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CONTRACTS¹

RICHARD A. HAUSLER*

"My hand against your eye. Which shell?
The nimble pea eludes the gaze—
Step up, step up, a child can tell,
and guessing right results in A's.
Hawks, pepper corns, or roundelays—
they move the Court like calomel.
The cases hold all fourteen ways."²

Why? Is it due to interpretation? Is it due to construction? Which shell? Step up, step up! Really, there is not much similarity between the process of giving a meaning to words, and the determination by the court of their legal operation. Yet, the courts, in attempting to discover the meaning of "meaning", often—too often—make use of the processes of interpretation, implication, and construction without making any fine distinctions between them or without observing any juristic definitions.

In most contract transactions there are at least two participants, each of whom plays some part in the formation and performance of the contract, and each of whom gives the symbols a meaning that may differ from the meaning that is given them by the other participant. Strictly speaking, interpretation is the process, indeed sometimes the art, of determining the true sense of any form of symbols (words, acts, and forbearances), that is, the sense which their author intended to convey, and of enabling others to derive from them the same idea which the author intended to convey. The process of interpretation stops short of a determination of the legal relations of the parties; by this process, we determine what ideas the symbols induce (or should induce) in other persons. On the other hand, the construction of a contract starts with the interpretation of its language but does not end with it. Construction requires the formulation of conclusions respecting matters that lie beyond the expression of the text, from factors known from the spirit as well as the letter of the text. By "construction" of a contract, we determine its legal operation.

In *Clark v. Clark*,³ the Florida Supreme Court used the terms "interpretation" and "construction" interchangeably. At one point, the court said "the only question presented is the interpretation of provisions;"⁴

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1. Primarily, the Survey is designed to cover the cases of the Florida Supreme Court contained in 67 So.2d 1 (Fla. 1953) through 80 So.2d 927 (Fla. 1955).

2. Second stanza of Ballade of the Class in Contracts, by Llewellyn, K. N. LLEWELLYN, PUT IN HIS THUMB, pp. 39-40 (1931).

3. 79 So.2d 426 (Fla. 1955).

4. *Id.* at 428.

while, at another point, the court said "we have no clear conviction that the construction by the lower court is erroneous . . . for these reasons alone we should affirm."⁵ All this in one decision. The court correctly held that much evidence of surrounding factors may be necessary in the process of interpretation, but, in its statement, the court should have stressed that, in spite of Restatement of Contracts, Section 230, it is the meaning of either or both of the parties to the contract that the court is trying to discover. Unfortunately, the court stated:⁶

In this, as in other contracts, our concern is the determination of the intention of the parties from the language used, consideration of surrounding circumstances, the objects to be accomplished, the other provisions in the agreement which might shed light upon the question and the occasion and circumstances under which it was entered into.

The court could have done better! For a statement such as that quoted above, this writer might substitute the following: "The court will give legal effect to the words of a contract in accordance with the meaning actually given to them by one of the parties, if the other knew or had reason to know that he did so. In determining the meaning so given by the one and the fact of knowledge or reason to know by the other, the court will hear all relevant evidence of surrounding circumstances, including the admissions of the parties, the negotiations and antecedent communications between them, and the current usages that might have affected their choice of words."

Surely, if the meaning of the symbols of expression used in an agreement is disputed, the issues involved therein are issues of fact. When judges say that interpretation of law is for the court, we have one instance, out of many, in which judges have, on various grounds of policy, withdrawn questions of fact from the jury. The idea, whether directly expressed or evident by assumption, that interpretation of law is for the courts is technically an inexactitude, but not an alarming one.

In *State ex rel. Guardian Credit Indemnity Corp. v. Harrison*,⁷ the court said it was faced with a "real problem of construction"⁸ in reference to a warranty. In the first part of a warranty made by a corporation engaged in a collection service, it appeared that the corporation was an insurer of delinquent accounts which it had processed; but words in subsequent provisions of the warranty presented the question whether the corporation intended to qualify or limit the obligation assumed. The court held that the contract was sufficiently ambiguous to justify the introduction of parol evidence. Without completely resolving this problem, the court observed

5. *Id.* at 429.

6. *Id.* at 428.

7. 74 So.2d 371 (Fla. 1954).

