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PART THREE
PROPERTY LAW

SURVEY OF REAL PROPERTY LAW
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INTRODUCTION

The importance of property matters in Florida jurisprudence and economy is again evidenced by the mass of litigation and the amount of significant legislation in this area during the past biennium.¹ The creation of a Department of Water resources,² the change in procedure for the disposition of submerged lands,³ and amendments to the dower⁴ and mechanics' lien laws⁵ are among the most important legislative enactments.

Litigation concerning the homestead⁶ continued in significant quantity, and important issues relative to joint bank accounts indicate that these survivorship accounts⁷ will continue to plague the courts. Factually interesting cases⁸ arising from the mistaken improvement of wrong land reached pragmatic results at the apparent expense of some time honored equitable principles. The rights of owners adjacent to vacated streets where all conveyances were made in reference to a plat were adjudicated in a case of first impression,⁹ and disputed boundaries,¹⁰ tax titles¹¹ and mechanics' liens¹² frequently required judicial decision.

The subject is divided into seven principle headings as follows:

I. Vendor and Purchaser.
II. Deeds: Recording, Delivery, Cancellation and Reformation.

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1. The material in this survey includes the cases reported in 82 So.2d (Fla. 1955) through 96 So.2d 592 (Fla. 1957) and the enactments of the 1957 legislature.
2. FLA. STAT. §§ 373.071-373.251 (1957). See subtitle IV, Rights In Land, in text.
3. FLA. STAT. § 731.35(3) (1957).
4. FLA. STAT. § 84.05(11)(a) (1957).
7. See subtitle III, Estates, Dower, Homestead and Future Interests, in text.
8. Voss. v. Forgue, 84 So.2d 563 (Fla. 1956); Chavis v. Citizens Federal Savings and Loan Ass'n., 95 So.2d 581 (Fla. 1957); see subheading I, Vendor and Purchaser, in text.
10. See subtitle V, Special Titles, note 176 infra.
11. See subtitle V, Special Titles, in text.
12. See subtitle VI, Liens and Mortgages, in text.
III. Estates, Dower, Homestead and Future Interests.
IV. Rights in Land.
V. Special Titles.
VI. Liens and Mortgages.
VII. Landlord and Tenant.

No special section is provided to discuss new legislation as that material is incorporated into the appropriate principle division listed above. Legislative changes are indicated at the beginning of the appropriate material by the subheading legislation. Thus, a unified treatment of each topic is achieved. Access to particular material is provided by the generous use of headings and subheadings.

I. VENDOR AND PURCHASER

Legislation: Conveyances by corporations delinquent in tax payments; curative acts.—A new act\(^\text{13}\) specifically validating conveyances by corporations delinquent in the payment of taxes should have a salutary effect on the marketability of titles and ease the burden of title examiners. Heretofore the corporate taxing statute in effect prior to 1949, providing that corporations delinquent for six months should forfeit their charter privileges and be denied the facilities of the state courts,\(^\text{14}\) had cast doubt on the ability of such corporations to make valid conveyances. The preamble to the new act expressly states that it was not the intent of the legislature to place any undue restraint on the alienation of real property,\(^\text{15}\) and the act itself provides that conveyances, whether heretofore or hereafter made, by corporations not dissolved or expired, shall be valid notwithstanding they may be delinquent in the payment of their taxes.\(^\text{16}\) It will still be necessary, however, to ascertain that the corporation was in fact in existence at the time it received or conceived title. Another act\(^\text{17}\) validates deeds executed by limited guardians appointed under the Uniform Veterans' Guardianship law.\(^\text{18}\)

Mistaken improvement of another's land. — The equitable principle "all land is unique"\(^\text{19}\) and a doctrine of the common law, "improvements placed on another's land without the consent of the owner become part of the realty and title vests in the fee owner"\(^\text{20}\) were disregarded by the supreme

\(^{13}\) FLA. STAT. § 692.04 (1957).

\(^{14}\) FLA. STAT. § 610.11 (1931) now repealed. This statute has been replaced by FLA. STAT. § 608.35 (1957) which simply provides that such delinquent corporations shall not be permitted to prosecute or defend actions in the state courts.

\(^{15}\) FLA. LAWS 1957, c. 57-264 (preamble).

\(^{16}\) FLA. STAT. § 692.04 (1957).

\(^{17}\) FLA. STAT. § 694.14 (1957).

\(^{18}\) FLA. STAT. §§ 293.01-293.20 (1955).

\(^{19}\) McLINTOCK, EQUITY § 44, p. 105 (2nd Ed. 1948).

\(^{20}\) McCreary v. Lake Boulevard Sponge Exchange Co., 133 Fla. 740, 183 So.7 (1938).
court in Voss v. Forgue. The court in this case was faced with the problem of a person by mistake building a dwelling upon his neighbor's lot. The builder became aware of his mistake when he was almost finished and filed a bill in equity praying that he be allowed to purchase his neighbor's lot at a fair value or, in the alternative, that his neighbor be forced to purchase the building at a reasonable price. The chancellor entered a decree ordering the parties to exchange lots, both lots being substantially alike and neither having any intrinsic value. The decree was affirmed, the court saying, "There is no contention that either of the lots has any peculiar or intrinsic value. We do not approve appellee's carelessness or laxness in looking to the location of his lot but there is no showing that the appellant was harmed." Proof that this wasn't a once-in-a-million decision based upon a once-in-a-million fact situation was the case of Chavis v. Citizens Federal Savings and Loan Ass'n. In this case, thirteen months later, the court was presented with an identical set of facts; the houses were the same value, the lots were the same size, the chancellor ruled the same way—and the court affirmed on the basis of the Voss case. The equity-minded supreme court, disregarding some time-honored principles, apparently applied the maxim, "The Court of equity should frame its decree so as to protect to the greatest possible extent the conflicting interests of the parties."

Statute of Frauds; specific performance.—The cases involving specific performance during the past biennium reaffirmed many of the established principles of equitable remedies and announced very little new law. Specific performance was held to be the proper remedy in Perry v. Benson even though the vendee had brought a prior unsuccessful suit for the rescission of the contract based upon a defect in the title. The court held that the vendee could waive the defect and bring the second action, such action not being barred by the theory of election of remedies. The court, in Mortgage Investment Foundation v. Eller, reversed the lower court's strange refusal to grant specific performance to the successful claimant. In this case one Kindell had brought an action for specific performance and the appellant intervened, claiming that he also had a contract for the purchase of the land in question. Kindell's suit was dismissed as appellant was found to possess a paramount right. Nevertheless, the chancellor denied specific performance to the appellant on the basis that the title would not be clear until Kindell's time for appeal had run. The supreme court, stating that the unsuccessful claimant might always appeal, held that this possi-

21. 84 So.2d 563 (Fla. 1956).
22. Id. at 564.
23. 95 So.2d 581 (Fla. 1957).
24. These conclusions are derived from the court file, Chancery No. 18058 11th Jud. Cir.
25. Those referred to in the text to notes 19 and 20 supra.
27. 94 So.2d 819 (Fla. 1957).
28. 93 So.2d 868 (Fla. 1957).
bility should not be grounds for denying relief to the successful claimant. The statement, "If it is your client's intention to rescind the transaction then the deposit of $200.00 should be returned," was held by a divided court to be an offer of recission which was accepted by the vendor's letter asking to whose order the draft should be drawn. Once rescinded, the vendee's action for specific performance was properly dismissed. The chief justice, in his dissenting opinion, felt that the statement of the vendee was not a clear manifestation of an intention to rescind and, therefore, there was no "meeting of the minds." An agreement to rescind was probably reached in Van Dame Estates v. May, but the failure to reduce to writing the agreement to release the vendor was fatal to the vendor's defense in an action for specific performance. This result necessarily followed when it was affirmed that an agreement to release an interest in land is "squarely within the statute of frauds."

The court found that the vendee in Gates v. Thompson was entitled to equitable relief, but failed to specify in what manner the relief should be afforded. The facts were that the vendor contracted to sell land of which he only owned a one-half undivided interest, and the vendee brought an action for specific performance. In reversing the lower court decree dismissing the bill, the supreme court found the bill was not without equity and recommended equitable relief.

The court held that an agreement between two developers of a subdivision to share the profits in a joint venture does not fall within the Statute of Frauds. The agreement only stated that they would buy and sell land together and did not reflect any property transactions between the parties.

**Damages.** — The question of penalties versus liquidated damages was revisited by the court in Goldfarb v. Robertson. It was held therein that the earnest money deposited by a vendee was not returnable in the absence of special circumstances when the vendee refused to consummate the transaction. In the instant case the buyer demanded to see the books of the business because he suspected that some of the stock was stolen merchandise. The lower court found that there was no justification for such a demand, and hence, the buyer was in default. Since the deposit

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29. Id. at 870.
30. Hammond Realty Co. v. Wheaton, 90 So.2d 292 (Fla. 1956).
31. Id. at 294
32. 92 So.2d 816 (Fla. 1957).
33. Id. at 817. The Statute of Frauds is FLA. STAT. § 725.01 (1955).
34. 92 So.2d 420 (Fla. 1957).
35. Fla. R. Civ. P. 1. 8 (b). "Every complaint shall be considered to pray for general relief." Such relief, for example, might include the imposition of a lien on the vendor's interest in order to enforce the return of plaintiff's deposit.
37. 82 So.2d 504 (Fla. 1955). See Boyer, Survey of Real Property 8 MIAMI LQ. 389,390 (1954).
receipt contained no provision for stipulated damages, the amount of the deposit was the proper measure under the proposition that a vendee in default cannot recover sums paid on behalf of the purchase price.\textsuperscript{38}

Fraud; recission.—In this field the law has been well established in Florida that lack of information due to careless indifference or the negligent attitude of the buyer, in matters which are available to him through the use of ordinary means, is not grounds for recission.\textsuperscript{39} Those cases in which the conveyance was set aside rested upon the individual facts in each case. In one, the court held that a grant by an incompetent of his homestead was subject to recission,\textsuperscript{40} and in the second, a gratuitous conveyance of property by a debtor to a close personal relative was quite properly held fraudulent.\textsuperscript{41}

Miscellaneous.—The rule that a parol donee of land must show clear and convincing proof of an intention to transfer title\textsuperscript{42} was restated by the court in McKinnon v. Commerford.\textsuperscript{43} The parties in Cox v. Bellamy\textsuperscript{44} were rather confused as to their respective rights under an option, two assignments of that option and a fourth document called “Option Renewal.” The confusion arose because of different provisions in the various instruments relative to the clearing of title. In some of the instruments the vendees were given “reasonable times” starting at different dates to clear the vendor’s title. It was held that the vendor could not close out the interest of the vendees until he had given them notice that a reasonable time had expired.\textsuperscript{45}

II. Deeds: Recording, Delivery, Cancellation and Reformation

Legislation; acknowledgments.—An amendment to the statute regulating acknowledgments by members of the armed forces authorizes acknowledgment by spouses of military personnel in the same manner as acknowledgment by such personnel.\textsuperscript{46}

\textsuperscript{38} The rule was announced some time ago in Beatty v. Flannery, 49 So.2d 81 (Fla. 1950). See Boyer, note 37 supra.

