.
237. Laube v. City of Stuart, supra note 233.
239. Downing v. Bird, 100 So.2d 57, 60-61 (Fla. 1958); Laube v. City of Stuart, 107 So.2d 757 (Fla. App. 1958).
240. Cannon v. Putnam County, 104 So.2d 37 (Fla. 1958), earlier decision, 75 So.2d 577 (Fla. 1954); Walton v. City of Clermont, 109 So.2d 403 (Fla. App. 1959); Laube v. City of Stuart, supra note 239.
242. 100 So.2d 192 (Fla. App. 1958).
243. The principle of reliction was also involved. See text accompanying notes 75, 76 supra. The issue in the case was the right of the abutting owner to have access to the lake and to enjoy the riparian rights attached to the walkway. These rights were protected.
244. 101 So.2d 801 (Fla. 1958).
245. In this case the abutting owner sought to have a deed conveying the fee in the strip cancelled. It was concluded that the abutter, not owning the fee, was not entitled to have the deed cancelled, but the rights of the abutter to use the strip were recognized.
246. 269 F.2d 458 (5th Cir. 1959). See also text accompanying notes 75 and 186.
The conversion of a state land service highway on land dedicated for right of way purposes to a limited access facility has been held to be not so inconsistent with former use as to amount to an abandonment of the public easement which would thus cause a reversion.247

Eminent Domain. In State Plant Board v. Smith,248 one of many cases concerning eminent domain, the Supreme Court of Florida distinguished eminent domain from the police power, and discussed the application of section 12 of the Bill of Rights of the Florida Constitution.249 The case arose as a result of the Plant Board's action in destroying a number of the plaintiff's trees under legislative authority250 for the containment and eradication of a citrus disease known as the spreading decline and caused by the burrowing nematode.

The act provided for compulsory destruction of infested trees and fumigation of the soil, and the plan adopted by the Board, which was clearly implied in the act, was known as the "pull and treat" program. This program was carried out summarily in any grove where the burrowing nematodes were found, and the grove owner was accorded a hearing on the sole question of the adequacy of the compensation to be paid for destruction of the non-infested trees,251 and this only after the trees were actually destroyed. Various aspects of the act and the actions pursuant thereto were held invalid.

The court first stated that this was not a case of appropriation of private property for public use, hence section 29 of Article 16 was inapplicable,252 but rather an exercise of the police power. The court then considered the application of section 12 of the Declaration of Rights,253 and stated that the prohibition therein contained against taking private property without just compensation and due process of law was not limited to taking under the power of eminent domain. The court then noted that the destruction of certain property under the police power did not require compensation, but distinguished those cases from the instant one where the "just compensation" was a clear requisite for the act of destruction.254

248. 110 So.2d 401 (Fla. 1959).
249. This section provides, among others, that no person shall be deprived of life, liberty or property without due process of law, and that private property shall not be taken without just compensation.
251. No compensation was to be paid for infested trees whether or not the "decline" had started. The case brought out that for sometime after the trees were infested, they would bear fruit, and that such fruit while the tree is still healthy is no different from the fruit of non-infested trees.
252. FLA. CONST. art. 16, § 29, concerning the taking of property for public use under eminent domain proceedings.
253. See note 249 supra.
254. This part of the decision relates specifically to that part of the legislation
The court finally determined: (1) the legislature was not justified in fixing a maximum amount of compensation that could be paid for the destruction of non-infested trees;\(^{255}\) (2) that "just compensation" and not "fair market value" was the proper measure of recovery;\(^{256}\) (3) that "just compensation" is a matter for judicial determination and not the legislature;\(^{257}\) (4) that summary taking under the police power is justified where there is an imminent danger to public health, safety, welfare or morals,\(^{258}\) and that such action is only subject to judicial review later, but where there is no such immediate danger,\(^{259}\) then the due process concept requires a notice and hearing before the taking;\(^{260}\) (5) that the provision denying compensation for destroyed trees which were infested but which had not yet shown any decline was invalid;\(^{261}\) and, (6) that the remainder of the act was valid.\(^{262}\)

Other eminent domain cases held: when a portion of land subject to a mortgage is taken, the mortgagee is not entitled to the whole of the award but only to a proportionate part by which his security is diminished;\(^{263}\) that loss by the owner of a drive-in theater to direct access to a highway was not such a loss as to entitle him to compensation when the highway was converted to a limited access facility;\(^{264}\) that where a public corporation had a valid easement for the construction of canals, no compensation need be paid servient owners upon the exercise of such an easement;\(^{265}\) and that the loss of access by boat to a nearby bay as the result of the construction of a dam was not the deprivation of a private riparian right for which compensation need be paid.\(^{266}\)

\(^{255}\) State Plant Board v. Smith, 110 So.2d 401, 407, 409 (Fla. 1959).
\(^{256}\) Id. at 406.
\(^{257}\) Id. at 407.
\(^{258}\) The court gave as examples: the destruction of diseased cattle, contaminated food, obscene publications, illicit intoxicants, narcotics, prohibited weapons, gambling devices, and other property that menaces the public health, safety or morals.
\(^{259}\) It was noted that the burrowing nematode travels underground from one tree to another at an average rate of 1.6 trees or 36 feet per year. There was thus no imminent danger of the spread of the disease from an infested to a non-infested grove.
\(^{260}\) 110 So.2d 401 at 408.
\(^{261}\) Id. at 408, 409.
\(^{262}\) Id. at 409.
\(^{263}\) Investors Syndicate of America v. Dade County, 98 So.2d 889 (Fla. App. 1958). In this case approximately one tenth of the land was taken, and the court awarded the mortgagee one tenth of the award.
\(^{264}\) Florida State Turnpike Authority v. Anhoco Corp., 107 So.2d 51 (Fla. App. 1958), modified, 114 So.2d 39 (Fla. App. 1959), to conform to a then unpublished mandate of the supreme court. The court found that a strip of the owner's land was taken, however, and ruled that recovery for such strip would have to be obtained in a condemnation suit and not as ancillary relief in an injunction proceeding.
\(^{266}\) Carmazi v. Board of County Commissioners of Dade County, 108 So.2d 318 (Fla. App. 1959), earlier report, 104 So.2d 727 (Fla. 1958).
Eminent Domain, Damages. Many eminent domain cases dealt with the proper measure of damages, and, of these, some were decided on procedural matters. Thus, in *Houk v. Dade County*, it was held not error for the trial judge to refuse to award attorney fees following an appeal in which the property owner was successful since the statute requires such fees to be determined by the jury. The procedure by which the property owner may obtain a portion of the ultimate award concomitant with the condemning authority's obtaining an immediate title was clarified and delineated in *State v. Wingfield*. It was therein held that when the declaration of taking did not contain a statement of the sum estimated by the condemning authorities to be just compensation for the land taken, the trial judge was without power to adopt the value fixed by the court appraisers as a basis of his discretionary power to make a preliminary payment.