8. *Id.* at 378.

that "all ambiguities in the contract must be strictly construed against the party that drew up the contract."⁹

In *Bruce v. McClure*,¹⁰ the court pointed out that, in Florida, even an integrated contract may be subsequently modified by parol. This is not a new rule to this jurisdiction. The question in the case was viewed as "solely one of interpretation of the contract;"¹¹ yet, the court continued, "it must therefore give due consideration to the canon of construction that if the conduct of the parties subsequent to a manifestation of intention indicates that all the parties placed a particular interpretation upon it, that meaning is adopted if a reasonable person could attach it to the manifestation."¹² This rule is the same as that in Section 235 (e) of the Restatement of Contracts. It is useless to talk of the meaning of a contract unless it is known whose meaning is sought; this inquiry cannot be disposed of by the answer "the meaning of the parties." The inadequacy of such an answer should be obvious. The courts should not be concerned with the meaning of a "reasonably intelligent man", but rather with the meaning of either one or both of the parties to the contract. In many respects, the rule adopted in the *Bruce* case is itself a rule of substantive contract law for determining the party whose meaning shall be made legally operative; it is not a rule of interpretation by which that meaning is to be discovered.

*Beach Resort Corp. v. Wieder*¹³ concerned the interpretation of a section of a lease covering improvements. The majority of the court held, in accord with a well settled rule, that courts may not rewrite a contract or substitute their judgment for that of the parties thereto in order to relieve one of the parties from the apparent hardship of an improvident bargain. Chief Justice Mathews, dissenting, insisted that the Chancellor had not rewritten the contract for the parties; and, further, the dissent relied on the equitable doctrine that parties should not be permitted to profit by their own wrong.

"Ah yes," courts continue to say, "we will not disregard the plain language of a contract" and, in the same cocksure vein, "we will not write contracts for the parties to them, nor construe them other than in accordance with the plain meaning of the language used." Beware of such opinions so naively arrived at. The judge who insists, in an instant, that language has but one reasonable meaning and that he knows "that" meaning is under an illusion that there is no essential imperfection of language, whether spoken or written. In place of such statements, I would suggest substituting something like the following: "If, after a consideration of the language of a contract, in view of all the relevant circumstances, and, in view of

9. *Ibid.*

10. 220 F.2d 330 (5th Cir. 1955).

11. *Id.* at 337.

12. *Ibid.*

13. 79 So.2d 659 (Fla. 1955).

all the tentative rules of interpretation based upon the experience of the courts, the court achieves a definite, plain meaning, one actually given by a party as the other party had reason to know, the court will not disregard this meaning and substitute another that is less convincing."

In *Voelker v. Life & Casualty Co. of America*,¹⁴ which involved a suit on policies insuring against loss by accidental death, the counsel for appellant contended that the policy should be construed most strictly against the insurance company. But, the court held that the policy provision, excluding from coverage any injuries of which there was "no visible external wound" causing death, was a clear and unambiguous provision; thus, the court held that it was not permitted to give any "construction" to it other than that which is evident from a reading thereof. Specifically, the court said, "Courts are not authorized to write a new contract for the parties on the pretext of construing the terms thereof when the wording employed is plain, crystal clear and unambiguous."¹⁵

Judge after judge has said that if the words of a contract are plain and definite, evidence of surrounding circumstances to aid interpretation is not admissible. Such statements contain an erroneous assumption of certainty and uniformity in the meaning of words that simply does not exist. Until a court knows the circumstances, it cannot properly hold that the circumstances have no probative value. Some of the surrounding circumstances must always be known before the meaning of words can be plain; moreover, proof of the circumstances may make a meaning plain when, in the absence of that proof, some other meaning may also have seemed plain. Cases should be analyzed to determine whether or not the circumstances, proof of which is offered, would in fact have any probative value.

Rules of interpretation will be useful if they call attention to some of the various meanings of a language that are worthy of comparison. They will be harmful if they are taken as dogmatic directions that must be followed, or if they mislead us into thinking that language has only one meaning. There are scores of rules of interpretation of symbols, but none of them will infallibly lead to the one correct understanding or meaning . . . in fact, there is no "one correct" meaning of a symbol.

It is well settled, in Florida, that a written contract or agreement may be altered or modified by parol agreement, if the oral agreement has been accepted and acted on by the parties in such manner as would work a fraud on either party to refuse to enforce it. Naturally, the only circumstances under which this exception to the general rule could be invoked would be where the actions of the parties are consistent with the supposition of a modifying agreement and inconsistent with the original contract.

14. 73 So.2d 403 (Fla. 1954).

15. *Id.* at 408.