\textsuperscript{39} In Frese v. Hayes, 240 F.2d 277 (5th Cir. 1957), the vendor recommended that vendee save some money and not hire a surveyor despite the advice of an attorney to obtain one. The court held that there was no fraud involved when the vendee later discovered an encroachment.

In Barrett v. Quesnel, 90 So.2d 706 (Fla. 1956), vendee pleaded that he was misinformed as to the income of the property, but the books were available for the vendee and he never availed himself of the opportunity to examine them.

\textsuperscript{40} Hartnett v. Latauro, 82 So.2d 362 (Fla. 1955).

\textsuperscript{41} Cleveland Trust Co. v. Foster and Wentz, 93 So.2d 112 (Fla. 1957).


\textsuperscript{43} 88 So.2d 753 (Fla. 1956); see note 174 infra.

\textsuperscript{44} 93 So.2d 64 (Fla. 1957).

\textsuperscript{45} Ibid.

\textsuperscript{46} Fla. Stat. § 695.031(4) (1957).
Recording.—The effect of a recorded but erroneously acknowledged instrument was the crucial issue in *Edenfield v. Winegard* 47 In this case one C. B. Edenfield executed a mortgage in favor of E. B. Edenfield; however the acknowledgment stated that E. B. Edenfield executed the mortgage. The instrument was recorded and sometime later C. B. Edenfield executed a second mortgage to the defendants. The defendants foreclosed their mortgage without naming E. B. Edenfield as a defendant. The instant suit was subsequently brought by E. B. Edenfield to foreclose the defendants’ interest in the land. The defendants contended that the mortgage of E. B. Edenfield was improperly acknowledged, not recordable, 48 and therefore, did not act as constructive notice. 49 The majority of the court, denying the application of this rule, held that there was no doubt that the person who appeared before the notary was the person who executed the mortgage. 50 In keeping with the tendency to uphold acknowledgments wherever possible, the mistaken name would be considered merely a clerical error. Thus, the court found substantial compliance with the recording statute and the defendants were then charged with constructive notice of the prior mortgage. 51 The minority of the court felt that this was an instance of the notary taking the acknowledgment of the wrong party—hence no acknowledgment. 52

The extent to which one is charged with constructive notice through recording was the principle issue in *Chatlos v. McPhersen* 53 where the competing titles had their origins in the famous “land boom” days. The plaintiff, seeking to quiet title, based his claim on a prior deed which was dated on December 16, 1925, but not recorded until December 15, 1927. In the interim between the date of the deed and the date of recording, a judgment was recorded against the grantor and an execution was issued. The execution resulted in a sheriff’s deed which was recorded on December 18, 1944, and it was through this deed that the defendant claimed title.

It is not clear just when the sheriff’s deed was issued, but this is immaterial as the execution was levied before the recording of the prior deed. The Florida recording act 54 protects creditors and subsequent pur-

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47. 89 So.2d 776 (Fla. 1956).
48. FLA. STAT. § 695.03 (1955), requires proper acknowledgement in order to entitle the instrument to be recorded.
49. This rule is well established. Lassiter v. Curtis-Bright Co., 129 Fla. 728, 177 So.201 (1937); see Tiffany, Real Property, § 1264 (3rd Ed. 1939).
50. FLA. STAT. §§95.90 (1957), requires the officer taking the acknowledgment to obtain satisfactory proof that the person making it is the individual who is described in, and who executed the instrument.
51. Edenfield v. Winegard, 89 So.2d 776 (Fla. 1956).
52. Id. at 779.
53. 95 So.2d 506 (Fla. 1957).
54. FLA. STAT. § 695.01 (1955). The statute in part reads: “No conveyance, ... shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to law; ... “
chasers for value without notice against prior unrecorded instruments. Thus, under the facts stated this far, it is clear that the defendant should prevail.

An additional factor not yet mentioned, however, was the fact that prior to all of the aforementioned transactions, the grantor-debtor had the particular lot released from a blanket mortgage. The plaintiff contended that this partial release would put everyone on notice of an impending sale (suggesting, apparently, at least an unrecorded contract in existence), as "it is common knowledge" that a developer obtains a partial release for the purpose of selling lots. The court wisely rejected this contention which would require subsequent buyers to search "outside" the record whenever a partial release of a blanket mortgage is found.

The case is sound. To constitute constructive notice of matters outside the record, the record itself should make some reference to those matters. A vendee can gain protection against possible interests intervening between the date of his contract and the date of closing by checking the records up to the very instant of closing. He might also insist that the vendor acknowledge the contract when made so that it can be recorded, thus preventing subsequent parties from gaining priority. Consistent with these views, it was held in Poladian v. Johnson that a "wild deed" executed and recorded by one not in possession and whose only interest in the land is an unrecorded contract to purchase, is not sufficient notice to defeat a subsequent purchaser. The court stated that a purchaser is only expected to exhaust the records and not to canvass the neighborhood to ascertain if there are any outstanding claims.

Reformation and cancellation.—Hedges v. Lysek presented an interesting set of facts. D, the common grantor, was the owner of two adjoining lots, Whiteacre and Blackacre. A small house was located near the dividing line on Whiteacre and Blackacre was unimproved. However D presumed, as did all subsequent parties, that the house stood on Blackacre. D entered into agreements for deed with A for Whiteacre and B.

55. See note 53 supra.
56. This, of course, is not easy. A foolproof method is to escrow the purchase money until the deed can be recorded and the record checked to see that no one else has gained priority. If the subsequent examination reveals that the grantor's title was still clear when the deed was delivered, then the purchase money is released and disbursed. To protect the grantor in case the subsequent examination reveals intervening superior rights, a quit claim deed back to the grantor may be "escrowed" with the money. In case intervening superior claims should arise, then the purchase money is returned to the grantee, and the quit claim deed recorded. If the title is found good and the money disbursed, the quit claim deed is returned to the purchaser and destroyed.
57. The instrument must be acknowledged to be entitled to recording. Generally, vendors may not want contracts recorded because their title will be clouded if the proposed transaction is not consummated.
58. 85 So.2d 140 (Fla. 1956).
59. Ibid.
60. 84 So.2d 28 (Fla. 1955).
for Blackacre. A then conveyed Whiteacre to the defendant and two days later D conveyed Whiteacre to A. B then found a purchaser for Blackacre and quit-claimed back to D who conveyed to the Plaintiff. The plaintiff then discovered that the house was located on Whiteacre and sought equitable relief in the following alternatives: (1) reform the deeds so that the house will be on the plaintiff's lot; or (2) allow the plaintiff to move the house onto Blackacre. The lower court held that by the doctrine of "after acquired title" the defendant was the owner of the house and lot and denied relief. The supreme court reversed, reasoning that all the parties to the many transactions relied on the fact that Whiteacre was unimproved and Blackacre was improved, and directed that a decree be entered allowing the plaintiff to remove the house from Whiteacre and place it on Blackacre.61

In Cook v. Adams62 the court approved the cancellation of a deed by the grantor for failure of consideration. The grantor, an aged woman, conveyed property to the defendant while reserving a life estate for herself. The consideration for this conveyance was that the defendants would take care of the grantor. Upon a showing that the defendants had failed to provide for the grantor, the deed was cancelled.

III. Estates, Dower, Homestead and Future Interests

Homestead: Legislation, special tax exemption.—Special tax relief is accorded paraplegic veterans by completely exempting their homesteads from taxation.63 Requirements of eligibility include: honorable discharge; service connected disability; and special pecuniary assistance from the Veterans' Administration because the disability requires specially adapted housing.64

Homestead conveyances, estate taxes, descent, exemption.—The effect of an inter-familial homestead conveyance on estate taxes was considered by the United States court of appeals in Nelson's Estate v. Commissioner.65 The land in question, which had been conveyed by the deceased husband to his wife, consisted of a citrus grove and a small tract of land upon which the parties lived. The tax court held that the conveyance was gratuitous and invalid.66 Thus, the wife was allowed to claim only a life estate in the property and was not allowed a marital deduction in computing the estate tax.67 In modifying the ruling, the court held that the assistance rendered her husband in the management of the grove was

61. Ibid. This case may be compared with Voss v. Forgue, note 21 supra, and Chavis v. Citizens Federal Savings and Loan Ass'n., note 23 supra.
62. 89 So.2d 6 (Fla. 1956).
64. Id. subsection (1).
65. 232 F.2d 720 (5th Cir. 1956).
66. Many Florida cases hold that gratuitous conveyances of the homestead are invalid. See Boyer, Survey of Real Property, 10 Miami L.Q. 389, 398 (1956).
adequate consideration to support that conveyance, but that the household services rendered were only those duties expected of "every rural housewife who aids her husband." The wife's contention that only her heirs have the right to attack the conveyance was rejected, the court stating that the commissioner has the right, as well as the duty, to seek any adjudication under law which is essential for the protection of federal revenue legitimately due.

In Florida cases involving homestead the court championed the rights of the surviving spouse and gave the homestead provision the liberal interpretation which one has come to expect under such situations. In a question regarding descent, the court held that an entire parcel which included, along with a dwelling house, a one story cottage and a two story garage apartment (used for rental income), was to be regarded as homestead. This is an affirmation of the doctrine of Cowdery v. Herring, in which it was said that the homestead provision was to "preserve as exempt a reasonable portion of the homestead improvement, . . . when it appears that the improvements concerned are being used as a means of making the owner's livelihood."

The fact that the income producing portion of the homestead is temporarily abandoned will not remove its homestead character so as to make it amenable to execution in satisfaction of a judgment lien according to the rule of Olesky v. Nicholas. In this case the court repudiated the argument that the constitution does not protect the homestead from satisfaction of a judgment obtained for the commission of a malicious tort. This protection of the constitution also extends to prevent the forced sale of homestead property to satisfy a foreign judgment on a note which contained a waiver of homestead. Such waiver is clearly against the public policy of Florida and unenforceable.

