Survey of Real Property Law

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INTRODUCTION

In the field of real property law the struggle for marketability continues to loom as the dominant factor. The conduct of the participants, the Legislature and the Supreme Court, may be characterized as action and reaction, with each maintaining a watchful eye on the other. Instances are readily apparent in the following article, but by way of illustration, attention is directed to the discussion under Reverter rights and tax deeds immediately following this introduction.

The material for this survey is divided into seven main topics:

I. Legislation
II. Vendor and Purchaser
III. Estates, Dower, Homestead and Future Interests
IV. Deeds: Recording, Cancellation, Delivery
V. Rights in Land
VI. Mortgages and Liens
VII. Special Titles

Legislative changes, for purposes of emphasis, are discussed separately in the beginning of the article. However, reference to such legislation, when applicable, is also made in later sections. It is hoped that by a generous use of headings and subheadings easy access to the subject matter will be achieved.

I. LEGISLATION

Reverter rights and tax deeds.—One of the most important acts of the 1955 legislature amended Florida Statutes, Section 192.33, to provide specifically that reverter rights, that is, possibilities of reverter and rights of re-entry, shall not survive a tax deed or a master’s deed issued pursuant to a foreclosure of a tax certificate. Prior to this act, the aforementioned section provided that restrictive covenants running with the land should survive and be enforceable after the issuance of such a deed. The 1955 amendment relates specifically to the third unnumbered paragraph of this section. It expressly states that “it being among other things the specific intention of the legislature that all forfeitures, rights of re-entry, and reverter rights shall be destroyed and shall not survive to the grantee in such tax deed or master’s deed, or to his or its heirs, successors and assigns.”

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2. Ibid.
This legislation was undoubtedly the result of the decision in the *Biltmore Village* case. In this case the majority held by inference, or at least assumed, that such possibilities of reverter or rights of re-entry did survive tax deeds. Both the case and the legislation are best understood in historical perspective. In 1951 the Florida legislature enacted Section 689.18 of the Florida Statutes limiting the effectiveness of reverter and forfeiture provisions in private conveyances to a duration of twenty-one years. This statute was construed in the *Biltmore Village* case, and, as applied to pre-existing reverter provisions, was held unconstitutional in that it violated the impairment of contract and the due process clauses of the State and Federal Constitutions. Both grantees involved in the *Biltmore* case derived their titles through tax deeds, one of them claiming through a Murphy deed. Insofar as the majority decision held that the statute was unconstitutional as applied to pre-existing reverter rights, it seemed to necessarily follow that such reverter rights did in fact survive tax titles. It was pointed out by the dissenting judge that such a holding was inconsistent with the usual theory that a tax deed creates a new and independent title. Covenants, as distinguished from reverter rights, do survive such tax deeds as a result of express legislation. The new statute thus clarifies the situation and makes it clear that the tax deed will nullify or abolish any pre-existing reverter rights although it will not abolish restrictive covenants. The legislation should have a salutary effect on the validity and marketability of Florida tax titles.

**Mortgage foreclosure.**—Chapter 29700, Florida Laws 1955, was enacted to clarify Chapter 28093 of the Florida Laws of 1953 which amended Florida Statutes, Section 702.02. The 1953 legislation provided for the foreclosure of mortgages by a sale conducted by the clerk of the court. The 1955 legislature declares that the foreclosure procedure of the 1953 legislation is an alternative method and not an exclusive one. The new act specifically provides that foreclosure may be by the clerk of the court, or in accordance with procedures heretofore in existence prior to the enactment of that statute. Such pre-existing procedures undoubtedly refer to chancery proceedings with the aid of masters.

**Partition.**—Chapter 29928 of Florida Laws of 1955 amends the partition laws of Florida. It provides for the sale of the land upon an uncontested allegation that the property is not divisible and not subject to

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5. Note 3 supra.
6. Ibid. See also case note 9 MIArsII L.Q. 232 (1955), and Boyer, *Survey of Real Property*, 8 MIArsII L.Q. 411 (1954).
10. Laws of Fla., c. 29700 (1955); FLA. STAT. § 702.02 (1955).
partition without prejudice to the owners. The court, if satisfied that such
allegation is correct, upon application of either party and notice to others
before the court, may appoint a special master to make sale of the property
either at a private sale or in the same manner as provided for the sale
thereof by Section 66.07. This act should have a beneficial effect in clearing
titles to real estate where there are co-owners and one or more of the parties
is unable to be found. In those cases where land is conveyed after a parti-
tion sale with the court holding part of the proceeds for the absent parties,
this section should help marketability and help put the land back in com-
merce. Another act relating to partition is Chapter 29685 which amends
Florida Statutes, Section 66.06. This statute relates to the compensation
of commissioners in partition proceedings. It removes the three dollars
per day limitation on compensation and permits the court to allow any
amount it deems reasonable for such services.