Thus, where, in *Harris v. Air Conditioning Co.*,¹⁶ the facts disclosed by the record were quite as consistent with one hypothesis as with the other, it necessarily followed that there was no proof from which a jury could justifiably conclude that both parties accepted and acted upon an agreement differing from their original contract. Therefore, the above mentioned exception was held not applicable to the facts in the *Harris* case.

Statements are often made to the effect that existing statutes are incorporated in a contract by "implication". Strictly speaking, this is a rule for determining the legal effect to be given to a contract rather than a rule of interpretation. In *State v. City of Coral Gables*,¹⁷ the city had issued bonds under a statute providing for payment of such bonds, including the levy of an annual tax to service them. One of the arguments was that the charter of the City, as well as other applicable provisions of the law under which taxes are collected, might be repealed at any time. The court concluded this question by adopting the well settled principle that the law in force at the time the contract is made forms part of the contract; and, when a city or county issues its bonds under a statute providing for payment of said bonds (including the levy of a tax to service them), the legislature is without power to repeal the statute or otherwise impair the contract.

An elaboration of this rule was involved in *Shavers v. Duval County*.¹⁸ The court pointed out that the laws existing at the time and place of the making of the contract may affect its validity and construction and become a part of the contract as if they were expressly referred to therein. Thus, in the *Shavers* case, the Constitutions of the United States and of Florida, and the laws enacted under such Constitutions, are a part of the contract; but, again in reference to the *Shavers* case, the exercise of the power of eminent domain does not interfere with the inviolability of contracts clause of the Constitution. In the exercise of the power of eminent domain, the obligation of the contract may be impaired with the limitation that the sovereign shall pay just compensation for such impairment.

The case of *Minsky's Follies of Florida v. Sennes*¹⁹ involved a lessor who prepared a night club lease (for a period longer than one year), and the prospective lessee allegedly agreed to execute it; the lessee sent (to the lessor) several letters and telegrams, signed with his first name but containing his full name typewritten underneath, in which he referred to the "Inn deal" and "lease of" named "Inn." The lease was never executed. The lessor, at the express request of the lessee, procured a liquor license at a cost of \$100, and employed a watchman for the premises. On these facts, the court held that, since neither the telegrams nor the letters referred

16. 76 So.2d 877 (Fla. 1955).

17. 72 So.2d 48 (Fla. 1954).

18. 73 So.2d 684 (Fla. 1954).

19. 206 F.2d 1 (5th Cir. 1953).

to the proposed lease with requisite certainty, there was no writing to satisfy the Statute of Frauds; and neither the employment of a watchman nor the procurement of a license was sufficient possession or part performance to take the transaction out of the Statute of Frauds. It followed that the lessor could not recover for loss of the use of the premises, since to allow recovery would amount to indirect enforcement of the lease, thus subverting the Statute of Frauds. But, of course, the fact that the lease was unenforceable did not relieve the lessee of an implied obligation cast upon him by law, independently of the lease, to reimburse the lessor for moneys expended at the lessee's request and for his benefit.

The decision contains a reaffirmation of earlier announcements by the Florida court regarding the Statute of Frauds, namely: (1) that in order to satisfy the statute, the writing must be certain as to the parties, the subject matter, the promises upon both sides, and the consideration; (2) a memorandum may consist of more than one writing, but, if some of them are signed by the party to be charged and others are not signed, in order for the unsigned writings to be used to supply the essential elements of the contract, there must be some reference to them in the signed writing; and, (3) possession will not serve to take a transaction out of the Statute of Frauds unless such possession had been under and in pursuance of the lease.

No Florida case has been found where a contract of employment with a provision not to compete or work for a competitor has been upheld. In the absence of special equities, such contracts will not be enforced, and have generally been stricken down for "lack of mutuality". This same rule has been applied to support the refusal of injunctive relief in a case involving the enforcement of a restrictive covenant in a contract of employment. Applying this rule to the facts in *Aronid v. Grosman*,²⁰ the court affirmed the issuance of a temporary injunction restraining the defendant who was a director, stockholder, and officer of a corporation from competing or from working for a competitor. This decision was based on the factual mutuality of remedies arising from the stockholders' agreement to devote full time to corporate activities and from the special equities arising from the fiduciary relationship between the corporation and the officers and the directors. However, the allowance of a permanent injunction was held to be too severe in view of the fact that the defendant was, if at all, only technically a stockholder since his stock had been pledged, and, for all practical purposes, he had been barred from participating in corporate affairs.

The case of *Donnelly v. Mann*²¹ involved a mother's action against her daughter. The major contention was that the daughter had prevailed

20. 75 So.2d 593 (Fla. 1954).