The fact that present zoning or other regulations restrict the taken land to a particular use does not necessarily preclude evidence as to what the value of the land would be if the restrictions should be changed to permit other uses to which the land is better suited. The general rule permits such value to be shown where there is a reasonable probability of such a change. Evidence of such increased value was permitted where the city by agreement with state officials had arbitrarily zoned land for residential purposes so that the state could pay less when it finally decided to acquire the land. Similarly, a property owner was allowed to show the increased value of his land because of phosphate deposits although mining was prohibited in the area at the time.

Other cases involving damages held: that the reasonable expenses of an owner in relocating his business because of an insufficiency of land remaining after condemnation proceedings may be recovered; that the...
statute authorizing the recovery of damages to an established business five years old when adjoining land was taken did not require that the present owner had operated the business for such period, but that he was entitled to such damages where the business qualified although the present owner acquired it within the period; that compensation should be measured by the value of the land taken and not by the separate interests in the land; that an grossly inadequate award for attorney’s fees may be set aside; and that a lessor who leased a filling station was not entitled to loss of profits which might be occasioned by the condemnation since it would be the lessee’s retail business which would suffer any such loss. The case of State Road Department of Florida v. Darby allowed recovery on the theory that there was a taking where the department had prepared plans and supervised reconstruction of a road but had taken no steps to prevent the deposit of clay, sand and silt on the plaintiff’s land.

Tax Titles. The importance of ascertaining that all jurisdictional requirements have been satisfied in the acquisition of a tax deed was again emphasized in a number of cases which invalidated tax titles of many years standing. In Ruyle v. Dolly, a tax title dating from 1907 was held invalid because the land was not subject to taxation when the taxes were levied. Because of an erroneous survey, the land in question was mistakenly located outside the bed of a navigable lake, and a private chain of title initiated. Since the land in fact was under the lake, it was sovereignty land, hence the original conveyance by the Board of Education was invalid. Thus, the tax deed was invalid, and a subsequent grantee from the Trustees of the Internal Improvement Fund in 1956, long after the lake was drained, prevailed over a remote claimant under the tax title.

Two Murphy tax titles were invalidated during the period of this survey because of jurisdictional defects. In H. and H. Investment Company

278. Ibid.
279. City of Tampa v. Texas Co., 107 So.2d 216 (Fla. App. 1958), writ discharged, 109 So.2d 169 (Fla. 1959). Another basis for denial of the claim was that the taking itself did not cause any damage to the remainder of the parcel, but such was caused by the widening of the street and the lowering of the pavement. A number of other issues were also involved, and the question of damages discussed at length.
280. 109 So.2d 591 (Fla. App. 1959). The damage may have been caused at least in part by the default of a subcontractor. There was a dissent on the proposition that the complaint sounded in tort and that the State Department was not responsible in tort.
281. See BOYER, FLORIDA REAL ESTATE TRANSACTIONS ch. 31 (1959), for a discussion of the various types of tax titles and suggested check lists for each type.
282. 110 So.2d 467 (Fla. App. 1959). See also the text accompanying note 81 supra and note 283 infra.
283. See text, Submerged Sovereignty Land, following note 213 supra which also contains a discussion of this case.
v. Goldberg,\textsuperscript{284} the tax assessments were held invalid because of faulty description of the property, and the resulting certificates and forfeiture of the land to the state were likewise held invalid. A similar result based on the authority of this case was reached in Allison v. Rogero,\textsuperscript{285} which also held that a faulty description in the assessment and tax certificate rendered the resulting tax title a nullity.

The case of Fleming v. Hillsborough County\textsuperscript{286} involved a tax title derived through county in rem proceedings.\textsuperscript{287} It was therein held that incompetency of the taxpayer during pendency of the foreclosure suit constituted no basis for relief or invalidation of the decree in the absence of any provision in the statutes.\textsuperscript{288} Other cases held that failure of the taxing officials to adhere to jurisdictional requirements afforded the taxpayer the right to enjoin a tax sale,\textsuperscript{289} and that an easement for roadway purposes, particularly where the tax deed expressly so stated, survived the tax deed.\textsuperscript{290}