Statutes of limitations.—A new statute of limitations or curative act
was enacted by Chapter 29954. This statute concisely provides that no
judgment, order or decree of any court shall be a lien upon real or per-
sonal property in the state after the expiration of twenty years from the
date of the entry of such judgment, order or decree. This act complements
existing statutes and should aid marketability of titles. Florida Statutes,
Section 95.11 provides that an action based upon a judgment or decree of
a court of record may be brought within twenty years. Such a statute would
preclude an action based on a judgment more than twenty years old and
normally would dissipate the lien although the statute does not specifically
say that the judgment or decree shall cease to be a lien after that time.
If no action can be brought on the judgment or decree, its effectiveness
is certainly nullified. The new act, however, does eliminate any possibility
of the lien continuing after twenty years and clouding title to real estate.
It should preclude any dickering by overcautious attorneys.

Florida Statutes, Section 95.28, was amended by Chapter 29977, Laws of
Florida 1955, to provide specifically that when a mortgage is barred by the
twenty year statute of limitations, recovery also will be denied to the mort-
gagee for the payment of taxes. Such a recovery will be permitted if the
mortgagee obtains an assignment from the State of the tax sale certificates,
but the mere redeeming of the tax certificates shall be insufficient for such
subrogation purposes. This statute was undoubtedly prompted by the
Kirtley case11 where foreclosure was attempted more than twenty years after
the mortgage was due. The mortgagee claimed principal, interest and taxes
as proper items of recovery. It was held that Section 95.28, Florida Statutes
barred the action on the foreclosure of the mortgage, but that the plaintiff
was entitled to recover for the taxes which he paid on the property during
the default of the mortgagor. The court stated "the amount thus expended
for the payment of taxes by the mortgagee was an expenditure which the

mortgagee was forced to make by reason of the neglect of the mortgagor to carry out his covenant to pay all taxes as they became due. Under these circumstances the mortgagee is entitled to be subrogated to the paramount lien of the state, as to which the statute of non-claim does not apply."\textsuperscript{12} The 1955 legislation, changing the rule of the above case, specifically provides that "all such obligations, including taxes paid by the mortgagee, the period of limitation shall be twenty (20) years, provided, however, that a mortgagee shall have no rights of subrogation to the lien of the state, for taxes paid by said mortgagee to protect the security of his mortgage unless said mortgagee obtains an assignment from the state of the tax sale certificates, and, provided, further, that the mere receiving of the tax certificates shall be insufficient for such subrogation purposes."\textsuperscript{13} This legislation should be an important factor in clearing title to real estate. Under the decision of the Kirtley case,\textsuperscript{14} the purchaser of real property could not rely on the statute of limitations provided in Section 95.28 as the mortgagee may have paid the taxes and could assert a claim for them. The amendment is certainly justified. The new legislation does not affect the exempt mortgages and liens specified in Florida Statutes, Section 95.32 and the extension agreements provided for in Section 95.29.

\textit{Limitations on tax certificates.}—Chapter 29794, Florida Laws 1955, provides a statute of limitations for the enforcement of tax sale certificates obtained in connection with the provisions of Chapter 18296, Laws of Florida, 1937, commonly known as the Murphy Act. The 1955 legislation provides that all such certificates held by private holders, natural or corporate, or persons under a disability or otherwise, shall be deemed and held to be barred by this act from and after midnight, June 30, 1956. Provision is also made for the clerk of the Circuit Court to cancel all such tax certificates after the effective date of the act, and an exemption is provided for those tax sale certificates held by the clerk of the Circuit Courts on behalf of the state, by virtue of which title to the land vested in the state under Section 192.38, Florida Statutes.

\textit{Decedents' estates; eminent domain; miscellaneous.}—Chapter 29714, Florida Laws 1955, concerns the estates of decedents. This act amends Section 733.13, Florida Statutes relating to the appointment of commissioners to allot dower. It provides that the county judge may, in his discretion, allot and set off dower and dispense with such appointment when: (a) interested parties agree to the allotment of dower; or (b) assets are of such nature that dower may be allotted without the appointment of commissioners. This act also amends Section 733.43, Florida Statutes relating to the annual and final returns required of personal representation concerning the estates of a decedent. It provides that it shall not be

\textsuperscript{12} Id. at 878-879.
\textsuperscript{13} Laws of Fla., c. 29977 (1955); Fl.A. Stat. § 95.28 (1955).
\textsuperscript{14} Note 11 supra.
necessary to file such a return, or advertise notice thereof, where there is a
single heir of a beneficiary, or where all heirs or beneficiaries are *sui iuris*
and consent thereto in writing, unless required by the county judge.

An amendment to Florida Statutes, Section 73.10, relating to eminent
domain trials, was enacted by Chapter 29729. The new act provides that
the property shall be viewed by the jury only upon demand by counsel for
any party prior to presentation of evidence or by order of court on its own
motion. The former section provided for a view in all cases unless the
parties consented to dispense therewith. The condemnation statutes were
further amended by Chapter 29915, Florida Laws 1955, concerning the
payment of money into the court where it is determined that the petitioner
is entitled to possession of the property prior to final judgment. As in the
old statute, such sum shall in no event be less than double the value as
fixed by the court appraisers. Whereas the old statute, however, required
the sum to be deposited within ten days after date of such order, the new
act allows the petitioner twenty days in which to deposit the money. Fur-
ther, the new act provides that such sum shall not be charged with com-
missions or poundage.