Taxation.—While it is well established law in other jurisdictions, the Florida court for the first time announced in Gautier v. Lapo that a lessee, with an option to purchase, has no estate in the property, either legal or equitable. This decision precludes a leaseholder, who exercised his option after January 1, from claiming the homestead tax exemption since he was not the title holder at the beginning of the year, and his after acquired title does not relate back to the date of executing the option.

68. 232 F.2d 720, 724 (5th Cir. 1956).
69. Id. at 724.
70. Union Trust Co. v. Glunt, 85 So.2d 877 (Fla. 1956).
71. 106 Fla. 567, 145 So.433 (1932).
72. Id. at 569, 435.
73. 82 So.2d 510 (Fla. 1955).
75. See also Fidelity and Casualty Co. v. Magwood, 107 Fla. 208, 145 So. 67 (1932).
76. 91 So.2d 324 (Fla. 1956).
contract. The court distinguished "contracts of sale" wherein the vendee is the equitable owner at the time of execution and the "lessee-option contract" in which case the vendee is only a tenant until he exercises his option.

Future Interests.—In Owenby v. Quincy the supreme court was divided four to three as to whether there had been a breach of condition in a fee simple determinable. Land was donated to the City of Quincy for use as a "park, playground or other recreational purposes," and the city was required to improve the property for such use within five years. Suit was brought nine years later to recover the property alleging that the city had done nothing except to place some fill on the property to correct a drainage problem. The majority, reversing the lower court, felt that this improvement fell below that which was contemplated by the parties at the time of the conveyance.

The creation and termination of life estates were the subject of two interesting cases. The first, a case of a careless scrivener, involved the construction of a deed which purported to convey a fee simple in the granting clause and only a life estate in the habendum clause. The court held that the statute abolishing the necessity of words of limitation rendered such words in the granting clause surplusage and, therefore, the intent of the grantor as expressed in the habendum clause would be controlling. The second case involved a suit by the guardian of an incompetent, the owner of a life estate, for rents and profits from the remainderman in possession. The defense interposed by the remainderman was that the incompetency of the holder of the life estate terminated her interest and the remainderman became the fee owner. The supreme court replied that "A person sent to the state hospital is not to be considered as having died hence having been divested of an interest in a life estate."

Dower; legislation.—A new statute of limitations on the rights of a widow to elect dower was enacted by adding subsection (3) to Florida Statutes section 731.35. The new subsection provides that any dower interest in realty will be barred unless the widow's written election is filed within nine months after the first publication of notice to creditors or three years after the death of her husband, whichever first occurs. A significant feature of the new provision is that such election must be filed and recorded within the time limits specified in the office of the clerk of the circuit

78. Guatier v. Lapof, 91 So.2d 324 (Fla. 1956).
79. 95 So.2d 426 (Fla. 1957).
80. Ibid.
82. FLA. STAT. § 689.10 (1957).
83. Kany v. Becks, 85 So.2d 843 (Fla. 1956).
84. Id. at 845.
85. FLA. STAT. § 731.35 (3) (1957).
86. Ibid.
court for the county wherein such realty is located.\textsuperscript{87} The former provision, which is still retained,\textsuperscript{88} simply provides that the election must be filed “within nine months after the publication of the first notice to creditors in the office of the county judge in whose court the estate of the deceased husband is being administered.” Thus, as to realty, such election now has to be filed in both the county judge’s court and the appropriate circuit court. A saving provision of the new legislation provides that no such claim will be barred if the written claim is filed prior to June 1, 1958.\textsuperscript{89} The new legislation should have a salutary effect on title marketability and reduce the probability of purchasers having unexpected dower claims asserted against their land.

In *Estate of Payne*,\textsuperscript{90} the court disallowed a set-off against an asset of the estate of a deceased husband prior to the allotment of the widow’s dower. The court followed *Murphy v. Murphy*\textsuperscript{91} which held that assets in which the widow has a dowerable interest are not subject to any liability which the deceased might have incurred, the estate being entirely liable for the indebtedness. The court distinguished the case of *Henderson v. Usher*.\textsuperscript{92} In this latter case the deceased had purchased securities on margin and had pledged them with the broker. Under the dower statute in effect at that time a widow could claim dower in all property possessed by her husband at the time of his death. Being pledged, the securities were in the possession of the broker and hence not subject to dower. The present statute\textsuperscript{93} allows the widow a dower interest in all property owned by the deceased husband; therefore the *Henderson* case is not controlling. It may be noted, however, that the present statute also provides “... nothing herein contained shall be construed as impairing the validity of the lien of any duly recorded mortgage or the lien of any person in possession of personal property.”\textsuperscript{94}

**Murder.**—Acquitted of the murder of her husband by reason of insanity, a surviving widow did not lose her right to claim dower in her husband’s estate.\textsuperscript{85} The statutory bar which precludes a convicted murderer from inheriting from his victim\textsuperscript{95} was held not controlling since there was no conviction of murder. The court further found no common law bar which prevented her from exercising her dower right. The contention that the acquittal in the criminal action would not be res judicata as to her criminal

\begin{thebibliography}{9}
\bibitem{87} Ibid. See Brooker, Dower: Fickle Dame of the Law, 32 Fla. B. J. 132 (1958).
\bibitem{88} FLA. STAT. § 731.35 (1) (1957).
\bibitem{89} FLA. STAT. § 731.35 (3) (1957).
\bibitem{90} 83 So.2d 109 (Fla. 1955).
\bibitem{91} 125 Fla. 855, 170 So. 856 (1936).
\bibitem{92} 125 Fla. 709, 170 So. 846 (1936).
\bibitem{93} FLA. STAT. § 731.34 (1955).
\bibitem{94} Ibid.
\bibitem{95} FLA. STAT. § 731.31 (1955).
\end{thebibliography}
responsibility in the probate proceedings\textsuperscript{97} was rejected. The court stated that if she had been convicted in a criminal action she would have been barred in the civil suit, so an acquittal should operate in the same fashion.

It is submitted that this argument of res judicata is beside the point. The decision is obviously one of policy. Clearly the statute barring a convicted murderer is not directly controlling. The widow was not convicted, and she was not claiming inheritance, but dower. The policy behind that statute, however, might have been used to defeat her claim. The cases involving tenants by the entireties so indicate.\textsuperscript{98} Dower has historically been a favorite creature of the common law, and the instant case indicates that it is still highly regarded by the Florida Supreme Court.

Cotenancies.—The application to bank accounts of real property estate concepts provides a fruitful source of litigation. In Spark v. Canny,\textsuperscript{99} a mother, eighty-three years old and in ill health, changed a sole bank account approximately six months before her death into a “joint account with the right of survivorship” between her and a daughter. The mother had also made her three daughters principal legatees under her will, and there was evidence that she intended for them to share equally in all of her estate. In deciding that the three daughters were equally entitled to the proceeds of the account, the court held that no joint tenancy with right of survivorship was created because of a lack of donative intent.

The court recognized that as between the depositors and the bank a survivorship account was created, but noted that such recognition would not necessarily determine the status of the account in regard to the litigants at bar. It was determined that the change in the account was made simply for the convenience of the decedent to provide a practical means of withdrawing funds to pay her expenses, and not for the purpose of vesting any beneficial interest in the other “joint tenant.” The court observed that the signature card would raise a presumption of a gift of the balance of the fund on the death of its creator, but that such presumption could be overcome by clear and convincing evidence to the contrary. Apparently such clear and convincing evidence was lacking in Colclazier v. Colclazier.\textsuperscript{100}

\textsuperscript{97} Stevens v. Duke, 42 So.2d 361, 363 (Fla. 1949), holding that a judgment in a criminal action is not res judicata in a civil action. Cf Carter v. Carter, 88 So.2d 153 (Fla. 1956). In an action to recover as the beneficiary of her husband's insurance policy, containing a clause prohibiting payment to one who feloniously kills the insured, the wife was prohibited from pleading her acquittal in the criminal action.

\textsuperscript{98} There is a great disparity of results among the jurisdictions in these cases. See comment Homicide—Effect on Wrongdoer’s Inheritance, Interstate and Survivorship Rights, 7 Miami L.Q., 524, 528 (1953). Florida takes the intermediate position that violent homicide of one cotenant by the other destroys the tenancy by the entireties in a manner similar to that of divorce, and such cotenant is treated as a tenant in common. The wrongdoer thus neither gains nor loses by his wrongful act. The rule applies although the slaying cotenant is not convicted of murder. See Ashwood v. Patterson, 49 So.2d 848 (Fla. 1951), where the killer committed suicide. The rule was applied. See also Boyer, Survey of Real Property Law, 8 Miami L.Q. 380, 403-404 (1954).

\textsuperscript{99} 88 So.2d 307 (Fla. 1956).

\textsuperscript{100} 89 So.2d 261 (Fla. 1956).
where the court recognized the claim of the widow, as a surviving tenant by the entireties, to the balance of a joint account.

The cases add to the perplexities of attorneys in advising clients as to their rights arising out of similar funds. While giving presumptive effect to the signature cards, the court nevertheless makes it clear that the signature cards are not the sole criteria in establishing the right of the survivor to the balance of such accounts. In this manner the reliability of such accounts in accomplishing the apparent objective of the depositor is weakened. On the other hand, however, no injustice is done in cases of this kind in inquiring into the real intent of the parties to the transaction. The balance of the fund is on hand, and the rights of the claimants can be seasonably ascertained. If in fact the parties intend to create a genuine survivorship account, that intention will be recognized; but if in fact no such result is intended, the real intent of the parties will be effected.

The problem of tracing withdrawals from an alleged bank account tenancy by the entireties was twice considered by the supreme court. In re Estate of Lyons, the decedent had opened two accounts in the joint names of himself and wife. Later, he withdrew the funds from one account to open a third in his sole name, and he also had his wife's name removed from the signature card of the second account. After the death of the husband the wife sought to trace the funds of both accounts so that she could claim the proceeds as the survivor of an estate by the entireties. In denying the survivor's claim, the court held that the signature cards alone were not sufficient indicia of an intent to own the accounts by the entireties. The decision followed an earlier one which recognized bank accounts by the entireties but cautioned that "Such implication (of an intention to create an estate by the entireties) may not, for obvious reasons, be indulged where a bank account or bonds simply payable to a man or his wife are concerned." In Winters v. Parks, involving a widow who was seeking to trace funds withdrawn from a joint bank account to purchase realty, the court reached a similar result.