21. 68 So.2d 584 (Fla. 1953).

upon the mother's weakened condition to secure the mother's agreement to an unconscionable contract to pay their joint expenses and devise to the daughter whatever was left at the mother's death. The Supreme Court held that the record sustained a finding that the agreement was valid and enforceable. Thus, the facts came under the rule that mere weakness of mind, unaccompanied by any other inequitable incident, is not a sufficient ground to set aside an agreement if the person to whom weakness of mind is ascribed had sufficient intelligence to understand the nature of the transaction and was left to act upon his own free will.

In an action to recover on the basis of an oral contract or general custom for damages to a tenant's property when the landlord failed to install storm shutters, the Florida Supreme Court held²² that, since the evidence disclosed a practice among some owners of large buildings and hotels to furnish and install shutters but did not show that the practice was general, the tenant could not recover on theory of a general custom which would create an implied obligation on the part of the landlord. The court invoked a very reasonable and dignified rule, namely: that in order for a custom to be general, it must be shown to be uniform, of long duration, compulsory, certain, reasonable, not opposed to public policy, and must be understood by both parties and contracted by them with a view of enforcement.

In the case of *Donahue v. Davis*,²³ which involved a suit to establish a joint adventure contract, the court had an opportunity to define a "joint adventure" as an agreement among two or more persons to purchase specific property for speculation or resale at a profit; the only distinction between such an agreement and one of partnership being the joint adventure's limited and specific object in view. The court had an opportunity to reaffirm the rule that a binding option contract requires a valuable consideration to support it, and, unless supported by a consideration, an "option" is a mere offer which may be withdrawn at any time before acceptance.

Although agreements to arbitrate disputes are generally looked upon with approval by the courts, and, although every reasonable presumption will be indulged to uphold arbitration proceedings which have resulted in an award, the fact remains that an agreement to submit in the future to final arbitration the rights and liabilities of the parties with respect to any and all disputes that thereafter may arise under the contract is, at least until a subsequent valid agreement is entered into, voidable at will by either party at any time before an award is made, and has no effect on the right of the parties to invoke the jurisdiction of courts. This conclusion is based upon the established rule that parties cannot, by such private executory contracts, oust the courts of the jurisdiction vested

22. *El Encanto, Inc. v. Boca Raton Club*, 68 So.2d 819 (Fla. 1953).

23. 68 So.2d 163 (Fla. 1953).

in them by law. Therefore, in *Fenster v. Makovsky*,²⁴ a provision in an alleged partnership agreement that all disputes concerning any cause related to functions of the partnership should be resolved by arbitration and that the decision of a majority of the board of arbitrators should be conclusive (with the same force as a judgment of the highest court of last resort), was held invalid, and could not be used as a bar to an action brought on the subject matter of the contract or as a ground for withholding relief in a court of equity.

Cases involving matters of
remedies, or
"Though This be madness,
yet there is method in it."

Hamlet, Act II, Sc. 2

The case of *Lewis v. Arthur*²⁵ involved a suit by a general contractor for specific performance of an oral agreement. In consideration of services rendered and to be rendered, the contractor was to receive shares of stock in a corporation to be formed by the parties to take title to land and erect houses thereon. The complaint alleged formation of the corporation and refusal of the defendants to issue stock to the contractor, notwithstanding performance by the contractor of all obligations under the agreement, except supervision of construction of houses and tender of such performance. The court held the complaint stated grounds for equitable relief. The majority of the court, in an opinion written by Justice Buford, insisted that the facts fall squarely under an earlier Florida case, *McCutcheon v. National Acceptance Corp.*²⁶ But, Justice Drew strongly dissented, maintaining that the only point settled by the *McCutcheon* case was that a contract for the sale of corporate stocks that have no recognizable value or which are procurable only from him who has agreed to sell may be specifically enforced in equity. In that earlier case, the court was not faced with a lack of mutuality of remedy. Therefore, in the *Lewis* case, Justice Drew reasoned that, since a contract for personal services will not be enforced in equity by compelling the rendition of services, the court cannot compel the plaintiff to perform the personal services which were a part of the consideration for the stock and hence, that there is *not* mutuality of remedy. Justice Drew's dissent is based on the rule that, if there is no mutuality of remedy, specific performance will not lie. Fundamentally, the answer to the dispute between Justice Drew and Justice Buford consists in determining whether the facts in the *Lewis* case come squarely under the *McCutcheon* case or under the *Calumet Co. v. Oil City Corp.*²⁷

24. 67 So.2d 427 (Fla. 1953).