VI. MECHANICS’ LIENS AND MORTGAGES

Mechanics’ Liens — Legislation, Effective Date and Relation.\textsuperscript{291} Several sections of the Mechanics’ Lien Law were amended by the 1959 Legislature, the amendments relating primarily to the effective date of the lien, the relation doctrine and priorities. Section 84.03 of the statutes\textsuperscript{292} was amended to provide that after a default in construction and a subsequent resumption, the liens of the subsequent lienors relate only to the time work was resumed.\textsuperscript{293} This enactment appears to be a codification, although differently expressed, of the dictum in Geiser v. Permacrete.\textsuperscript{294} This change in the wording of the statute necessitated other changes also. Thus, section 84.16 was amended to provide that in the event of a default of the original contractor, no claim or lien attaching prior to such default shall be filed after three months from the date of default or from three months after the final performance of labor or services or furnishing of materials, whichever accrues first.\textsuperscript{295} Similarly, section 84.20 had to be amended to conform to the new policy, and this section was changed to read that mechanics’ liens shall have priority over interests unrecorded at

\begin{itemize}
\item \textsuperscript{284} 103 So.2d 682 (Fla. App. 1958).
\item \textsuperscript{285} 112 So.2d 578 (Fla. App. 1959).
\item \textsuperscript{286} 107 So.2d 162 (Fla. App. 1958).
\item \textsuperscript{287} These and other tax proceedings are discussed in Boyer, op. cit. supra note 281, ch. 31.
\item \textsuperscript{288} Fleming v. Hillsborough County, supra note 286.
\item \textsuperscript{290} Berger v. City of Coral Gables, 101 So.2d 396 (Fla. App. 1958).
\item \textsuperscript{292} Fla. Stat. § 84.03 (1957).
\item \textsuperscript{293} Fla. Laws 1959, ch. 59-460.
\item \textsuperscript{294} 90 So.2d 610 (Fla. 1956). The case is noted in Boyer, Ankus & Friedman, Survey of Real Property Law, 12 U. MIAMI L. REV. 499, 529 (1958).
\item \textsuperscript{295} Fla. Laws 1959, ch. 59-460.
\end{itemize}
the time the lien attached.\textsuperscript{297} The change consisted in granting priority to the lien over interests unrecorded at the time the lien attached rather than over interests unrecorded at the time of visible commencement of operations.

Section 84.08\textsuperscript{298} of the Law was also amended.\textsuperscript{298} This section relates to the furnishing of affidavits, and now applies to any person, firm or corporation, and not just to persons as formerly. The statute now makes the furnishing of a false affidavit perjury if the one to whom it is furnished parts with anything of value in reliance thereon. The requirements of knowledge of the falsity and intent to defraud have been deleted.

**Contractual Basis; Lessor's Interest.** The basic proposition that a mechanic's lien rests on contract was reaffirmed in a number of decisions which denied the imposition of a lien on the estates or interests of persons not participating, either expressly or by implication, in contracting for the construction. Thus, in *North Dade Plumbing, Inc. v. La Salle Bldg. Corp.*\textsuperscript{299} it was held that a lienor basing his claim on construction ordered by a tenant could not assert his lien against the landlord's fee interest when the lease did not by its language or by implication provide for the construction of an improvement. Similar results were reached in the cases of *Tom Joyce Realty Corp. v. Popkin*\textsuperscript{300} and *Dills v. Tomoka Land Co.*\textsuperscript{301}

The above cases did not overrule the earlier case of *Anderson v. Sokolik*\textsuperscript{302} which had subjected the lessor's interest to a mechanic's lien under not greatly dissimilar circumstances. In that case, although the lease did not specifically require or expressly authorize the construction of any improvement, the court concluded that improvements were contemplated and thus subjected the fee interest to the lien. The effect of the recent decisions appears to be one of restricting the rationale of the Sokolik case to its precise facts, or as the appellate courts have stated, to those situations where the making of improvements on the leased land "is the pith of the lease."\textsuperscript{303} This seems desirable from a policy viewpoint as there seems to be no compelling reason why the lienors should be allowed claims against the property interests of others than those who contracted for the improvements.\textsuperscript{304}

\textsuperscript{297} Ibid.
\textsuperscript{298} Fla. Stat. § 84.08 (1957).
\textsuperscript{299} Fla. Laws 1959, ch. 59-405.
\textsuperscript{299} 114 So.2d 707 (Fla. App. 1959).
\textsuperscript{300} 111 So.2d 707 (Fla. App. 1959).
\textsuperscript{301} 108 So.2d 896 (Fla. App. 1959).
\textsuperscript{302} 88 So.2d 511 (Fla. 1956). The case is discussed in Boyer, Ankus & Friedman, *op. cit. supra* note 294 at 528.
\textsuperscript{303} Tom Joyce Realty Corp. v. Popkin, 111 So.2d 707, 711 (Fla. App. 1959); Dills v. Tomoka Land Co., 108 So.2d 896, 897 (Fla. 1959); Anderson v. Sokolik, 88 So.2d 511, 514 (Fla. 1956).
\textsuperscript{304} See the criticism of the Sokolik case in Boyer, Ankus & Friedman, *op. cit. supra* note 294, and the cases cited in notes 299-301 *supra* limiting the doctrine.
Two other cases also recognized the necessity of privity between the lienor and lienee. In *Grossman v. Pollock*, the architect was employed by a proposed lessee. The lease was placed in escrow conditioned upon the procurement of construction funds. The proposed lessee could not secure the funds, hence the lease never became operative, and the architect was accordingly denied a lien against the land. In *Carolina Lumber Co. v. Daniel*, the chancellor's determination, based upon conflicting evidence, was upheld to the effect that a contractor making certain repairs was not an agent of the owners but an independent contractor, that the materialman relied solely on that person's credit, and hence was denied a materialman's lien.

The statutory agency of non-separated spouses was recognized and upheld in *Meadows Southern Constr. Co. v. Pezzanti*. In this case, a wife's interest in an estate by the entireties was subjected to a mechanic's lien when the work was contracted solely by the husband, but the wife under such circumstances could not be held personally liable, and hence could not be subjected to a deficiency decree.