A new act provides that the state may be named a party in civil
actions to quiet title or foreclose a mortgage or other lien on real or personal
property in which the state has or claims such mortgage or other lien.
Provision is made for service on the state, and it is required that the com-
plaint set forth with particularity the nature of the state's interest. It is
provided that the judicial sale shall discharge the lien held by the state
to the same extent as provided by law, but a sale satisfying an inferior lien
shall not disturb the state's lien unless the state consents to sale free from
its lien and receives a proper share of the proceeds.

Another curative act was adopted by Chapter 29995. It provides that
judgments recorded under Section 28.221, Florida Statutes are validated
and confirmed and declared to be liens on the real property the same as
if a certified transcript thereof had been recorded in the judgment lien
record. Chapter 29857 provides that delivery of an insurance policy to a
purchaser of Florida property as an inducement for an incident to such
sale shall constitute a negotiation, sale and delivery of such contract in
this state.

II. VENDOR AND PURCHASER

Statute of Frauds: specific performance—A number of cases for the
specific performance of real estate contracts were considered by the Florida
Supreme Court during the past biennium. Most of these cases were not
particularly significant. The requirements for removing an oral contract

from the Statute of Frauds were reviewed in *Miller v. Murray*. To be entitled to specific performance of an oral contract the plaintiff must not only establish the contract by a preponderance of the evidence, but by clear, definite and certain proof. The following elements are necessary: (1), payment of all or part of the consideration, whether it be in money or in services; (2), possession by the alleged vendee; and (3), the effectuation of valuable and permanent improvements with the consent of the vendor; or (4), in the absence of such improvements, the proof of such facts as would make the transaction a fraud upon the purchaser if the contract were not enforced. Further, the acts claimed to have been done under the oral contract must be referable exclusively thereto. Specific performance was denied in the instant case, and the decision of *Cottages, Miami Beach, Inc. v. Wegman* was distinguished in that the plaintiff in the latter case had changed her position significantly in reliance on the alleged contract.

The remaining cases concerning specific performance turned primarily upon the terms of the contract. In *Adams v. Stoffer* it was held that an assignment of the option to the vendor's husband was no excuse for non-performance on her part. Since by its terms the option was assignable, it was immaterial that the husband or anyone else had acquired it. A provision that time shall be of the essence may be waived and was in fact found to be waived under the circumstances of *Forbes v. Babel*. The utility of specific performance against a defaulting vendee was depicted in *Clements v. Leonard*. It was therein held proper to decree specific performance and, upon failure of the purchaser to perform upon a specified date, to order the property sold and the proceeds applied to the satisfaction of the vendor's claim against the vendee. Further, the court may, in its sound discretion, authorize the collection of any unpaid balance by execution on other leviable assets of the defaulting vendee. The court distinguished the earlier case of *McCaskill v. Dekle*, which refused a deficiency decree under similar circumstances, by stating that a deficiency decree would under the facts of that case have been inequitable. Considering the clear language expressed therein, the instant decision appears to be a retreat therefrom.

In *Rosenthal v. Le May* an option to repurchase contained a provision that it was unassignable and that the holders would not convey, alienate, or
transfer within a certain period of time without first offering the property to the other party. In order to obtain the money with which to exercise the option to rebuy the building, the option holders placed a mortgage on it. It was held that the mortgage did not constitute an alienation under the meaning of the contract. Of course, a contract cannot be enforced against one who is not a party to it. Thus, in Brown v. Griffin, 29 where only the husband signed the contract for the sale of property in which his wife was a co-owner, specific performance could not be obtained against the wife or her estate. The vendees, however, had made improvements on the land with the knowledge of both the husband and wife. Under these circumstances specific performance could be had to the extent of compelling a conveyance of the husband's interest with an abatement of purchase price for the wife's unconveyed interest, and a reimbursement from the wife's estate for the value of the improvements erected on her portion. 30 In Cox v. LaPota, 31 an estoppel was invoked against the vendors when they, knowing that their signatures were not properly witnessed, misled the vendees by subsequent addition of signatures of alleged witnesses. 31a

Equitable enforcement of a non-competitive covenant was sought in the case of Giehler v. Ward. 32 In this case the grantors had agreed in their deed not to compete in business with the grantees for a space of three years. The defendant vendors did in fact violate their covenant, and, in a prior suit, the vendees brought an action for an injunction. In the instant suit the vendees sought to have the effective date of the covenant advanced so that they would obtain the full three year period of noncompetition originally provided. Relief was refused because the original agreement provided for a term of noncompetition “from the date of the agreement” and not for a total period of three years. 33 Thus the relief sought would amount to making an entirely different contract. In the case of Tobler v. Goolsby 34 an option to buy additional land was contingent upon prompt payments on a purchase money mortgage. Upon failure to make the first payment when due, the vendor instituted foreclosure. It was held that default automatically terminated the option. Termination was not inequitable under the circumstances; hence, the equities being equal, the maxim “Equity follows the law” was applicable. 35