25. 72 So.2d 397 (Fla. 1954).

26. 143 Fla. 663, 197 So. 475 (1940).

27. 114 Fla. 531, 154 So. 141 (1934).

The case of *Forbes v. Babel*²⁸ involved an action for specific performance of a contract to convey land. The contract expressly provided that time was of the essence, and that the purchaser was to complete the contract within 30 days from delivery of the abstract. No definite time was set for closing. The purchaser actually failed to complete the contract within the 30 days, but there was no attempt at any time to cancel or close the contract. There was no excuse given whatever for refusal to go through with the contract, though the purchaser was ready, willing and able to do so. The court held that waiver of performance was shown, and that the purchaser was not precluded from requiring specific performance by the vendor. The court, in answering the question as to whether the "time" provision of the contract was binding on both parties or whether it could be waived at the option of the seller, relied on the not-too-startling rule that the vendor cannot take advantage of a delay in performance which he condoned. This is true even when time is of the essence of the contract.

In *Clements v. Leonard*,²⁹ the court pointed out that, in accordance with earlier Florida cases on a purchaser's breach of contract to purchase realty, the vendor may either retain the property and sue at law for breach of contract (recovering as damages the difference between the agreed purchase price and the fair market value as of the date of breach), or sue in equity to require the purchaser to perform the contract (by accepting a deed to the property on payment of the price) and for a writ of execution against the purchaser's leviable assets on the purchaser's failure to comply with the terms and conditions of a final decree granting the vendor such relief. In the early Florida case of *McCaskill v. Dekle*,³⁰ the court held that an equity court is not authorized to render a deficiency decree in a suit to enforce a lien securing a purely legal liability. Subsequent references to the rule of that case have been by way of obiter dictum, and the premises of the *McCaskill* case have never been critically examined until so done by Justice Sebring in the *Clements* case. The latter decision's rule is that in a suit for specific performance of a contract to purchase realty, a personal decree may be rendered against the purchaser, and, if such decree is not satisfied by him in accordance with its terms, the property may be sold and the proceeds of the sale applied on the sum found by decree to be due the vendor. Insofar as the *McCaskill* case contravenes this rule, it is expressly receded from in the *Clements* case.

In *Issacs v. Deutsch*,³¹ the court was faced with the question of the collection of a debt arising out of a contractual obligation assumed by a father. In 1928, a contract was entered into between a husband and wife; the husband agreed to pay the wife a specified sum each week for the

28. 70 So.2d 371 (Fla. 1954).

29. 70 So.2d 841 (Fla. 1954).

30. 88 Fla. 285, 102 So. 252 (1924).

31. 80 So.2d 657 (Fla. 1955).

support of their minor child. The parties were divorced. Payments were made on the contract for about one year, the minor became of age in 1947, the father-husband died in 1952, and the suit to recover payments on the contract that accrued from 1929 to 1947 was instituted in 1953. The court held that the statute of limitations started running against each payment as it became due rather than upon the termination of the contract, that is, the date upon which the minor obtained his majority. Under this holding, recovery can be had only for payments that accrued within five years from the date that this action was brought. This rule is in accord with the great majority of cases from other jurisdictions involving similar contracts, and, by analogy, is also in accord with the rule in cases involving an obligation payable in installments — after all, there is no essential difference between a continuing contract and an installment contract. Three justices dissented in the *Issacs* case. The dissenting opinion insists that the majority opinion leads to an unjust conclusion in that it makes it impossible for the wife to realize anything for most of her labor and materials; to recover on such a contract, under the majority opinion, she would have had to bring a suit on each weekly payment. The dissent maintains that the contract was one to furnish labor and rations, and is a continuing one; thus, the statute of limitations should begin to run on all weekly payments from the date the child reached his majority (that is, when the labor was completed). “No other deduction can in justice be reached from an examination of collateral decisions.”³² After all is said, the question is one of interpretation.”³³ One thing definitely can be said about the dissenting opinion: it avoids the undesirable result of compelling the injured party, in order to protect his rights, to bring successive actions from time to time.

Ordinarily, the breach of an agreement is not regarded as a proper basis for the rescission or cancellation of a contract. But, as was held by the court in *International Aluminum Window Corp. v. Ferri*,³⁴ where the injury caused by the breach of an agreement is irreparable, or the damages that might be awarded would be inadequate, or difficult or impossible to determine, the injured party may resort to equity for rescission. This case involved an action by a patentee of a new type of window to cancel, for failure of consideration, a contract transferring a one-half interest in the patent to the transferee with the intention that the transferee would furnish necessary capital and business ability to produce the windows. He failed to do so. Hence, it would be difficult to find a factual situation more appealing to a court of equity.