**Federal Tax Liens, Priorities.** The case of *U. S. v. Griffin-Moore Lumber Co.*, according priority to a mechanic's lien over a subsequently filed federal tax lien, has apparently been overruled by the United States Supreme Court in *U. S. v. Hulley*. The *Hulley* case reversed the State Supreme Court which had accorded priority to a mechanic's lien recorded after the recordation of the federal tax lien, but which mechanic's lien related back under Florida law to the visible commencement of the work. The state decision was reversed on the basis of federal decisions arising in other jurisdictions. It appears that under the federal decisions, which are of course, controlling, a tax lien is given priority over a mechanic's lien, whether recorded or not, unless the mechanic's lien is reduced to a judgment before the federal lien attaches. It is probable

305. 100 So.2d 660 (Fla. App. 1958).
306. 97 So.2d 156 (Fla. App. 1957).
308. 62 So.2d 589 (Fla. 1953).
311. *Griffin-Moore* and *Hulley* are thus distinguishable. In *Griffin-Moore* the mechanic's lien was recorded before the federal tax lien, in *Hulley* the federal tax lien was recorded first, but the mechanic's lien related back under the state law. The federal tax lien becomes effective on assessment and does not depend on recording. See 26 U.S.C.A. § 6322 (1955). For further discussion, see the references in note 313 infra.
313. This whole problem is discussed more fully in Boyer, *FLORIDA REAL ESTATE TRANSACTIONS* § 34.15(4) (1959). See the amusing discussion of the federal requirement of "choateness" to entitle the state lien to priority in 42 A.B.A.J. 608 (1956).
that federal legislation will at least formalize the rules of priority.\textsuperscript{814}

**Progress Payments and Major Improvements.** Two cases involved the determination of proper payment in contracts calling for progress payments where the cost of improvements exceed $3,000. Under these circumstances, where no bond is furnished, the statute requires the owner to withhold 20\% of each payment, and in no event to pay more than 80\% under the contract until it has been fully performed, final payment is due, and the contractor has furnished the required sworn statement.\textsuperscript{818} In *Flood v. Clark*,\textsuperscript{818} the contract between the builder and developers required the developers to withhold 30\% of the price for the final payment. It was accordingly held that this written contract prevailed, that it could not be modified by a subsequent parol agreement to withhold only 20\%,\textsuperscript{817} and accordingly the lienors were entitled to liens to the extent of 30\% of the contract price and not just to 20\%.

The case of *Sinclair Refining Co. v. J. H. Cobb, Inc.*,\textsuperscript{818} also involving progress payments, decided that the owner had proceeded properly until the final payment. In this case, the contract provided that the progress payments would constitute 80\% of the value of the work completed to date. The owner made payments accordingly, and at the time for final payment had actually 24\% of the total contract price unpaid. The trial court had held that the owner was required to withhold 20\% of the 80\% stipulated payments, but this was reversed on appeal. The District Court of Appeal stated that to follow the interpretation of the trial court would require a withholding of 36\% of the total contract price in the instant case, and concluded the purpose of the statute was accomplished by the progress payments of 80\% of the completed value.\textsuperscript{819} The case appears sound. It does show, however, the ambiguity in the statute which requires a withholding of 20\% of *each* progress payment and a payment of no more than 80\% of the total price until the work is completed and all statutory requirements satisfied.

**Perfection of Lien.** A number of cases dealt with various aspects of other requirements for the perfection of liens.\textsuperscript{820} A licor’s failure to serve

\begin{itemize}
\item \textsuperscript{814} See Tax Law Notes, 33 FLA. B.J. 1080 1959), referring to proposed legislation introduced in both the House and Senate in 1959. This legislation is H.R. 7914 and H.R. 7915 in the House, and S. 2305 in the Senate.
\item \textsuperscript{815} FLA. STAT. § 84.05(11)(a) (1957).
\item \textsuperscript{816} 111 So.2d 465 (Fla. App. 1959).
\item \textsuperscript{817} The project was a cooperative apartment house, and the escrow agreement with the apartment purchasers also stipulated for the 30\% retention. The court pointed out also that the developers could not change this contract without the consent of the owners or purchasers of the various apartments.
\item \textsuperscript{818} 112 So.2d 582 (Fla. App. 1959).
\item \textsuperscript{819} Sinclair Ref. Co. v. J. H. Cobb, Inc., supra note 318.
\item \textsuperscript{820} Stone Arts v. Dwyer, 99 So.2d 880 (Fla. App. 1958). See also Bover, Ankus & Friedman, Survey of Real Property Law, 12 U. MIAMI L. REV. 499, 528 (1958), for earlier cases on this problem.
a cautionary notice was held no bar to the acquisition of a lien in the absence of the owner's obtaining a sworn statement from the contractor.\textsuperscript{221} Although a claimant dealing directly with an owner perfects his lien by the performance of labor or the supplying of material,\textsuperscript{222} such lien may be lost as to purchasers and creditors: (1) when rights are acquired more than three months after the final performance of the labor or services or the final furnishing of the materials when no claims have been filed as provided; or (2) when acquired before the three months has run and no claim of lien is filed within the three months, and no suit to enforce the lien is commenced within the three months.\textsuperscript{223} Thus, a grantee from a builder-owner took free of liens for which claims had been filed more than three months after furnishing the last materials or labor.\textsuperscript{224}

The determination of whether a particular claimant was a contractor or subcontractor was the controlling issue in \textit{Pope v. Carter}.\textsuperscript{225} The claimant in this case had supplied fill dirt and graded the properties. He contended that the owners were improving the property as their own contractors, and that he was a subcontractor and therefore did not have to furnish a sworn statement in order to be entitled to a lien. The court concluded, however, that under the facts the claimant was a contractor dealing with the defendants as owners, and, therefore, was required to furnish the statement, so that he presumably lost the lien because he did not furnish it within a year.

\textit{Mortgages; Legislation.} A 1959 statute\textsuperscript{226} requires a printed or rubber stamp special notation on “balloon” mortgages. The act also defines “balloon” mortgages,\textsuperscript{227} provides for certain exceptions, and exacts the penalty of forfeiting interest as well as extending the date of maturity in case of violation.