29. 75 So.2d 781 (Fla. 1954).
30. Ibid.
31. 76 So.2d 662 (Fla. 1955).
31a. Apparently the court assumed that Fla. Stat. § 689.01 (1955), was applicable. Similarly, see Abercombie v. Eidschun, 66 So.2d 875 (Fla. 1953); Scott v. Hotel Martinique, 48 So.2d 160 (Fla. 1950).
It appears, however, that ‘Fla. Stat.’ § 725.01 (1955) is applicable and that witnesses are not necessary. Lente v. Clark, 22 Fla. 515 (1886), expressly so held.
32. 77 So.2d 452 (Fla. 1955).
33. Id. at 453.
34. 67 So.2d 537 (Fla. 1953).
35. Ibid.
Fraud.—Smith v. Irvine was an action nominally for the abatement of the purchase price of a motel because of misrepresentation. As the purchasers did not seek rescission, it was held that the action was in reality an action at law for damages either for a breach of contract or for deceit. Hence, they were not entitled to an equitable lien or any other equitable relief. The fact that the defendants might claim homestead exemption on much of their property purchased with money received from the plaintiffs, and thus escape execution, was not deemed a sufficient basis for the interposition of equity. Lack of information due to careless indifference to ordinary and acceptable means of obtaining information is not a sufficient basis for rescission and, where the purchasers fail to establish grounds for rescission based on alleged fraud and misrepresentation, defendant vendors are not entitled to a claim for broker's commission and attorney fees.

Marketable Title.—The effect of encroaching eaves on the marketability of title was considered in Loeffler v. Roe. Rescission was therein denied and the encroachment held inconsequential and within the rule of de minimis non curat lex. The difference between a good and merchantable title and a good and merchantable title of record was delineated in the case of Alexander v. Cleveland. As the vendors had promised an abstract showing "a good and merchantable title," it was necessary to show a good and merchantable title of record without resort to matters in pais. The abstract traced title to a tax deed from the State of Florida and no further. The court stated, "In view of the insecurity attached to a bare tax deed, an abstract showing title based solely upon the issuance of such deed, without a showing in the abstract of all prior procedural steps on which it is based, is not an abstract showing good and merchantable title of record."

Whether or not visible easements constitute an incumbrance within the meaning of a contract to convey free of incumbrances was the issue in Cassell v. Werny. In this case the purchasers had seen a guy wire and large cement anchor on the property, but they were assured that the visible use of the property was a temporary condition and would be corrected. Hence, the usual presumption that the vendees contracted with reference to the visible easements and adjusted the price accordingly, or else con-
sidered the easements beneficial to the property,\textsuperscript{46} was held inapplicable.\textsuperscript{47} Thus, although this action was for a declaratory decree to construe the contract, the test of an incumbrance was held the same as that applied in an action brought by a grantee for breach of the covenant against incumbrances in a warranty deed.\textsuperscript{48}

\textbf{Miscellaneous.---}Neither reformation nor rescission was decreed for parties May and Holley in a repeat appearance\textsuperscript{49} before the Supreme Court in a dispute involving encroachments.\textsuperscript{50} It was held that such a right based on mutual mistake cannot be claimed against a third party bona fide grantee without notice.\textsuperscript{51} Further, reformation under such circumstances is based on the assumption of a prior complete meeting of the minds on the exact subject matter of the deed and does not apply to a situation wherein the parties are mistaken as to the identity of the property.\textsuperscript{52} In another case\textsuperscript{53} it was held that the purchasers could not rescind for non-compliance of the vendors with the original terms when those terms were later superseded.

\textbf{III. Estates, Dower, Homestead and Future Interests}

\textbf{Homestead.---}The perplexing ramifications of the homestead law continued to busy the Florida Supreme Court. A clear distinction between an estate or title and homestead status was delineated in the case of \textit{Wakeman v. Noble}\textsuperscript{54} wherein it was determined that the County Judge's Court had jurisdiction to determine the homestead status of real property. The constitutional provision giving the Circuit Courts exclusive original jurisdiction in all cases "involving the titles or boundaries of real estate"\textsuperscript{55} does not preclude the County Judge's Court from determining the homestead character of land. The question of homestead is primarily a matter of status rather than an estate or title. Thus, "the homestead character of property at the time of the owner's death depends upon its use and his decision as head of the family. The title is affected by neither."\textsuperscript{56} The manner in which the title descends or is transformed into a life estate on the death of the homestead owner is simply consequential.\textsuperscript{57}

Two cases involving the conveyance of the homestead show no significant developments. In \textit{Regero v. Daugherty},\textsuperscript{58} the validity of a conveyance,