The decision denying relief to the widow is sound, but these cases seem to raise as many questions as they solve. It will be noted that the unarticulated assumption of both cases seems to be that tracing would be allowed if there had been shown a clear intent to create a tenancy by the entireties. Thus, there would seem to be an open invitation for survivors to attempt a tracing of former depleted accounts.

101. 90 So.2d 39 (Fla. 1956). for the payment of the proceeds to the survivor of the joint account, but it does not specify that any particular estate is created.
102. See Fla. Stat. § 659.29 (1955). This statute exempts the banks from liability.
104. 91 So.2d 649 (Fla. 1956).
The concept of a tenancy by the entireties in bank accounts is anomalous as there is no joint seisin, in fact no seisin at all, and no joint control as in the corresponding estate in real property.\textsuperscript{106} Since either party normally can withdraw funds from the account, it differs radically from the similar real property interest where one of the parties is unable singly to convey even his own interest.\textsuperscript{106} Hence, if the court desires to adhere to former decisions recognizing such estate or interest in bank accounts, it should authoritatively establish the characteristics. Assuming an intent to establish a survivorship account in the first instance, a logical position would be that either party, subject to contrary agreement between them, can withdraw or deposit funds, or even terminate the account completely, and dispose of the corpus, but that on the death of one, the survivor is entitled to the balance. This result probably conforms to the actual intent of the parties in similar cases and is not without authority.\textsuperscript{107} No tracing of withdrawals should be allowed except, possibly, where it is determined that no beneficial interest whatever was intended for the co-depositor and he withdrew funds.

In a case of first impression,\textsuperscript{108} it was held, contrary to holdings in some jurisdictions,\textsuperscript{109} that a surviving widow of an estate by the entireties is not entitled to contribution from the estate of her deceased husband for one half the unpaid balance on a purchase money mortgage. The rationale supporting this view was: (1) the widow and deceased each owned the whole estate and consequently the whole obligation, the death of either neither enlarging the one's estate nor the debt of the other; and (2) the personal estate of the deceased would not benefit by contributing to the debt, and to make it do so would be inequitable.\textsuperscript{108}

\textit{Partition: Legislation.} — The partition statute relating to costs was amended to provide that the interested parties should pay the cost of defendant's attorney as well as the plaintiff's, such costs to be com-

\textsuperscript{105} These survivorship bank account cases are exhaustively analyzed in Brooker, Survivorship in Joint Bank Accounts, 31. Pla. B. J. 183 (1957). See note 10 Miami L.Q. 116 (1955), concerning the Lyons case and containing a general analysis.

\textsuperscript{106} Cooper v. Maynard, 156 Fla. 534, 23 So.2d 734 (1945); Straus vs. Straus, 148 Fla. 23, 25, 3 So.2d 727 (1941); Anderson v. Trueman, 100 Fla. 727, 732, 130 So. 12 (1930); Mailey v. Smith, 89 Fla. 303, 306, 103 So. 833 (1925).

\textsuperscript{107} Crawford v. McGraw, 61 So.2d 484 (Fla. 1952), Malone v. Walsh, 315 Mass. 484, 53 N.E. 2d 126 (1944), both involving joint tenancies with the right of survivorship; Seymour v. Seymour, 85 So.2d 726 (Fla. 1956), Matter of Totten, 179 N.Y. 112, 71 N.E. 748 (1904), both involving "Totten" trusts. In Ohio where neither tenancies by the entireties nor joint tenancies with the right of survivorship are recognized, survivorship rights may be acquired by contract. See Sage v. Flueck, 132 Ohio St. 377, 7 N.E. 2d 802 (1937); note 6 Ohio St. L. J. 191 (1950); Ohio Rev. Code Ser. § 1105.09 (Baldwin 1953).

\textsuperscript{108} Lopez v. Lopez, 90 So.2d 456 (Fla. 1956).

\textsuperscript{109} Cunningham v. Cunningham, 158 Md. 372, 148 Atl. 444 (1930); In re Dowler's Estate, 368 Pa. 519, 84 A.2d 209 (1951); In re Kershaw's Estate, 352 Pa. 205, 42 A.2d 538 (1945).

\textsuperscript{110} The case is noted in 11 Miami L.Q. 526 (1957).
mensurate with the service rendered and to be determined on equitable principles at the discretion of the court.\textsuperscript{111}

That the right to partition may be waived was affirmed in \textit{Condrey v. Condrey}.\textsuperscript{112} In this case the parents, through a straw conveyance, created a tenancy in common with their son and daughter-in-law in consideration of the son's promise of support. In a partition suit brought by the son, the parents' defense was an oral agreement not to partition. The oral agreement was held removed from the Statute of Frauds because the parents' consideration had been fully executed by the conveyance of the property and the creation of the estate. The court added that partition should be denied if such relief would be clearly inequitable or result in fraud.

The ownership of property by a man and woman not ceremonially married again required the supreme court to determine its proper disposition after the death of the parties.\textsuperscript{113} The decision, partly denying the claim of the "wife's" administrator: (1) found insufficient proof that property was purchased with funds of the woman, and refused to impress a constructive trust on individually held property; (2) similarly found insufficient proof of a joint venture; and (3) finding insufficient evidence of a common law marriage, thus precluding an estate by the entitieties, decreed that jointly held property was owned as tenants in common and should be equally divided.\textsuperscript{114}

\textbf{IV. Rights in Land}

\textit{Legislation: water law.} — The creation of administrative control over many of Florida's water problems is one of the most significant property enactments during the past biennium.\textsuperscript{115} Henceforth, the major responsibility for the systematic development, conservation and allocation of water resources will be vested in the Department of Water Resources and the State Board of Conservation. Thus, it can be expected that a more orderly and rational settlement of water disputes will result. Decisions will be made by experts viewing the problem on a state or regional basis rather than on the traditional judicial level which considers primarily, if not exclusively, only the rights of the litigants before the court. Existing common law riparian and other rights are preserved, however.\textsuperscript{116}

The Department of Water Resources was created in 1957 after an extensive study by, and on the recommendation of, the Water Resources...
Study Commission. This Commission was created in 1955.\textsuperscript{117} As viewed by the Study Commission, the solution to Florida's water problems required three steps: "First, insure that legal authorization exists for the capture, storage, and use of water in excess of reasonable uses; second, authorize the diversion of such water beyond riparian or overlying land; and, third, provide means of restricting unreasonable withdrawals of water in areas where such withdrawals exceed the natural replenishment of such waters, or where such withdrawals exceed or threaten to exceed the natural replenishment of such waters, or where such withdrawals render the waters unfit for use by reason of salt water intrusion or other causes."\textsuperscript{118} The act creating the Department of Water Resources provides for all three measures.

The purpose of the act as expressed therein is to effect "the maximum beneficial utilization, development and conservation of the water resources of the state in the best interest of all its people and to prevent the waste and unreasonable use of said resources."\textsuperscript{119} However, "the present property rights of persons owning land and exercising existing water rights appertaining thereto shall be respected and such rights shall not be restricted without due process of law nor divested without payment of just compensation; and there shall be no authorization to divert water from springs (or downstream therefrom), now developed and operated for recreational purposes or as tourist attractions, to a degree that will materially interfere with such use."\textsuperscript{120}

The Department is generally empowered to accomplish the purposes of the act with the supervision and approval of the State Board of Conservation, and to that end the Department is given broad powers of conducting research and study and of compiling statistics.\textsuperscript{121} The Board, on the other hand, is given the following general powers and duties:

To authorize the capture, storage and use of water of any watercourse only in excess of average minimum flow at the point of capture; to authorize the capture, storage and use of water of any lake only in excess of average minimum level; to authorize the capture, storage and use of ground water only in excess of average minimum elevation at the point of capture; and to authorize the diversion of such waters beyond riparian or overlying land; provided that such capture, storage, use or diversion of water from a surface or ground water source will not interfere with the reasonable uses existing at the time of the beginning of the capture, storage, use or diversions.\textsuperscript{122}

\textsuperscript{117} Laws of Fla., c. 29748 (1955).
\textsuperscript{118} Fla. Water Resources Study Comm'n, Florida Water Resources, a Report to the Governor and the 1957 Legislature, 15 (1956).
\textsuperscript{119} FLA. STAT. § 373.101 (1957).
\textsuperscript{120} Ibid.
\textsuperscript{121} FLA. STAT. §§ 373.111, 373.131 (1957).
\textsuperscript{122} FLA. STAT. § 373.141 (1957).
Thus, in essence, existing common law rights as to streams or lakes, unchanneled surface waters and percolating or underground waters are preserved. It is clear, however, that (except as to existing reasonable uses), the legislation envisions no common law rights to flood waters, or any other surplus waters, surface or underground, in excess of average minimum level or elevation. The act in effect declares that these surplus waters can be captured, stored, and used by the state, even to the extent of being diverted from riparian or other land from which they are captured, to the best interest of the people as a whole.

The philosophy of the new law that there is no common law right of the landowner to excess waters is generally in accord with the dictum of the Florida Supreme Court in *Tilden v. Smith*, wherein the court stated:

> Flood waters which are of no substantial benefit to a riparian owner or to his land, and are not used by him, may be appropriated by any person who can lawfully gain access to the stream, and may be conducted to land not riparian, and even beyond the watershed of the stream, without the consent of the riparian owner and without compensation to him. But where the water in question, although in a sense high water or flood water, is nevertheless a part of the regular and usual flow of the stream for a considerable period of each year, and at a time when such flow is of substantial use and benefit to the riparian lands, or the flow of such water in its accustomed place is necessary to the gathering of water in subterranean strata from which the owners of the underlying lands are entitled to take it, there is no right of appropriation for non-riparian use as against the riparian owners.

It would appear that the common law right of anyone to take these excess waters, in view of all the limiting factors announced in the decision, is a most tenuous one. Clearly, provision for capture of such waters by the state and subsequent use thereby is desirable and much more practicable. It is to be hoped that the limiting factors expressed in *Tilden v. Smith* will generally not be regarded as vesting common law rights in any surface owner to flood or surplus waters so as to restrict the power of the state under this new legislation.

It may be noted that the Board of Conservation is a management rather than an operating agency. It is not empowered to build the necessary dams, canals or other works for the capture, storage or diversion of excess waters. Instead, it grants such authorization to individuals or groups who must supply the necessary physical facilities. The Board is specifically

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123. 94 Fla. 502, 113 So. 708 (1927).
124. Id. at 510-511, 113 So. at 711.
125. See note 123 supra.
empowered to so authorize any legally constituted water management district. Such districts generally have the advantage of taxation or assessment powers whereas the Board does not.