Mention should be made of one other case dealing with the topic of rescission. In *Brown v. Coward*,³⁵ the court held that a purchaser's lack

32. E.g., mechanic's lien contracts cases.

33. 80 So.2d at 662.

34. 72 So.2d 31 (Fla. 1954).

35. 69 So.2d 174 (Fla. 1954).

of information, resulting from a careless indifference to the ordinary manner of obtaining information (e.g., by the purchaser investigating for himself the property before signing the option) rather than from a misrepresentation of the vendor, cannot serve as a basis for rescission of an option.

Two cases were particularly interesting from the standpoint of damages. In *Hyman v. Cohen*,³⁶ a tenant defaulted in the payment of rent; the landlord treated this as a termination of the lease and repossessed the premises and used them for his own purposes for the remainder of the term. In a suit by the tenant to recover one year's rent given the landlord as a deposit (which sum was to be forfeited if the tenant defaulted), the sum was held to be liquidated damages and not a penalty. Where actual damages for breach of an agreement are readily ascertainable and the sum stipulated to be paid in the event of breach is disproportionate thereto, the stipulated sum will be regarded as a penalty. If the forfeiture is incurred upon breach of any of several different covenants of widely varying importance, for any of which the sum to be forfeited is excessive, a provision for forfeiture will be held to be a provision for a penalty. This was the rule properly applied in the *Stenor* case.³⁷ But this rule has no application where the lease provides for a deposit "to secure full performance" of covenants thereof, without providing for forfeiture of deposit for mere breach of any of the covenants, but only upon premature termination of a lease by the lessor for default of the lessee. Thus holds the *Hyman* case. Insofar as decisions decided on the authority of the *Stenor* case may be construed to be contrary to the rule in the *Hyman* case, "they must now be considered expressly modified to that extent."³⁸

Having shown that the rule which controlled the *Stenor* case had no application to the facts in the *Hyman* case, the court applied other rules as relevant to the question of whether a provision for forfeiture of deposit is one for liquidated damages or for a penalty. For example, in determining whether the parties intended to stipulate for a penalty or for liquidated damages, the court will consider circumstances as of the time the agreement was entered into (as to whether the sums are disproportionate, and so forth). In doubtful cases, courts will construe a provision for payment of an arbitrary sum upon breach of contract as a provision for a penalty, rather than as an agreement for liquidated damages. But, where it is covenanted in a lease that the sum paid to the landlord by the tenant may be retained by the former in case the tenant is dispossessed from the premises by due process of law, the sum thus to be retained is presumptively liquidated damages and not a penalty.

36. 73 So.2d 393 (Fla. 1954).

37. *Stenor Inc. v. Lester*, 59 So.2d 673 (Fla. 1952).

38. 73 So.2d 393, 401 (Fla. 1954).

The court had the opportunity to discuss the topic of liquidated damages, again, in *Kanter v. Safran*.³⁹ In the absence of an express stipulation it will not be presumed that liquidated damages, stipulated to between landlord and tenant, include rents which have accrued at the time the lease is terminated; this is based on the reasons that such rents are capable of exact ascertainment at any time forfeiture might be declared, and that such rents are more in the nature of debt than of damages. If, however, the provision for the forfeiture of the deposit cannot be upheld as a stipulation for liquidated damages and is held to be a stipulation for a penalty, then the lessee can recover only that portion remaining after deducting the landlord's actual damages (including damages for loss of future rents if the deposit was intended to secure such loss); and, if the landlord has resumed possession and relet premises for account of the tenant, the tenant has no cause of action for recovery of the balance of the deposit until the end of the term, since it is not until then that the damages are finally ascertainable.

To create a contract by implication, there must be an unequivocal and unqualified assertion of right by one of the parties and such silence by the other as to support a legal inference of his acquiescence. Moreover, upon relinquishment or abandonment of leasehold premises by a tenant under circumstances which amount to repudiation of the lease agreement, the landlord is not required to relet premises for account of the tenant in order to preserve the landlord's right to general damages for loss of future rents.⁴⁰ This is simply an application to lease contracts of the general contract law doctrine of "anticipatory breach."

39. 68 So.2d 553 (Fla. 1953).

40. *Id.* at 558. See also *Hyman v. Cohen*, 73 So.2d 393 (Fla. 1954), and cases cited therein.