\begin{itemize}
\item 46. \textit{Van Ness v. Royal Phosphate Co.}, 60 Fla. 284, 53 So. 381 (1910). The doctrine of this case was followed in Pasco County v. Johnson, 67 So.2d 659 (Fla. 1953), wherein it was stated that the presence of a visible highway did not give rise to a breach of the statutory warranty in a deed which had no reservation for the road.
\item 47. \textit{Cassell v. Werny}, 72 So.2d 45 (Fla. 1954).
\item 48. \textit{Van Ness v. Royal Phosphate Co.}, \textit{supra} note 46.
\item 49. The former case was \textit{May v. Holley}, 59 So.2d 636 (Fla. 1952). See \textit{Boyer, Survey of Real Property}, 8 \textit{Miami L.Q.} 389, 403 and 418 (1954).
\item 50. \textit{Holley v. May}, 75 So.2d 696 (Fla. 1954).
\item 51. \textit{Id.} at 697.
\item 52. \textit{Id} at 698.
\item 53. \textit{Public Realty Co. v. Krieger}, 70 So.2d 834 (Fla. 1954).
\item 54. 73 So.2d 873 (Fla. 1954).
\item 55. \textit{Fla. Const.}, Art. V, \textit{§} 11.
\item 56. \textit{Wakeman v. Noble}, 73 So.2d 873 at 874 (Fla. 1954).
\item 57. \textit{Ibid}.
\item 58. 69 So.2d 178 (Fla. 1954).
\end{itemize}
by a mother to her daughter, for services rendered was upheld. It may be noted that although the constitutional provisions do not say anything specifically about conveying for an adequate or valuable consideration, the tenor of earlier cases suggests that consideration is essential. Some of the later cases, however, say that it is not. It is significant, however, that in those homestead cases asserting that consideration is not essential, the court either had additional grounds for the decision or did in fact find consideration. As consideration was present in the Regero case, it contributes nothing to this important matter. The case of Thompson v. Thompson was resolved on the basis of the statute of limitations. It was held that where the deed had been recorded for more than twenty years prior to the institution of the action for cancellation, where there was no claim of disability or minority, allegations of fraud, forgery, concealment or other defects, and where the record indicated that all parties knew of the deed and had been sui juris for more than seven years prior to the institution of the suit, the deed could not be cancelled.

Homestead descent problems continue to be a fruitful source of litigation. The case of Stephens v. Campbell concerned the applicability of those provisions to a factual situation involving the wife as head of the family. She supported the husband; all her children were by a former marriage and being adult, were not dependent on her. It was held that the homestead provisions would control and that the wife could not devise the homestead. A dissenting opinion based on the literal wording of the Florida Constitution and statutes to the effect that the prohibition on devising the homestead applies only to the husband and not the wife, has some merit but is not consistent with precedent applying homestead provisions equally in situations where the wife as well as the husband is the head of the family.

59. FLA. CONST., Art. X, §§ 1, 4.
61. Denham v. Sexton, 48 So.2d 416 (Fla. 1950); Scoville v. Scoville, 40 So.2d 840 (Fla. 1949).
62. In Denham v. Sexton, supra note 61, the homestead was held as an estate by the entitites and both the husband and wife had previously conveyed some of the land. A later grantee of the widow sought to cancel the former deeds. Relief was denied. It is to be noted that in all cases in which such gratuitous conveyances were voided, the complaining party were children of the homestead owner and had a protected interest under the constitution. In this case, the plaintiff had no such interest. Further, the children themselves could not complain since the homestead had been owned by the entitites and would vest in the surviving spouse in any event. In Scoville v. Scoville, supra note 61, the court did not think the land in question was a homestead at the time of conveyance, and, further, the court found consideration.
63. 69 So.2d 178 (Fla. 1954).
64. 70 So.2d 555 (Fla. 1954).
65. Ibid.
66. 70 So.2d 579 (Fla. 1954).
67. Ibid.
68. Stephens v. Campbell, 70 So.2d 579 (Fla. 1954), J. Terrell dissenting at 580.
of the family. In *Sheaf v. Klose* it was determined that an adult son’s moving into the home with his mother was not of itself sufficient to convert it into a homestead. There must be an intent on her part to make it such, and the fact that she may bestow various gratuities on him is not sufficient to show that he is dependent on her for support. There must be an intent to convert the realty into a homestead status. Factually in contrast to this case is *Brodgon v. McBride*, wherein homestead status attached although the daughter did not live in her father’s home. It was held that the daughter who lived with her divorced mother was entitled to the benefit of the homestead descent laws as to an apartment house owned by the divorced father. The father lived there with his second wife and made it his home. The court stated that, since the minor child was absent from the father’s home by order of a court, she had a right to demand that he provide her with the necessities of life and such comforts as her station in life warranted. Thus, the devise to the second wife was ineffective.

Exemption from levy.—Two cases during the last two years involved the question of homestead exemption from execution by creditors. In *DeJonge v. Wayne* it was held that a wife’s property was not homestead property simply because her husband made mortgage payments and did minor repairs on their dwelling place. The property therefore was subject to execution by judgment creditors of the wife. In short, the husband was head of the family, not the wife, and so her separate property could be levied on by her creditors. The case of *Buckels v. Tomer* held that an owner of rural land who resided thereon was entitled to have his entire contiguous tract of land exempt from execution by his creditors although he subdivided a large portion of the area and laid it out in streets and building lots. As long as he owns land on both sides of the platted streets he is entitled to an exemption for all of the land.

Taxation.—In *L’Engle v. Forbes* a reserve officer recalled to active duty was successful in avoiding a waiver of his homestead tax exemption although he did not claim it by April 1 of the year in question. As the controlling statute of the case has since been changed, the decision is not particularly significant.