The 1957 legislature also provided a method for the erection of structures in state owned navigable and non-navigable streams for the capture and diversion of the water. Riparian owners and grantees of easements from riparian owners may obtain this authority from the Trustees of the Internal Improvement Fund. Hence, in these situations, applicants must obtain a permit from the State Board to divert the water, and another from the Trustees of the Internal Improvement Fund for the erection of the structure. Of course, both boards have the same membership since they are both ex officio bodies consisting of members of the state cabinet.

Legislation; submerged lands.—Significant changes have also been enacted by the 1957 legislature relative to the title and disposition of submerged lands within the state. Section 253.12 of the Florida Statutes was amended to provide administrative and detailed procedure for the disposition of submerged sovereignty tidal and bottom lands. The basic policy is retained that the title to such lands is vested in the Trustees of the Internal Improvement Fund, but the method of disposition is altered.

By former legislation dating from 1856, the state granted the title to such lands to the riparian owners and gave them the right to bulkhead and fill in their land to the edge of the channel. Although the statute appeared to vest the title automatically in the riparian owners, it was decided that such grant was provisional and conditioned upon the riparian owners' compliance with the statute. Until the owners actually filled the land it was subject to reversion to the state at any time. This legislation is expressly repealed by the new act, but titles previously acquired by the upland owners under former provisions are confirmed.

128. See note 126 supra at 138.
130. See note 126 supra at 146.
131. Ibid.
135. Fla. Stat. § 271.01 (1955). This statute and others were significant in Trustee of the Internal Improvement Fund v. Claughton, see note 145 infra.
Under the new legislation the Trustees of the Internal Improvement Fund may convey affected submerged lands and grant permits for their filling and development after due application, notice and hearing. All land between the high water mark and the bulkhead line as established in accordance with other provisions of the act may be conveyed only to the upland owner.

Additional sections are added to chapter 253 of the Florida Statutes. These sections authorize counties and municipalities with the approval of the Internal Improvement Fund to establish bulkhead lines offshore from existing lands and islands. Administrative procedures for establishing such lines and for obtaining permits for filling to the bulkhead lines are also added. It is further provided that the lands shall not be filled beyond bulkhead lines as such expansion "shall be deemed an interference with the servitude of commerce and navigation ..." Generally, existing rights are preserved and a number of exceptions are provided. On the whole, the legislation appears to be a pragmatic and sensible solution to a problem of increasing importance. Instead of a carte blanche grant by legislative fiat to upland owners irrespective of the size of the land and the effect on the public as a whole, the administrative determination in each instance of the proper dividing line between public and private interests may be expected to result in fair decisions and an orderly development of Florida's vast waterfront lands.

The title to submerged lands and the right of an island owner to bulkhead and fill were the critical issues in Trustees of the Internal Improvement Fund v. Claughton. The case reviewed at length the history of the island, tracing its development from an original five acre tract, to its present size of twenty and seven-tenths acres, and to its proposed size of more than seventy acres if the right of the owner to further fill were recognized. The history, scope and relationship of all the applicable legislative acts, in addition to principles of estoppel, were utilized in arriving at the conclusion that the present owners were entitled to the twenty and seven-tenths acres but not entitled to expand the boundaries. The case should be consulted for detailed analysis and study.

Beach erosion; pollution. The Trustees of the Internal Improvement Fund are designated the erosion agency of the state and are authorized to establish and maintain a department of beach and shore erosion. The Trustees are also authorized to make rules and regulations for the investiga-

140. FLA. STAT. § 253.12 (1957).
141. Ibid.
142. FLA. STAT. § 253.122 (1957).
143. Id. § 253.122 (1) (1957).
144. Id. §§ 253.12 (1), 253.126 and 253.129 (1957).
145. 86 So.2d 775 (Fla. 1956).
146. FLA. STAT. § 253.65 (1) (1957).
147. Id. § 253.65 (2).
tion of erosion conditions along Florida shores, and to perform the functions (also enumerated in the statute), of the department of beach and shore erosion in case no such department is created. A section is added to chapter 387 of the Florida Statutes relating to water pollution to provide the remedy of injunction to restrain violations of the chapter, and the sovereign immunity of the state is waived permitting suit in the event any temporary injunction or restraining order is issued without requiring bond, or is otherwise improperly, erroneously or improvidently granted.

Covenants and easements.—A partial review of the principles of privity of estate and equitable servitudes was prompted by a remote grantee's attempt to cancel certain restrictive covenants which were part of a general development scheme. Privity of estate was not in issue since the action was in equity and not at law. However, the court, by way of dictum, approved the Clark concept of privity of estate, and quoted his criticism of the other two views as being “supported neither by ancient law nor modern policy.” The grantee having taken title with both actual and constructive notice of the restrictions, and there being no change in the character of the neighborhood, the equitable servitudes will be enforced against him regardless of privity of estate technicalities.

Affirmative relief in the form of cancellation of restricted covenants because of an alleged change in the neighborhood was denied in Wahrendorff v. Moore. The case presents an interesting problem of interpretation because the covenants provided for both restriction on use to single family residences and for the applicability of zoning regulations (the parcel in controversy having been rezoned for business purposes). The effect of rezoning was considered evidence of a change in the neighborhood but

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148. Id. § 253.65 (1).
149. Id. § 253.65 (3).
150. Id. § 253.65 (4).
151. FLA. STAT. § 387.10 (1) (1957).
152. Vetzel v. Brown, 86 So.2d 138 (Fla. 1956).
154. See Wheeler v. Schad, 7 Nev. 204 (1871), requiring also a succession of estate between the covenantor and covenantee at the time the covenant is made, and Morse v. Aldrich, 19 Pick. 449 (Mass. 1837), requiring the parties to the covenant to have a mutual and simultaneous interest in the same land.
155. 93 So.2d 720 (Fla. 1957). That the principle of changed circumstances is available not only defensively but also affirmatively is well established in Florida. Osiris v. Barton, 109 Fla. 556, 147 So. 562, 88 A.L.R. 394 (1933), and 129 Fla. 184, 176 So. 65 (1937); Barton v. Moline Properties, 121 Fla. 683, 164 So. 551, 103 A.L.R. 725 (1935); Edgewater Beach Hotel v. Bishop, 120 Fla. 623, 163 So. 214 (1935); Dade County v. Thompson, 146 Fla. 66, 200 So. 212 (1941).
156. See note 152 supra, the land in controversy was also zoned for business purposes, but the court did not discuss the effect of such zoning regulation. In Tolar v. Meyer, 96 So.2d 554 (Fla. 1957), the covenant was also upheld in spite of a more lenient zoning regulation.
not conclusive, and the chancellor's determination of the covenant's applicability upheld. As to the conflict between the covenant and zoning, the court concluded that the terms of the conditions themselves indicated that the more restrictive requirements should prevail. A dissenting opinion was to the effect that although normally the more restrictive of the two—zoning regulations or covenants—would prevail, that rule should not apply here because the agreement as to zoning was itself a covenant, and a proper interpretation, along with the general principle of favoring unrestricted use, should give the zoning regulation priority.

In *Grentner v. Le Jeune Auto Theatre* the unreasonable use of certain light by the defendant, a used car dealer, which resulted in a breach of the covenant not to make any use of the property which would be objectionable to the plaintiff's adjacent "drive in," was enjoined. In so holding the court reiterated its position in *Sinclair Refining Co. v. Watson*. A "sale" by the county commissioners of a "useless easement" was held not violative of the statute requiring competitive bids because the county's interest was deemed infinitesimal.

**Water rights.**—In *Kock v. Wick* the right of a city-lessee of a narrow strip of land contiguous to appellants' property—to draw off percolating waters for sale to the public was restricted. A municipality as such gets no additional rights to percolating waters, and, therefore, like an individual lessee or owner, is only entitled to make a "reasonable use" of the percolating waters. In *Hayes v. Bowman* it was decided that an upland riparian owner, whose property abuts navigable waters, is entitled to have his riparian rights, including those of unobstructed view and access to the channel, preserved over an area "as near as practicable" (but not necessarily at right angles as claimed by the owner), in the direction of the channel. The application of this rule will necessitate the resolution of each individual controversy upon its own particular facts rather than on any predetermined geometric formula based upon the angle of projection of the boundary lines of the upland owner's lot. In addition certain Florida

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157. Wahrendorff v. Moore, 93 So.2d 720, 723 (Fla. 1957).
158. 85 So.2d 238 (Fla. 1956).
159. 65 So.2d 732 (Fla. 1953). "While covenants restraining the free use of real property are not favored . . . public policy . . . favors the fullest liberty of contract and the widest latitude possible in the distribution of one's property . . . so long as the restraint is within reasonable grounds."
160. Iv. Enterprises v. Atlantic Island Civic Ass'n., 90 So.2d 607 (Fla. 1956). A prior decree had enjoined the use of the easement by the county, and had restricted its use to specific property owners.
161. FLA. STAT. § 125.35 (1957).
162. 87 So.2d 47 (Fla. 1956).
163. 91 So.2d 795 (Fla. 1957). The case may also be noted for the doleful observation that a view of the "bright white tower of Stetson Law School which shines as a beacon of learning on the eastern horizon" is not one of plaintiff's riparian rights. Id. at 801.
164. FLA. STAT. §§ 253.12 to 253.15, 271.01, 271.07 to 271.09 (1955), and others.
statutes pertaining to submerged lands were discussed, but some of these were modified by the 1957 legislature.165

The determination of what rights are included in the term "riparian rights" perplexed the supreme court. Title to the bottom of navigable lakes being in the state, a riparian owner (in the absence of statute),166 has no right to dredge soil from the bottom of the lake in order to add a peninsula to his land abutting the lake.167 A riparian owner whose land abuts a small arm of a large navigable lake, however, has a right of ingress and egress to the main body of the lake, and this right may not be infringed by the State Road Department.168

Navigable waters.—A body of water to be considered navigable in Florida must be “permanent in character, of sufficient size and so situated that it may be used for purposes common or useful to the public in the locality.”169 A non-navigable inland lake may be privately owned; and if so owned a county is unable to secure any rights to fish or boat thereon under the guise of a condemnation for a public purpose.170