\textit{Deeds Absolute As Mortgages.} Three cases during the period of this survey involved the issue of whether certain deeds absolute should be construed as mortgages. In two instances\textsuperscript{228} the allegations were sus-

\textsuperscript{221} Gulf Stream Lumber Co. v. Lathrop, 108 So.2d 55 (Fla. App. 1959). The court permitted the materialman a lien for materials furnished subsequent to the release or receipted bill, however.

\textsuperscript{222} Thus, no claim of lien need be filed. Nathman v. Chrycy, 107 So.2d 782, 784 (Fla. App. 1959); \textit{Boyer, Florida Real Estate Transactions} § 33.14 n. 2 for many case citations.

\textsuperscript{223} Nathman v. Chrycy, infra note 324.

\textsuperscript{224} Nathman v. Chrycy, 107 So.2d 782 (Fla. App. 1959); Gray v. L. M. Penzi Tile Co., 107 So.2d 621 (Fla. App. 1959). Liens were also denied to one furnishing material to a plasterer who was a contractor with the owner because it was not shown that the plasterer had not been paid in full at the time of filing the claim of lien.

\textsuperscript{225} 102 So.2d 658 (Fla. App. 1958).

\textsuperscript{226} Fla. Laws 1959, ch. 39-356.

\textsuperscript{227} “Every mortgage in which the final payment or the balance due and payable upon maturity is greater than twice the amount of the regular monthly or periodic payment of the said mortgage shall be deemed a balloon mortgage.” Fla. Laws 1959, ch. 59-356, § 2.

\textsuperscript{228} Kinney v. Mosher, 100 So.2d 644 (Fla. App. 1958); Erstling v. Trinity Wesleyan Methodist Church, 100 So.2d 74 (Fla. App. 1958), which simply sustained the chancellor’s finding.
In the other, the contention was denied, the court concluding therein that the deed was given in satisfaction of the debt and not as security therefor. In *Kinney v. Mosher*, a husband and wife purchased a piece of realty as tenants by the entireties. They shortly afterwards conveyed it to the husband's brother and sister-in-law to secure a previous temporary loan of $10,000. Later, the brother and sister-in-law conveyed the property back to the husband alone. On the subsequent death of the husband, a dispute arose as to the rights of the deceased's children under the homestead law. It was held that the deed conveying the land was in fact for the purpose of securing the loan, and hence was a mortgage, and that the reconveyance to the husband was in reality a satisfaction of the mortgage. Thus, the surviving widow was entitled to the entire realty as surviving tenant by the entireties, and the homestead descent provisions were inapplicable.

In *Toner v. Hubbard*, also involving the question of construing a deed as a mortgage, the grantor joined by his wife, conveyed certain realty to his attorneys in return for the cancellation of two previous mortgages given to secure the payment of legal fees, cancellation of an additional $200 indebtedness, and $400 in cash. The grantor was also given a written option to repurchase within a year, which option had not been exercised. Five and one half years later Edwards (the original grantor), conveyed the land subject to the alleged mortgage indebtedness, and the grantee filed suit. The court concluded that the deed was in fact a deed absolute and not a mortgage and that it had been given in satisfaction of the debt. It was also concluded that the fact that the grantees were the attorneys for the grantor did not render the transaction voidable in the absence of bad faith, over-reaching, undue influence or other inequitable conduct.

Mortgages, Miscellaneous. In two cases raising the issue of consideration, it was found in one that the mortgage was based on consideration and hence was not invalid for that reason; while in the other, it was held that an agreement to refund interest on prepayment of the mortgage was

330. The transaction is a mortgage if there is a debt between the parties and the deed is given as security therefor. If the debt is extinguished, however, it is not a mortgage. See Boyer, *Florida Real Estate Transactions* 1003-1004 (1959).
331. 100 So.2d 644 (Fla. App. 1958).
332. See text accompanying note 151 *supra* for a discussion of this aspect of the case.
333. 105 So.2d 180 (Fla. App. 1958), cert. denied, 109 So.2d 168 (Fla. 1959).
334. For an explanation of conditional sales see Boyer, op. cit. *supra* note 330, at 1004.
not supported by consideration and hence was unenforceable. In cases involving assignments, it was held in one\(^{88}\) that a mortgagor is not entitled to settle with the holder of the note and mortgage where he knows that there is an assignment of a part interest, and, in another,\(^{89}\) that an assignee of the mortgage was not entitled to recover from the mortgagors an overpayment by the mortgagee when the plaintiff failed to show a right to the claim.

In several cases involving foreclosures, it was held: that it was no abuse of the trial court's discretion to deny the right of intervention to a creditor pending his appeal in another suit wherein he was seeking to set aside the mortgage;\(^{340}\) that the court properly protected an unreleased dower interest by retaining one-third of the proceeds of the foreclosure sale pending assignment of dower by the county judge's court, and that such dower interest was not chargeable with attorney's fees;\(^{341}\) that the original mortgagor is not a necessary party in a foreclosure action where no deficiency decree is asked;\(^{342}\) and that where two separate mortgages securing two separate notes executed on different properties are being foreclosed, the proceeds shall not be intermingled but that the distinct rights of the parties under the two transactions shall be maintained, with the costs and attorney's fees being apportioned.\(^{343}\)

The acceleration clause in the mortgage controls over a similar clause in the note where the mortgage clause expressly so provides;\(^{344}\) and an unwitnessed mortgage is unenforceable against the homestead.\(^{345}\) A mortgage was set aside in one case\(^{346}\) where there was fraud in the procurement and the assignee was found to take with notice because he acquired his interest after default and at a substantial discount. It has been held error

\(^{338}\) Kaufman v. Bernstein, 100 So.2d 801 (Fla. 1958). The court also pointed out that since the mortgagor had owned only a half interest, it was error to order the property sold in its entirety. Only an undivided one half interest should be sold in such circumstances.