Co-tenancies.—*Morrison v. Byrd* involved the claim of a purchaser from one co-tenant. The former owner died in 1933 survived by a number of children, one of them named D. W. Byrd. Byrd continued to reside on the land and later acquired a tax deed thereto. In 1943, he and his

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69. 75 So.2d 595 (Fla. 1954).  
70. 75 So.2d 770 (Fla. 1954).  
71. Ibid.  
72. 76 So.2d 273 (Fla. 1954).  
72a. 78 So.2d 861 (Fla. 1955).  
73. 81 So.2d 214 (Fla. 1955).  
74. FLA. STAT. § 192.55 (1951).  
75. FLA. STAT. § 192.161 (1953).  
76. 72 So.2d 657 (Fla. 1954).
wife conveyed the land by warranty deed to Mrs. Morrison. She stayed there and paid the taxes for more than seven years. While it was conceded that normally a conveyance of one of the several co-tenants does not constitute color of title to the whole tract to the exclusion of the others, it was held that a deed purporting to convey the entire interest of one who holds only an undivided interest may constitute color of title, and the grantee may acquire title by adverse possession against the other co-tenants. It was thus held under the facts of the case that the deed from D. W. Byrd did constitute color of title to the whole tract and that Mrs. Morrison acquired title by adverse possession.

The case of Brocato v. Brocato involved an estate by the entireties in an action by the wife to foreclose a mortgage against her husband. The property was originally conveyed to both the husband and wife who in turn jointly gave a purchase money mortgage. The mortgagee subsequently assigned the mortgage to the wife. It was held the wife could not enforce the mortgage against the property as she was one of the makers of the note and mortgage, and the assignment to her acted as a satisfaction of the obligation.

The case of Forehand v. Peacock involved an agreement between an aged mother and her daughter to hold a piece of property as joint tenants or by the entireties. It was correctly held, of course, that an estate by the entireties could only exist between husband and wife. It was stated, however, that such an agreement would be sufficient to create an agreement between the parties not to partition the property and to vest title thereof in the survivor. It would thus amount to a joint tenancy with right of survivorship subject to a covenant not to partition. The agreement was before the court because the aged mother, the plaintiff, was having difficulty with the daughter and her husband. The court said: "Of course, such agreements, like all others, may be dissolved for fraud, overreachings or for other grounds recognized by law." It is interesting to note that the agreement between the mother and daughter was entered into after they had received a deed of the land as tenants in common. Although the agreement is itself probably not sufficient without a formal conveyance to convert the estate into a joint tenancy with right of survivorship, it can, in the absence of fraud, overreach, or other inequitable circumstances, be enforced specifically to accomplish the desired result.

Future Interests.—The question of a breach of the condition in a fee simple determinable was the issue in Dade County v. North Miami Beach.

77. Ibid.
78. Ibid.
79. 74 So.2d 58 (Fla. 1954).
80. Ibid.
81. 77 So.2d 625 (Fla. 1955).
82. Id. at 626.
83. Ibid.
84. 69 So.2d 780 (Fla. 1954).
The deed provided that the land was to be used and maintained for park purposes and that the reversion was retained by the grantor in the event of the discontinuance of the property for park purposes and the maintenance as such. The deed was delivered in 1934 and the suit was filed in 1951. Evidence disclosed that the county had exercised dominion and control over the property and was proceeding, although somewhat slowly, with plans for improvement. The court concluded that the record negatived anything to show an abandonment by the county, and refused to decree a reversion to the grantor. The case of Sanderson v. Sanderson involved the construction of a will and the nature of the estate granted. It illustrates the significance of careful draftsmanship although in the particular case two examples of ambiguous language counteracted each other and afforded the court an opportunity to protect the titles of innocent grantees. In this case the husband and wife made a joint will which provided ". . . we have jointly and severally agreed, as husband and wife, that the entire estate of the one passing away first shall belong in its entirety to the one still living to use and enjoy as they wish to do, without the expense of executors and administrators. Any residue of the estate left after both husband and wife have passed away and all their just debts and expenses paid, shall be divided equally between . . . ." It was held that the will created only a life estate in the survivor, but that the survivor had a power of disposition during her lifetime. Hence, grantees of the widow were entitled to a clear fee simple title. The court stated that a power may be created by implication as well as by express language. More careful draftsmanship would have made it clear that the survivor received either a fee simple estate with no strings attached, or else a life estate with a clear power of disposition.

A significant development in the field of future interests in the past biennium was the invalidation of the Florida statute limiting the effectiveness of reverter provisions in private conveyances. This statute was held unconstitutional as applied to pre-existing reverter clauses. The effect, of course, is almost a complete frustration of the legislative attempt to clear private titles from outmoded forfeiture provisions of unlimited duration. As to such future created provisions, there would seem to be no question but that the legislation is valid. However, the real problem is with the

85. Ibid.
86. 70 So.2d 364 (Fla. 1954).
87. Id. at 365.
90. See the preamble to c. 26927, Laws of Fla. (1951); Fla. Stat. § 689.18 (1953).
old limitations, and, as to them apparently, the only method of clearing title is the purchase of releases. The indirect effect of the Biltmore decision on tax titles has already been discussed in this survey, and, as noted therein, has already been changed by legislation.