V. SPECIAL TITLES

Legislation.—The Board of County Commissioners is authorized and empowered to convey to the record fee simple owners without further public notice and without consideration in those instances where land, formerly acquired by the county for delinquent taxes, was sold under the provisions of section 194.47 of the Florida Statutes and the former tax deed was invalid because the purchaser, or one of the purchasers, was the clerk of the circuit court of the county conducting the sale.171 Under an amendment to the statute regulating proceedings of eminent domain, the defendant may also recover damages to his remaining adjoining property.172

165. See notes 132-145 supra.
166. FLA. STAT. § 271.01 (1957), granted certain submerged land to upland owners. This statute was repealed in 1957; see note 138 supra.
167. McDowell v. Trustees of Internal Improvement Fund, 90 So.2d 715 (Fla. 1955).
169. Baker v. State, 87 So.2d 497, 498 (Fla. 1956). The United States Supreme Court’s definition of “navigable” is quoted with approval by the Florida court: “That navigability in fact is the test of navigability in law, and that whether a river is navigable in fact is to be determined by inquiring whether it is used in its natural and ordinary condition as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.” Oklahoma v. Texas, 258 U.S. 574 (1922).
170. Osceola County v. Triple E Development Co., 90 So.2d 600 (Fla. 1956).
172. FLA. STAT. § 73.10 (1957).
Adverse possession.—In Levering v. Tarpon Springs a municipality failed in its attempt to acquire title by adverse possession to that portion of the defendant's land upon which it mistakenly constructed a waterworks in 1924. The city's actions in assessing and collecting taxes on the land, and its publishing an official map showing the defendant's lot to be free of any encroachments of the water works were held to be completely and totally inconsistent with any hostile or adverse claim of ownership.

A person who takes possession of a tract of land apparently believing it to be a gift, when in fact no gift is intended, is a parol licensee and not a parol donee. Consequently, he is a permissive user and regardless of how long he remains, or how many improvements he makes, his interest cannot ripen into title. Similarly, when possession is obtained in a fiduciary capacity (as agent), the unauthorized issuance of a deed to the fiduciary (by the principal's wife), cannot transform the agent into an adverse possessor.

In Van Meter v. Kelsey, involving a disputed boundary, the chancellor's finding that there was insufficient evidence of adverse possession was approved. The doctrine of acquiescence was also held inapplicable because there was insufficient evidence that the fence was agreed upon as the boundary between the two properties; and the fact that original entries were made under an earlier survey did not control. Under these facts, where the parties actually accept patents under the second survey and receive a full quota of land, although the boundary may differ, apparently, and justly so, the rule that the first survey controls is inapplicable.

Tax deeds.—In Newmons v. Lake Worth Drainage District the supreme court considered the applicability of the four year tax deed statute of limitations to "Murphy" titles. It was specifically held that this statute of limitations has no application, as the grantee of a "Murphy" tax deed gets an absolute and indefeasible title as of the effective date of the deed.

The limitations statute in question, second 196.06 of the Florida Statutes, has alternative provisions. It provides (1) a bar to an action against the tax title holder who goes into possession and remains for four years; and (2) a bar to an action by the tax title holder who fails

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173. 92 So.2d 638 (Fla. 1957).
174. McKinnon v. Commerford, 88 So.2d 753 (Fla. 1956).
176. 91 So.2d 327 (Fla. 1956).
177. Id. at 330. See Boyer, Survey of Real Property Law, 8 Miami L. Q. 389, 419 (1954), for a discussion of the doctrine.
178. Id. at 332, Boyer at 402 for a discussion of the doctrine.
179. 87 So.2d 49 (Fla. 1956).
182. Newmons v. Lake Worth Drainage Dist., 87 So.2d 49 (Fla. 1956).
183. Ibid.
to get possession within four years of his tax title, thus allowing the land to remain in the adverse possession of another. In the Newmons case the grantee of the "Murphy" deed apparently neglected to gain possession of the land until after four years had elapsed. It was held that the four year statute of limitations was no bar to the action, that the aforesaid statute applies only to tax titles acquired under the provisions of chapter 194,184 and that the provisions of that chapter and of the "Murphy" legislation are mutually exclusive.185

The same four year statute of limitations, its relationship to adverse possession generally, and the effect of a merger title were significant issues in Gates v. Roberts.186 In this case the former owners of the land187 repurchased the original tract from the Trustees of the Internal Improvement Fund in 1941. In the meantime the defendants in 1939 had gone into adverse possession when they commenced to farm the plaintiff's land along with their own. Plaintiffs instituted suit in 1953 to recover possession of the land, and the defendants relied on the four year statute of limitations applicable to tax title holders.188 The defendants probably could not have prevailed under general adverse possession statutes189 as they were adverse possessors without color of title and probably did not pay the taxes.190

It was held under the particular facts of this case that the four year statute of limitations was no bar.191 Although apparently assuming the statute would normally bar a tax title holder under similar circumstances, the court held it has no such effect where the former owner is the tax certificate holder. In such cases, contrary to the usual situation of a tax title constituting a new and original title, the reacquisition simply operates as a payment of taxes by the former owner, his two titles merging into one.192 Hence, the defendant adverse possessors can rely only on the general statutes of limitation and not the special one relating to tax titles.193

The case does not specifically state whether the former owner is claiming under a "Murphy" or other type of tax deed, but the rationale seems broad enough to cover both situations. If, however, as appears likely, a "Murphy" deed was involved,194 the court could have reached the same

185. See note 182 supra.
186. 85 So. 2d 862 (Fla. 1956).
187. They had of course, lost it for non-payment of taxes.
190. Fla. Stat. §§ 95.18-95.19 (1957), require the payment of taxes for adverse possession without color of title.
191. Gates v. Roberts 85 So. 2d 862 (Fla. 1956).
192. Ibid.
193. Ibid.
194. The repurchase was in 1941, two years after the title to delinquent land became vested in the state. Former owners were given ten years to redeem homestead land under the provisions of the original act. Fla. Stat. § 192.36 (1957), and since then a provision has been added specifically authorizing resale to former owners. (Fla. Stat. § 192.381 (1953).
result on the basis of the Newmons case which held that the four year statute of limitations is not applicable to this type of tax deed.\textsuperscript{195} The court, instead, discussed the owner's right to redeem before the state actually issues a tax deed to another purchaser, and states that this right of redemption is more than an equity.\textsuperscript{196} Further, the fact that the title may be new and independent, so far as claims by former owners adverse to the new title are concerned, is held not to prevent a merger title for purposes of bolstering, reinstating, or restoring continuity where no intervening rights have become vested or accrued.\textsuperscript{197}

The case in point seems to reach a fair and just result. No rights of innocent third parties have intervened, and there are no special equities on behalf of the defendants. The doctrine of merger of title is already well established in Florida jurisprudence, hence the case should not unduly add to the burden of the title examiner. Such examiner must remember, however, that he cannot rely on the four year statute of limitations when either a "Murphy" or merger title is involved.

In another case it was held that when a tax deed has been on record for more than twenty years, the taxes having been paid and no adverse claim asserted, the title of the grantee is indefeasible.\textsuperscript{198}

Two cases concerned the statutory requirements relative to the sufficiency of notice prior to the issuance of tax deeds. The statutes require that notice of application for a tax deed must be published in a newspaper in the county in which the property is located.\textsuperscript{199} A newspaper qualifies if it is one of general circulation.\textsuperscript{200} In construing this requirement it was held that as to county tax deeds, as distinguished from municipal, a newspaper qualifies although its principal readers are of a particular segment of the population or of a particular area in the county.\textsuperscript{201} Other statutory requirements include publication continuously for one year prior to the date the notice was carried;\textsuperscript{202} at least one year's entitlement to second class mailing privileges;\textsuperscript{203} and publication on the same day each week for four consecutive weeks.\textsuperscript{204} In interpreting this last requirement it was held that the first publication be at least twenty-eight days prior to sale day, thus allowing a sale on the twenty-ninth day, rather than requiring a period

\textsuperscript{195} See note 179 \textit{supra} and the discussion applicable thereto. Note, however, that the opinion of the Newmons case, propounded on a rehearing, was published after Gates v. Roberts, but a per curiam decision had been reached earlier.

\textsuperscript{196} Gates v. Roberts, 83 So.2d 862, 864 (Fla. 1956).

\textsuperscript{197} Ibid.

\textsuperscript{198} Bladwin Co. v. Blaisdell, 82 So.2d 587 (Fla. 1955).

\textsuperscript{199} Fla. Stat. § 194.16 (1957).

\textsuperscript{200} Fla. Stat. § 49.01 (1957).

\textsuperscript{201} Johnson v. Taggart, 92 So.2d 606 (Fla. 1957).

\textsuperscript{202} Fla. Stat. § 409.03 (1957).

\textsuperscript{203} Ibid.

\textsuperscript{204} See note 199 \textit{supra}.
of twenty-eight days *between* the first notice and sale day which would preclude a sale before the thirtieth day. 205

Eminent domain.—An interesting case 206 concerning condemnation involved the rights of both an owner and optionee. Since the purpose of an eminent domain proceeding is to ascertain the value of the land condemned, and not the title thereto, it was held that questions as to the extent of each individual's interest may be settled in subsequent summary supplementary proceedings. Consequently, the optionee was not denied "due process" by the trial court's refusal to allow the jury to return separate verdicts. Moreover, the option, not having attained the status of a mutually binding contract due to the failure of the optionee to exercise it prior to the entry of the condemnation award, was held not to be such an interest in the condemned property as to entitle the optionee to any share in the award. 207

When considering a petition for certiorari in an eminent domain proceeding, the supreme court will ordinarily grant "special dispensation" in order that it may determine whether or not a sufficient issue as to the "necessity for the taking" had been raised in the trial court. 208 However, in *Howard Johnson v. State Road Department*, 209 certiorari was denied because the appellant failed to allege sufficient facts to create an issue on that subject.

The removal of lateral support from *improved* realty abutting a public way—upon which road the State Road Department was making extensive repairs—and the concomitant interference with the property owner's rights of ingress, egress and view, in an equity suit were held 210 not compensable as a "taking" under the provisions of the Florida constitution. 211 Damage to adjoining land, however, may be awarded in a condemnation proceeding. 212

Dedication.—Controversies involving problems inherent in common law and statutory dedications presented a comparatively prolific source of litigation in the past two years.