\(^{339}\) Washington v. Independent Realty Co., 99 So.2d 613 (Fla. 1958). The court also concluded that the action was not a proper one for declaratory decree.


\(^{341}\) Wax v. Wilson, 101 So.2d 54 (Fla. App. 1958). See text accompanying note 134 for another aspect of the case.

\(^{342}\) Ruben v. Kapell, 105 So.2d 28 (Fla. App. 1958). The court noted that a deficiency decree could be granted under a prayer for general relief, but said that such a complaint would not authorize a deficiency decree against one not a party to the suit, particularly where it is a dissolved corporation. It was also noted that a complainant is not compelled to submit the adjudication of a deficiency decree to a court of equity.


\(^{345}\) Perry v. Beckerman, 97 So.2d 860 (Fla. 1957), amended decree rev'd on other grounds, 106 So.2d 185 (Fla. 1958). See also text accompanying notes 14-21 and 141 supra.

\(^{346}\) Meyerson v. Boyce, 97 So.2d 488 (Fla. App. 1957). The mortgagors were illiterates who were told that their property would be improved without charge for advertising purposes, and they were induced to sign the note and mortgage under representations that it was a contract authorizing the work for advertising purposes.
to refer a whole foreclosure proceeding to an examiner irrespective of a crowded docket, when one of the parties objects.347

Satisfaction by Merger; Incompetence; and Estoppel by Record. The contention of satisfaction by merger was rejected in the factually interesting case of Miami Gardens v. Conway.348 In this case there was a first and second mortgage followed by a default on the first mortgage. The mortgagors thereupon executed a deed in blank to the first mortgagee and vacated the premises. The mortgagee then secured a buyer for the premises and, upon learning of the second mortgage, brought an action of foreclosure. The second mortgagee contended the first mortgage was satisfied and sought foreclosure of his own mortgage as a first mortgage. The court stated that the deed executed without the name of the grantee was a nullity, and, therefore, there was no merger of the legal and equitable title,349 and hence no satisfaction of the first mortgage. It stated, however, that a mortgagee in possession prior to foreclosure had a duty to account, and this duty extended to junior incumbrances, for the net rents and profits during the possession, actual or constructive, of the mortgagee.350

In Machtei v. Campbell,351 the principal issue was the validity of a mortgage executed by an incompetent during a brief period of restoration and pending further incompetency proceedings. It was held proper to cancel the mortgage even as against an innocent transferee and holder in due course of the note, but that to the extent the incompetent received consideration, the holder could enforce the obligation.

In Welbourn v. Cohen,352 the mortgaged property was purchased subject to a leasehold estate, a purchase money mortgage given, and then the mortgagors acquired a sublease in the same premises. After foreclosure, the mortgagors refused to deliver possession contending that the lien of the mortgage on the fee did not automatically attach to the subleasehold. The court refused to pass on "the interesting legal questions," pointing out that all the parties were before the trial court and that the decree barred the mortgagors from all right, title and interest. Since the mortgagors did not argue the point during the initial litigation, or at any rate, did not appeal from the decree, they were estopped by record, and the writ of assistance was proper.

347. Powell v. Weger, 97 So.2d 617 (Fla. 1957). There was one dissent on rehearing. The similarity and difference between a special master and an examiner were also delineated.
348. 102 So.2d 622 (Fla. 1958).
349. These points are also noted in the text accompanying notes 91 and 92 supra.
350. The possession of the vendee was regarded as the possession of the mortgagee, and "net rents and profits" were construed to mean the reasonable rental value of the premises less the costs of maintenance, taxes, and other proper charges. Miami Gardens v. Conway, 102 So.2d 622, 626-628 (Fla. 1958).
351. 102 So.2d 722 (Fla. 1958).
352. 104 So.2d 383 (Fla. App. 1958). For other aspects of the litigation between these parties, see text accompanying note 51 supra.
VII. LANDLORD AND TENANT

Options; Perpetuities and Other Problems. Florida became aligned during the period of this survey with the majority American viewpoint that options in leases do not violate the Rule Against Perpetuities. As this problem has already been discussed, other matters relating to options will be considered at this time.

In Markos v. Raimondi, it was reaffirmed that an option to purchase normally constitutes a covenant running with the land and inures to an assignee of the leasehold. Although an exception is recognized in case the lessor relies on the personal confidence of the lessee as may be the case if the transaction is to be accomplished partly on credit, this defense cannot be asserted if the lessor bases his refusal to convey on other grounds. Another aspect of the case dealt with the problem of expiration of the option, and the court concluded that it had not expired and therefore affirmed the decree of specific performance.

Options accorded the lessee are also enforceable against purchasers of the reversion from the lessor unless they are bona fide purchasers without notice, and this proposition was reaffirmed in Deneo, Inc. v. Belk. The case also noted that possession by the tenant normally constitutes notice of the lease and all of its contents, and stated that it was no defense to the tenant’s action that the amount allocable to the property in question was uncertain when the difficulty was occasioned by the purchaser’s own conduct in purchasing several properties for one lump sum payment.

A possible distinction between an option to renew and an option to extend was again denied in Sisco v. Rotenberg. Lease provisions governing the exercise of options are naturally controlling. Thus, it was held that where a clause provided that the option should remain in effect for a stated time measured from the execution of the lease, the time was not extended by an indorsement that the lessehold should begin at a later date. Accordingly, an attempted exercise within the period of the lease as extended but beyond the period measured from the execution of the lease was too late.