IV. Deeds: Recording; Cancellation; Delivery.

Recording and priorities.—Three cases involving the Recording Act were among the most interesting "litigators" concerning deeds during the past two years. The facts of Moyer v. Clark were rather simple. The owner conveyed to the defendant in 1932, but the deed was not recorded until 1953. In the meantime, the former owner died and his administrator conveyed the land to plaintiff.

\[
\begin{array}{c}
\text{(1)} \\
\text{deed given by O's Administrator on 4/20/53} \\
\text{deed} \\
\text{Pl. Clark}
\end{array}
\]

In a suit to quiet title by the second grantee, the defendant asserted that the plaintiff was not a bona fide purchaser for value without notice within the Recording Act. The plaintiff in turn sought to overcome this defense by asserting the twenty year statute of limitations. The twenty year statute of limitations was held inapplicable. That statute bars attack on a deed which is on record for twenty years and has no effect on other deeds. In the instant case, both the plaintiff and the defendant were relying and claiming through the last deed on record, namely O's, and neither one was attacking it nor asserting a claim adverse to it. Hence, the defendant would prevail unless the plaintiff were a bona fide purchaser for value without notice.

In Hull v. Maryland Casualty Co. a judgment creditor was seeking

\[
\begin{array}{c}
\text{(1)} \\
\text{deed conveyed 1927, recorded 1950} \\
\text{Husband} \\
\text{(2)} \\
\text{Judgment in 1932, 33, 35} \\
\text{inherited as sole heir of husband} \\
\text{Creditor} \\
\text{(3)} \\
\text{Plaintiff}
\end{array}
\]

91. Biltmore Village, Inc. v. Rotolante, supra note 89.
92. See text discussion following note 3 supra.
94. FLA. STAT. § 695.01 (1941).
95. 72 So.2d 905 (Fla. 1954).
96. FLA. STAT. § 95.23 (1953).
97. Moyer v. Clark, 72 So.2d 905 (Fla. 1954).
98. 79 So.2d 517 (Fla. 1954).
priority over a prior unrecorded deed. The deed was executed before but recorded after the judgments were obtained.

The decision was in favor of the heir of the grantee in the prior unrecorded deed. Although the Recording Act protects creditors and subsequent purchasers for a valuable consideration and without notice, notice was imputed in this case by the record of other instruments mentioning the rights of the plaintiff's ancestor. Neither the deed itself nor the prior purchase contract were recorded, but there were recorded assignments of the original contract and a blanket mortgage mentioning the contract to convey. The case is in accord with previous decisions to the effect that the record is notice not only of its own contents, but also of such other facts as would have been learned had the record been examined and the inquiries suggested thereby been duly prosecuted. Although the statute does not specify only judgment or lien creditors as being entitled to protection against unrecorded instruments, that limitation has been previously imposed and is obviously necessary for the pragmatic functioning of the Recording Act. Although the court did not see the necessity of discussing the chain of title, it is clear that the mortgage at least would be within the chain and would put third persons on notice to ascertain the extent of the vendees' interest under the various contracts therein recited. If the contract itself had not been recorded, as was the case at bar, it is difficult to see how an assignment thereof would be within the chain of title. However, if such an assignment were noted by an abstract company, which is very likely because of their unofficial tract indexes, then one seeing such an abstract and assignment would be put on inquiry, a type of actual notice, and would then have to ascertain the extent of such interests.

Bauman v. Peacock, the third case involving the Recording Act, is perhaps the most noteworthy of the three. In this case one Stone entered into a contract to convey to one Holmes in March of 1952. This contract was recorded. Holmes then assigned the contract to Peacock in August of the same year. The assignment was not recorded. In 1953 Bauman secured a judgment against Holmes for $4,000, and Peacock sought to quiet his title against the judgment of Bauman. Both Peacock and Holmes before him had been in possession through tenants. It was held in favor of Peacock on the basis that his possession constituted notice to Bauman, hence the unrecorded assignment was superior to Bauman's judgment.

100. Sapp v. Warner, 105 Fla. 245, 257, 141 So. 124, rehearing denied, 143 So. 648, motion to recall denied, 144 So. 481 (1932).
101. Ringling Trust and Savings Bank v. Whitfield Estate, 32 F.2d 92 (5th Cir. 1929), cert. denied 280 U.S. 573 (1929); Rogers v. Munnerlyn, 36 Fl. 591, 18 So. 669 (1895); Eldridge, Dunham & Co. v. Post, 20 Fl. 579 (1884).
102. Cf. Lassiter v. Curtiss-Bright Co., 129 Fl. 728, 177 So. 201 (1937), concerning the recording of a contract not entitled to record.
103. 80 So.2d 365 (Fla. 1955).
104. Ibid.
This decision generally is in accord with the proposition that possession constitutes notice of any outstanding interest.\textsuperscript{105} A refinement of that proposition, however, was raised in the instant case and disposed of rather summarily. It was alleged that the tenants of Peacock were the same as the tenants of Holmes, and therefore their possession would not constitute notice. The decision recognized previous holdings to this effect,\textsuperscript{108} but concluded that the trial judge had decided the tenants were not the same.

Additional grounds for the decision were given in what appears to be an extraordinary curtailment of the effectiveness of the Recording Act. It was stated that the judgment creditor was not entitled to the protection afforded a bona fide purchaser without notice since he was asserting a lien against a vendee's interest under a contract to purchase. It was asserted that the bona fide purchaser rule applies only to purchasers of the legal interest, and as between competing equal equities, the prior equity prevails.\textsuperscript{107} In view of the fact that the Recording Act states: "No conveyance, transfer or mortgage of real property, or of any interest therein, nor any lease for a term of one year or longer, 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; . . . .",\textsuperscript{108} (emphasis added) the expression of the court seems unwarranted.