In *Servando Building Co. v. Zimmerman*, 213 the supreme court held that conveyances in reference to a plat extended the title of lots abutting streets and alleys to the center of such monuments. Hence, on abandonment

205. Wells v. Thomas, 93 So.2d 73 (Fla. 1956); Myakka Co. v. Edwards, 68 Fla. 372, 67 So. 217 (1914), used both terms, *prior* and *between* which brought about the confusion.
206. Cravero v. State Turnpike Authority, 91 So.2d 312 (Fla. 1956).
207. Ibid.
208. Howard Johnson v. State Road Dept., 90 So.2d 306 (Fla. 1956).
209. Ibid.
210. Weir v. West Palm Beach County, 85 So.2d 865 (Fla. 1956).
211. FLA. CONS'T D. OF R. § 12 ART. 16; FLA. CONS'T Art. XVI § 29.
212. FLA. STAT. § 73.10 (1957); see note 172 supra.
213. 91 So.2d 289 (Fla. 1956).
of such ways, the absolute title vested in the adjoining owners rather than
in a specific grantee of the dedicator. To accomplish this pragmatic result
the court gave considerable weight to the usual presumption that the
title normally extends to the center of monuments having width.

The plat contained a more or less customary reverter clause which
provided: "... Coral Gables Corporation ... does hereby dedicate all
streets ... to the free use of the public provided that if such use of any
part thereof shall or may be discontinued by law such part shall revert to
said Coral Gables Corporation, its successors and assigns ..." A city
ordinance discontinued one of the streets.

The supreme court, approaching the problem pragmatically, held that
the dedicatory language could not be construed as to prevent the vesting
of title in the abutting landowners.\textsuperscript{214} Although there was an ambiguity
as to the intention of the dedication (upon which Justice Roberts based
his dissent),\textsuperscript{215} the language of the dedication was construed most strongly
against the dedicator. The provision in the dedication specifically reserving
title to the alleys for the use of the dedicator would appear completely
unambiguous, but the court held that it contravened the statute\textsuperscript{216} prohibiting
reservations of areas too small to be of practical use.

That private parties may obtain easements in land offered for dedication
is clearly established.\textsuperscript{217} However, when the question arose in \textit{Burnham v.
Davis Island Inc.},\textsuperscript{218} as to whether certain private owners had obtained
an implied right of easement in lands reserved for use as a golf course, the
supreme court found no such right because of the express reservation in
the margin of the plat in favor of the dedicator.\textsuperscript{219} Further, there was no
express grant, nor prescriptive use. Other cases dealing with dedication
held: The intention of the owner to allocate the lands for the use of the
public is the essence and basis of every dedication;\textsuperscript{220} any affirmative act
or permissive conduct on the part of a landowner that conclusively shows
his intention to dedicate, coupled with an acceptance by the public, is
sufficient to constitute a dedication;\textsuperscript{221} an offer to dedicate lands for a
highway does not restrict the public to that portion of the highway used
for vehicular traffic, as use by the public for sidewalks, drainage facilities

\textsuperscript{214} Id. at 292-293.
\textsuperscript{215} Id. at 293.
\textsuperscript{216} Fla. Stat. § 17708 (1957).
\textsuperscript{218} 87 So.2d 97 (Fla. 1956).
\textsuperscript{219} Id. at 98. "The owner contemplates that the blocks, marked 'Reserved—See
Margin' may become a part of a golf course, but the owner expressly reserves the absolute
right to prescribe the terms of any dedication hereafter made or to subdivide or dispose
of the same in such manner as it may determine."
\textsuperscript{220} Pocock v. Town of Medley, 89 So.2d 162 (Fla. 1956).
\textsuperscript{221} Miami v. Jansik, 90 So.2d 316 (Fla. 1956), but no dedication found in instant
case.
or "grassy parkways" also constitutes an acceptance, and an offer of dedication may be revoked at anytime prior to its acceptance.

When realty has been conveyed to a municipality to be dedicated to the public for use as a park, a private individual can not enjoin the dedicated public use unless he is injured in some unique manner. Consequently, in Town of Flagler Beach v. Green a hotel owner was unable to enjoin the city's construction of recreational facilities which he alleged would obstruct his view of the ocean.

Lands deeded to the Florida Board of Parks to be used for "park purposes" may be leased by the Board to an individual proprietor who may erect recreational facilities on the leased land, fees for the use of which will be regulated by the Board. In so deciding the supreme court adopted the modern concept of a dedicated public park, i.e., a reasonable portion of a "park's" area may be allocated for golf, tennis, swimming, parking facilities and other allied uses.

In order to circumvent the rather incongruous situation of having alleys with entrances but without exits the supreme court, in an eminently practicable decision, decreed that an offer to dedicate two contiguous alleys was wholly accepted by the city's action in paving one of them.

VI. LIENS AND MORTGAGES

Legislation; mechanic's liens. — Paragraph (11) (a), section 84.05 of the Florida Statutes, the Mechanics' Lien Law, was amended by chapter 57-302. This section is designed to protect both lienors and property owners by providing that the owner, when contracting for improvements of $3,000.00 or more, may either require the contractor to furnish a surety bond or else withhold the final payment and a percentage of each progress payment until the contract is fully performed, final payment due, and a statement under oath furnished as to the payment of laborers and sub-contractors.

The amendment (not altering the basic procedure or philosophy of the section), was occasioned by the supreme court decision in Greenblatt v. Goldin which invalidated the section as impairing liberty of contract and

222. Dade County v. Davis, 90 So.2d 316 (Fla. 1956).
223. Marion County v. Gary, 88 So.2d 749 (Fla. 1956).
224. Town of Flagler Beach v. Green, 83 So.2d 598 (Fla. 1956).
228. Waterman v. Smith, 94 So.2d 186 (Fla. 1957).
229. See Boyer, Survey of Real Property Law, 8 Miami L.Q., 389, 420 (1954), for a discussion of the principle upon which this case was based.
231. Fla. Stat. § 84.05 (11) (a) (1957).
232. 94 So.2d 355 (Fla. 1957).
being so unreasonable and unconscionable as to deprive owners of their property without due process of law. Specifically, only the following provision was found invalid:

> If for any reason the owner fails to comply with the requirements of this section, he shall be liable for, and the property improved shall be subject to, a lien in the full amount of any and all outstanding bills for labor, services, or materials furnished for such improvement regardless of the time elements set forth in this chapter.  

The court, however, concluded that the invalidation of the above provision invalidated the whole section because the portion left was not a "completed and workable statute." The concurring opinion would have saved the portions of the statute not specifically invalidated.

The invalidity of the statute consisted of two features: (1) the provision for personal liability of the owner who does not comply to the extent of any and all outstanding bills, and (2) the imposition of such liability regardless of the time elements in other provisions of the law for filing and prosecuting claims. The new act eliminates these objectionable features by providing:

> the property improved shall be subject to a lien in the full amount of any and all outstanding bills for labor, services, or materials furnished for such improvement; provided a claim of lien is filed of record within three months as required by section 84.16, and action to enforce it is commenced within one year from date of filing, in accordance with section 84.21, or the lienor has been made a party defendant in an action involving the real property described in the claim of lien within the same period of time and upon disposition of such action the lienor's claim shall be discharged.

Thus, the owner's liability is henceforth limited to a claim against his realty, and he is afforded the protection of the time elements in the statute. The statute as previously written, in addition to being more burdensome on the negligent but innocent owner, could have had a serious adverse effect on the marketability of titles because of the imposition of such liens without regard to statutory time elements.

Additional litigation was provoked by the Mechanics' Lien Law in the past biennium. Perhaps the most noteworthy of which developed and extended the basic proposition that such liens are founded on contract.

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233. *Id.* at 359.
234. *Id.*
235. *Id.* at 360. The opinion concurred in part and dissented in part.
236. *Id.* It is to be noted that the suit was for a declaratory judgment by home owners and that no personal liability was claimed by the lienors.
239. *Fla. Stat.* § 84.01 (1957).
It had been held in Florida that a (leasing) owner's acquiescence to improvements by his lessee is insufficient to subject his fee interest to a mechanics' lien.\(^{240}\) However, in *Brenner v. Smullian*\(^{241}\) this refuge of the landlord is somewhat weakened. It was held therein that the lessor owner by taking an active part in the renovation, and by requiring the lessee to make the improvements in a specified manner, was deemed to have subjected his interest in the fee to certain mechanics' liens.\(^{242}\) *Anderson v. Sokolik*\(^{243}\) goes further. In applying the doctrine of the *Brenner* case to the provisions of the ninety-nine year lease in the *Sokolik* case, the supreme court stretched the rationale to an inordinate degree. Although the lease did not specifically require or expressly authorize the construction of any type of improvement, the court found that the mere contemplation of improvements by the lessee was sufficient to subordinate the lessors' fee simple interest to mechanics' liens. A well reasoned dissent by justice Drew\(^{244}\) berates the position of the majority as doing violence to the law and resulting in substantial injustice to the owner of the fee.

Failure to furnish an owner with a "cautionary notice"\(^{245}\) constituted a common denomination in the resolution of three cases.\(^{246}\) *Roberts v. Lesser*\(^{247}\) reaffirmed the well settled principle that a subcontractor is entitled to a lien up to that portion of the contract price which was not "properly paid" regardless of whether or not a "cautionary notice" is furnished.\(^{248}\) However, failure to present the "notice" will deprive the materialman of other statutory benefits.\(^{249}\) When the owner acts as his own contractor it is unnecessary for a person in privity with him, in order to perfect his lien,\(^{260}\) to deliver to him either a "cautionary notice" or a "sworn statement" that all lienors have been paid.\(^{251}\) The failure of a sub-contractor who is not in privity with the owner to furnish the "cautionary notice" may, but does not always estop him from perfecting a lien against the owner.\(^{252}\) While reiterating its position in re a possible estoppel, the court,

\(^{240}\) Masterbilt Corp. v. S. A. Ryan Motors Inc., 6 So.2d 818 (Fla. 1942).

\(^{241}\) 84 So.2d 44 (Fla. 1956).

\(^{242}\) *Fla. Stat.* § 84.03(2) (1957). "... when an improvement is made by a lessee in accordance with a contract between such lessee and his lessor (emphasis supplied), liens shall extend also to the interest of such lessor . . . ."

\(^{243}\) 88 So.2d 511 (Fla. 1956). The case is noted in 11 *Miami L.Q.* 435 (1957).

\(^{244}\) Id. at 515.

\(^{245}\) *Fla. Stat.* § 84.04 (1) (1957). "... any lienor . . . may . . . give to the owner a written notice of intention to claim a lien, herein after called a 'notice' . . . ."