The proper construction of a lessor’s option to terminate was one of the principal issues in Mann v. Thompson, which utilized the

353. Tort cases are omitted.
354. See the text accompanying notes 130-133 supra.
356. Ibid.
357. Ibid.
358. 97 So.2d 261 (Fla. 1957), and 109 So.2d 201 (Fla. App. 1959).
359. The option was in the form of a first refusal if the lessor should decide to sell during the term of the lease. After sale by the landlord, the tenant brought an action against the purchaser.
360. 104 So.2d 365 (Fla. 1958). Other aspects of the case are discussed in text accompanying note 130 supra.
362. Ibid.
363. 100 So.2d 634 (Fla. App. 1958).
principle of *ejusdem generis* to limit the lessor's discretion. It was therein stated that the use of the words "for any other reason," preceded by specific reasons such as sale of the lands or need by the lessor for pasture, restricted the lessor's right to terminate to reasons related to those specified.\(^{364}\)

**Security Deposits.** A number of cases concerning the rights of the respective parties to security deposits arose during the period of this survey. *Kanter v. Safran*\(^{365}\) made its third appearance\(^{366}\) before the Supreme Court, the chief issue this time being the amount of damages the lessors were entitled to retain from the security deposit, the period of the original lease having expired.\(^{367}\) The court held that the fact that the lessor had sold the premises before the expiration of the lease term did not necessarily render it impossible to ascertain damages, but the burden of proof was on the lessors, and on the basis of the record presented, it was not error to refuse to allow a setoff for general damages.\(^{368}\)

In *Hayes v. Cameron*,\(^{369}\) the tenant had deposited a sum of money which was to be paid back to him in six monthly installments to run concurrently with the rental payments due for the last six months of the term. On assignment of the lease, the tenant specifically assigned the benefit of the security deposit to the assignee relying on reimbursement by having the assignee make the "rental payments" for the last six months to the assignor. Sometime later the assignee and the lessors surrendered the leasehold by mutual agreement. In holding that the original tenant was not entitled to recover the security deposit from the lessors, the court stated that the terms of the assignment evidenced an intent of the lessee to look only to his assignee for recovery of the money. In *Hirsch v. Covey*,\(^{370}\) the lessee recovered the balance of the security deposit after the

\(^{364}\) The case also involved specific performance of a new lease. In denying the remedy, the court concluded, among a number of reasons, that the parties did not intend to consummate the agreement before all the terms and conditions had been fully determined and formalized in a written document.

\(^{365}\) 99 So.2d 706 (Fla. 1958), earlier reports, infra note 366.

\(^{366}\) See earlier reports, *Kanter v. Safran*, 68 So.2d 553 (Fla. 1953), and 82 So.2d 508 (Fla. 1955).

\(^{367}\) This litigation undoubtedly constitutes a landmark exposition of much of the Florida law on such landlord-tenant problems as surrender by operation of law, anticipatory breach of lease, and rights of the parties to the security deposits. In 68 So.2d 553 (Fla. 1953), containing the most comprehensive exposition of these general principles, it was held that since the agreement for retention of security deposit was a stipulation for a penalty rather than liquidated damages, the rights of the parties could not be determined until expiration of the lease period. In 82 So.2d 508 (Fla. 1955), it was held that the lessor's renting for a period longer than the original lease did not necessarily show an intent to abandon resumption of the premises as agent of the tenant and to hold him for any losses resulting from such re-renting. The litigation is noted in previous survey articles: 12 U. MIAI. L. REV. 499, 530-531, (1958); 10 MIAI. L.Q. 383 (1956).

\(^{368}\) *Kanter v. Safran*, 99 So.2d 706 (Fla. 1958). The court affirmed the finding as to special damages.

\(^{369}\) 101 So.2d 45 (Fla. App. 1958).

\(^{370}\) 111 So.2d 491 (Fla. App. 1959).
lessor's damages were deducted, the principal point of dispute being the amount of damages to which the lessor was entitled.

Miscellaneous Problems and Construction of Particular Provisions. A lease of hotel space for operation of a medical clinic precipitated the litigation in Fontainebleau Hotel Corp. v. Kaplan,371 wherein the lessee doctor contended that he had the exclusive right to maintain a medical office or clinic on the premises, and that the hotel breached this right in leasing space to another doctor. The court concluded that the terms of the lease did not give such an exclusive right to the doctor, but that other provisions of the lease, requiring the hotel or its employees to refer inquiring guests to the tenant doctor, were breached, and that the plaintiff doctor was entitled to an injunction and damages.

In Parkleigh House v. Wahl,372 the tenant also contended an exclusive right to conduct a certain type of business and sought to enjoin the lessor from renting to a competitor. This exclusive right was based on oral representations, there being no such provision in the lease, and the court, in denying relief to the tenant, relied on the proposition that verbal agreements cannot vary the terms of a lease as subsequently reduced to writing in the absence of fraud, deception, mistake or overreaching.

The imposition of a vendor's lien on the sale and transfer of the tenant's business and lease was recognized in Oliver v. Mercaldi.373 At the time of the transaction, the assignor received a chattel mortgage which did not include the lease although the assignees represented that it would by implication. The court refused to reform the mortgage so as to include the leasehold, but imposed a vendor's lien instead, and enforced it against a subsequent transferee with notice. A chattel mortgage did include the leasehold in another case,374 but the lease was subsequently cancelled in a judicial action in which the assignees of the mortgage and final foreclosure decree were joined.

The settlement of accounts between the lessor and lessee of a hotel required judicial aid in National Hotel v. Koretsky.375 The lease provided that the tenant should return the personal property included in the transaction in as good a condition as when received, reasonable wear and tear, natural depreciation and obsolescence excepted. The dispute arose as to missing items, whether the tenant should be allowed a depreciation credit

372. 97 So.2d 714 (Fla. App. 1957).
373. 103 So.2d 665 (Fla. App. 1958).
375. 96 So.2d 774 (Fla. 1957), aff'd, 98 So.2d 803 (Fla. 1957). In Macina v. Magurno, 100 So.2d 369 (Fla. 1958), the sufficiency of the audit furnished by the lessee and by which additional rental payments were calculated constituted the principal basis of dispute. It was held that the affirmative defenses of waiver, laches and estoppel precluded the rendering of a summary judgment.
or charged at actual replacement cost. The court concluded that the tenant was entitled to a depreciation allowance.\textsuperscript{376}

\textit{Taxation of leasehold.} A leasehold is not taxable in Florida either as real or personal, tangible or intangible property according to \textit{Park-N-Shop, Inc. v. Sparkman}.\textsuperscript{377} In this case a county leased certain land for commercial use and provided that no ad valorem real estate taxes (county or city), should be levied. In upholding the validity of the tax exempt provisions, the court concluded that the property of the state and counties were \textit{immune} rather than exempt from taxation. Hence, the county and city were powerless to tax such land in any event regardless of any provisions in the lease. Similarly, they were powerless to tax the interest as tangible or intangible property since the taxing statutes did not include leaseholds.

\textit{Interference With Tenant's Use of The Premises.} The case of \textit{Young v. Cobbs}\textsuperscript{378} made its second appearance,\textsuperscript{379} the principal issue this time being the amount of recovery by the tenant for the landlord's eviction.\textsuperscript{380} It was previously held that he could not recover for loss of profits as they were too speculative since the business was being conducted in a "ghost town."\textsuperscript{381} However, this decision held he was entitled to recover for the permanent improvements since they were necessary expenditures and the tenant had expected to use the premises for the full term. He should be entitled to recover for the loss of their use for the unexpired term, but if he should be able to secure another location where such improvements were already installed, this fact could be considered.

In another case,\textsuperscript{382} the finding of a wrongful termination was affirmed, but the case was reversed because of excessive damages, the court referring to the first \textit{Cobbs} case as delineating the proper measure of recovery. In \textit{Carner v. Shapiro},\textsuperscript{383} the landlord's renovation of the second floor of a building interfered with a tenant's business. The repairs were virtually completed at the time of final hearing, hence the chancellor

\textsuperscript{376} The court also noted that a common law arbitration award may be attacked on the ground that the arbitrators erroneously applied rules of law, while a statutory award may be set aside only on grounds of fraud, corruption, gross negligence or misbehavior. It was held error to set aside the award in the instant case since the arbitrators proceeded correctly. \textit{National Hotel v. Koretzky}, 96 So.2d 774 (Fla. 1957), \textit{aff'd}, 98 So.2d 803 (Fla. 1957).

\textsuperscript{377} 99 So.2d 571 (Fla. 1958).

\textsuperscript{378} 110 So.2d 651 (Fla. 1959). See note 379 infra, for earlier decision.

\textsuperscript{379} The earlier case is 83 So.2d 417 (Fla. 1955).

\textsuperscript{380} The eviction consisted of the landlord's padlocking the plaintiff's store.

\textsuperscript{381} Young v. Cobbs, 83 So.2d 417, 419 (Fla. 1955), and stating that this was an exception to the usual rule. Actually, the location was an unsuccessful and abandoned shopping center, the plaintiff being the sole surviving tenant at the time of the eviction.

\textsuperscript{382} Smith v. Designers Industries, Inc., 109 So.2d 776 (Fla. App. 1959). The dissenting opinion questions the wrongful eviction, and indeed no evidence is stated showing such wrongful conduct on the part of the landlord. See 109 So.2d 776 at 777.

\textsuperscript{383} 106 So.2d 87 (Fla. App. 1958).
denied an injunction but awarded damages. This action was affirmed on appeal.

Remedies of the Landlord. In Wagner v. Rice, the lease called for a stipulated annual guaranteed minimum rental to be paid in advance with additional payments based on the number of tomato crates packed. The lessee refused to make the third guaranteed payment, and the lessor recovered possession of the premises by an action in the county court. Thereafter, the lessor brought action to recover double rent, including the omitted guaranteed payment, for the period of the holdover. The court first concluded that the landlord had no right to recover double rent since the statutory penalty was construed to apply only to expiration of the lease by passage of time and not to termination for other reasons. The court then concluded that the lessor had elected to terminate the lease on the tenant's breach and considered the claim for rent under the circumstances. It was held that a lawful eviction by the landlord does not affect his right to rents accrued under the lease, and that the fact that payments were to be made in advance is immaterial. Thus, the landlord was entitled to the past due guaranteed annual rental plus interest.

The case of Placid York Co. v. Calvert Hotel Co. involved the time for appeal in a summary eviction proceeding. It was therein held that in counties such as Dade, which have no county court, that the time for appeal from the civil court of record in these cases is governed by section 83.27 (two days), and not by section 83.38 (ten days), which is applicable to appeals from the county court. Thus, an appeal filed three days after the denial of a motion for new trial was too late.

The case of Concrete Block & Wall Co. v. Knap sought to set aside a judgment in a distress proceeding and also damages. The court briefly reviewed the nature of distress and noted that seizure of the tenant's chattels on the leased land may be a sufficient invoking of jurisdiction, but concluded that under the facts of service in the case the tenant corporation must have been apprised of the proceedings. Thus, it was held the judgment was not subject to collateral attack, and that the landlord purchased the distrained property for a very small sum did not give the tenant a cause of action. If additional property not covered by the warrant were appropriated and sold, it would constitute conversion, but this would not entitle the tenant to equitable relief since his remedy would be an action at law.

384. 97 So.2d 267 (Fla. 1957).
386. 109 So.2d 604 (Fla. App.), cert. denied, 114 So.2d 3 (Fla. 1959).
387. 102 So.2d 742 (Fla. App. 1958).
388. The landlord's remedies of distress, forcible entry and detainer, and summary eviction proceedings are discussed at length in Boyer, Florida Real Estate Transactions ch. 37 (1959).