\(^{246}\) Roberts v. Lesser, 96 So.2d 222 (Fla. 1957); All State Pipe Supply Co. v. McNair, 89 So.2d 774 (Fla. 1956); Orange Plumbing and Heating Co. v. Wolfe, 89 So.2d 671 (Fla. 1956).

\(^{247}\) Roberts v. Lesser, *supra* at 246.

\(^{248}\) Relief was denied, however, because there were no allegations of sums improperly paid or of an unpaid balance. See also Boyer, *Survey of Real Property*, 8 *Miami L.Q.* 389, 415 (1954).

\(^{249}\) *Fla. Stat.* § 84.06 (1957). This section sets forth an order of preference for claims of lienors.

\(^{250}\) *Fla. Stat.* § 84.04(3) (1957).

\(^{251}\) Orange Plumbing and Heating Co. v. Wolfe, 89 So.2d 671 (Fla. 1956).

\(^{252}\) All State Pipe Supply Co. v. McNair, 89 So.2d 774 (Fla. 1956).
nevertheless permitted the lien and receded from its position in a former case wherein the owner had been protected because he had no reason to believe that the contractor would subcontract. On the other hand, estoppel was invoked and a lien denied to a claimant who, although he served a cautionary notice, “receipted” his bill and executed a “release of lien” in return for a worthless check from the contractor. When a sum is “improperly paid” i.e., “no sworn statement” received by the owner, lienors have a right to have their liens perfected pro rata to the extend of the “final payment” called for in the contract between the owner and the general contractor.

The fact that a relationship (construction joint venture), is apparently incompatible or inconsistent with the existence of a mechanics’ lien, does not preclude the imposition of an equitable lien. Absent an allegation of wrongdoing, the statute of limitations having run under the mechanics’ lien law a materialman cannot seek relief by way of an equitable lien. An action by a subcontractor lienor against an owner, who has contracted with a general contractor, cannot be dismissed for failure to join an indispensable party if the lienor does not join the general contractor as a party defendant.

In Geiser v. Permacrete wherein a mechanics’ lien was given priority over a mortgage which had been recorded before the mechanic had performed his labor, the blanket theory was considered. (A blanket lien is one which operates in favor of all mechanics and materialmen, and which “relates back” to the date when construction was first visibly commenced.) Recognizing the possible harms inherent in such a doctrine, the court set forth the circumstances under which mechanics and materialmen can come under its aegis.

Mortgages.—Two attempts to foreclose mortgages resulted in judgments for the defendants. In Cullison v. Dees the supreme court resolved the question of whether credit extended by a pledgee to a mortgagor acts as payment to the mortgagee. The mortgagor contracted with the pledgee of the mortgagee—who held mortgagor’s note and mortgagee as security for a separate debt of the mortgagee—to have pledgee credit him with

253. Southern Supply Distributors v. Lansdell, 76 So.2d 26 6(Fla. 1956). The case was decided under similar facts, i.e., no notice given and no sworn statement received.
254. Lehman v. Snyder, 84 So.2d 312 (Fla. 1955).
255. Renuart Lumber Yards v. Steam, 95 So.2d 517 (Fla. 1957).
257. FLA. STAT. § 84.01 (1957).
258. Road Co. v. Luber, 91 So.2d 629 (Fla. 1956).
259. Bybee v. Steam, 95 So.2d 529 (Fla. 1957); FLA. STAT. § 84.29 (1957).
260. 90 So.2d 610 (Fla. 1956).
261. Id. at 613. The material delivered, or service performed, must have been provided in connection with a single construction project; going forward under a common plan; prosecuted with reasonable promptness and without material abandonment.
262. 90 So.2d 620 (Fla. 1956).
partial payment on his pledged note. The mortgagee's foreclosure suit failed because the transaction between the mortgagor and pledgee was deemed proper payment on the pledged note, and consequently mortgagor (defendant) was not in default. In *St. Martin v. McGee*, the mortgagor's alleged breach of covenant—to keep the premises in proper repair—resulted in no impairment of his security.

The supreme court, in a decision holding a note secured by a mortgage non-usurious, vehemently, although fruitlessly, castigated mortgage companies. The note and mortgage due in one year was executed by the mortgagor on December 5, 1954. The proceeds were not disbursed by the mortgagee until December 13, 1954, the closing date. Interest which accrued during those eight days if added to the face of the note would have made the entire transaction usurious. It was pointed out that in the instant case the note was not predated or closing delayed with the intent to charge the mortgagee interest on money he had not received. The mortgagee is justified in requiring that the note and mortgage be executed and recorded before disbursing the sums due the mortgagor. Consequently, the mortgagee's failure to abate the interest until the closing date was tantamount to an error in closing adjustments and not usury.

In *Maule Industries v. Seminole Rock & Sand Co.*, the plaintiff contended that the issuance of the certificate of title, after a judicial sale had been decreed, deprived the circuit court of jurisdiction to grant a rehearing on objections to the sale. The court held that the statutes involved did not specifically proscribe the action taken by the chancellor; therefore, as equity courts have a general supervision over judicial sales made under their decrees, chancellors can set aside or vacate a sale for cause even after confirmation.

**VII. LANDLORD AND TENANT**

**Security deposits.**—In an action to supplement the final decree in *Kanter v. Safran* the lessee claimed that the lessor had abandoned his

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263. 82 So.2d 736 (Fla. 1955).
264. Shaffran v. Holmes, 93 So.2d 94 (Fla. 1957).
265. Id. at 98. The 1957 legislature had an opportunity to remedy this situation and failed to act.
266. Fla. Stat. § 687.03 (1955). It shall be usury . . . if by way of contract, contrivance, or device whatever . . . the debtor is required or obligated to pay a sum of money greater than the actual principal sum received, together with interest at the rate of ten per cent.
267. 91 So.2d 307 (Fla. 1956).
268. Fla. Stat. § 702.07 (1957). The circuit courts . . . shall have jurisdiction, power and authority to rescind, vacate and set aside a decree of foreclosure of a mortgage of property at any time before the sale thereof has actually been made . . .
269. Fla. Stat. § 702.02 (1957), provides that if objections to the sale are not filed within ten days after filing of the certificate of title thereupon the sale shall stand confirmed and title pass.
270. See notes 268 and 269 supra.
271. 82 So.2d 508 (Fla. 1955).
position as the "agent of the lessee to relet the premises," an alternative
given the lessor in the prior decree.\textsuperscript{272} The lessee contended that since the
lessee had relet for a period longer than that of the original lease, the lessor
had abandoned his position as agent and the lessee was now entitled to
his security deposit. The court held that the lessor was entitled to make
the most favorable lease to himself and the lessee, and that the length of
the subsequent lease or its rental is not an indication of the lessor's forfeiture
of his agency relationship. That the security deposit need not be applied
to unpaid rent due was decided in 6701 Realty Inc. v. Deauville Enter-
prises.\textsuperscript{273} The court stated that the lease was breached upon failure to pay
the rent and that the landlord was not under an obligation to apply the
security deposit toward the rents prior to going into possession. Any other
interpretation of the security deposit would allow a tenant to stop paying
rent, stay in possession until the deposit ran out, and then leave, the land-
lord being left with nothing to compensate for the breached lease.

An unprofitable shopping center gave rise to an unusual set of facts
in Young v. Cobb.\textsuperscript{274} The plaintiff was the only store owner still in business
in the shopping center. All the others had given up and left. The defendant
asked the plaintiff to leave so that the place could be sold, but the plaintiff
refused. After some discussion (heated, no doubt), the defendant padlocked
the store and the plaintiff brought this action for damages resulting from the
unlawful eviction and the return of his security deposit. The defendant
contended: (1) as to the unlawful eviction, that damages based upon future
carings in a deserted shopping area were too speculative; and (2) as to
the security deposit, it was part of the rent and not returnable. Both his
contention were rejected; the court holding: (1) loss of business damages
could be reasonably ascertained and, (2) that security deposits must be
returned in those cases where the tenant is not the cause of the breached
lease since the deposit represents liquidated damages for the tenant's breach.

\textbf{Obligation to repair. —} The court listed three remedies available to a
lessee for the landlord's failure to keep the premises in good repair in
Rosen v. Needleman: \textsuperscript{275} (1) the disrepair renders the building uninhabitable,
the tenant may abandon the premises and not be liable for future rents;
(2) if the building is uninhabitable the tenant may, after notice to the
landlord, make the necessary repairs and sue the landlord for damages
(the cost of the repairs and loss of profits); (3) if the building is inhabitable,
the tenant may do nothing and sue the landlord for damages. In this case,
the lessee of a hotel chose the third alternative and sued for loss of profits

\textsuperscript{272} Kanter v. Safran, 68 So.2d 553 (Fla. 1953). This case was discussed in Wills,
Survey of Landlord and Tenant, 10 Miami L.Q. 383 (1956).
\textsuperscript{274} 83 So.2d 417 (Fla. 1955).
\textsuperscript{275} 83 So.2d 113 (Fla. 1955).
due to a reduced rental income made necessary by lowering the rates of the rooms in disrepair. The court approved the remedy despite the landlord's contention that the tenant should have repaired the premises and sued for costs.

_Estoppel; surrender by operation of law and double rent._—In _Centra Florida Oil Company v. Blue Flame Inc._ the parties, in 1950, executed a lease of realty for a term of fifteen years. In 1953 the parties executed a second lease of the same property for a term of one year with an option to renew. Various immaterial assignments were made. At the end of the term of the 1953 lease the tenants refused to renew the lease and notified the landlord that they would continue to hold possession under the 1950 lease. The landlord sued to regain possession and sought double rent for the tenants' occupation beyond the term. The court held that the acts of the tenants in executing the 1953 lease and occupying the premises under its terms were inconsistent with and precluded the tenants' claim of right under the 1950 lease, and it cited _Rader v. Prather_ as authority.

Section 83.06 of the Florida Statutes provides that if the tenant refuses to give up possession at the end of the term, the landlord may demand double the monthly rent. The court concluded that if the tenant maintained possession under a bona fide claim of right based upon reasonable grounds the statute should not apply. It considered the tenants' claim under the 1950 lease to be bona fide and reasonable for the purpose of avoiding the statute, particularly since the complaint in the lower court did not demand the penalty.

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276. 87 So.2d 812 (Fla. 1956).
277. 100 Fla. 591, 130 So.15 (Fla. 1930).
278. Painter v. Town of Groveland, Fla., 79 So.2d 765 (Fla. 1955), was cited for authority.