Miscellaneous.—In a number of suits seeking cancellation of deeds, it was held that the evidence was insufficient under the facts of each case to prove duress,\textsuperscript{109} mental incompetency,\textsuperscript{110} and fraud and undue influence.'\textsuperscript{111} In a similar suit involving forgery,\textsuperscript{112} it was held that the Dead Man's Statute\textsuperscript{113} did not preclude the grantor from testifying after the grantee had died that the purported deed was a forgery. It was asserted

\textsuperscript{105} See Synopsis of Florida cases in a comment in 6 MIAMI L.Q. 595 at 600 (1952).
\textsuperscript{107} Bauman v. Peacock, 80 So.2d 365 (Fla. 1955).
\textsuperscript{108} \textsc{Fla. Stat.} § 695.01 (1953).
\textsuperscript{109} Cooper v. Cooper, 69 So.2d 881 (Fla. 1954).
\textsuperscript{110} Davis v. Wigfall, 70 So.2d 908 (Fla. 1954).
\textsuperscript{111} Marquette v. Hathaway, 71 So.2d 648 (Fla. 1954).
\textsuperscript{112} Security Trust Co. v. Calafones, 68 So.2d 562 (Fla. 1953).
\textsuperscript{113} \textsc{Fla. Stat.} § 90.05 (1953).
that to hold otherwise would permit a person to acquire for his estate property of another without the knowledge and consent of the other.\textsuperscript{114}

In an interesting case involving quitclaim deeds from a municipality, it was held that a subsequent quitclaim deed of the same land to a different grantee was not itself a repudiation of the prior quitclaim deed.\textsuperscript{115} The city had acquired the land by means of foreclosing tax liens. It then executed and delivered a quitclaim deed to the first grantee, but this deed was said to be invalid because the action was not formally approved by city council. Later, a second quitclaim deed was executed and delivered for the same land, and this deed was formally approved by city council. It was held that the first deed was voidable only and not void, and that the second deed was not necessarily a repudiation of the first since a quitclaim deed did not necessarily purport to convey any particular interest.\textsuperscript{116} Hence, the quiet title suit by the purchaser from the second grantee was properly dismissed.\textsuperscript{117}

Deeds from the I.I.F., as all other deeds, must be delivered to be effective to pass title; signing and placing thereon the official seal is not sufficient.\textsuperscript{118} Estoppel may be asserted in defense of a title but not to establish one,\textsuperscript{119} and a judgment in ejectment must comply with the statute\textsuperscript{120} requiring it to specify the dimensions and location of the land encroached upon.\textsuperscript{121} Also, in an ejectment action, the measure of compensation for improvements made in good faith by a possessor under color of title, is the amount by which the value of the land is increased, and not the cost, less of course, the reasonable rental value while the party claiming compensation was in possession.\textsuperscript{122} A proper case for reformation is made out when the land conveyed was neither the land the grantor intended to convey nor the land the grantee expected to receive.\textsuperscript{123}

V. RIGHTS IN LAND

Covenants, easements, water rights.—The most significant development in this area of Florida property law was the express holding that the right to enforce a restrictive covenant was not a property right within constitutional guaranties.\textsuperscript{124} Hence, a governmental unit need not compensate individuals for the loss of such a right to enforce the covenant when neighboring land is taken for public purposes.\textsuperscript{125} In the case decided,\textsuperscript{126}

\begin{itemize}
  \item 114. See note 112 supra.
  \item 115. Goldtrap v. Bryan, 77 So.2d 446 (Fla. 1954).
  \item 116. Ibid.
  \item 117. Ibid.
  \item 118. Dolores Land Corp. v. Hillsborough County, 68 So.2d 393 (Fla. 1953).
  \item 119. Naples v. Morris, 71 So.2d 905 (Fla. 1954).
  \item 120. FLA. STAT. § 70.05 (1953).
  \item 121. Florida Coca Cola Bottling Co. v. Robbins, 81 So.2d 193 (Fla. 1955).
  \item 122. Arey v. Williams, 81 So.2d 525 (Fla. 1955).
  \item 123. Spear v. McDonald, 67 So.2d 630 (Fla. 1953).
  \item 124. Board of Public Instruction v. Bay Harbor Islands, 81 So.2d 637 (Fla. 1955).
  \item 125. Ibid.
  \item 126. Ibid.
\end{itemize}
the issue was raised whether a school could be built on restricted land, and, also, if such were done, whether the school board would have to compensate all the owners of the land for whose benefit the restriction was imposed. It was held, and correctly so, that the restriction was not enforceable against governmental units. Then, after a review of the conflicting authorities, the court decided to adopt what had been termed the minority view and hold that such compensation to owners of neighboring land need not be given. The court followed the decision of a Georgia case, which in turn relied heavily on a federal decision, in reaching what it termed the trend of decisions and the better view. The policy considerations of relieving governmental units from intolerable burdens in eminent domain cases, should the contrary view be adopted, was an important factor. The decision, of course, can be readily justified, and is pragmatic.

In other cases involving restrictive covenants, it was held that a restriction against liquor sales except as an adjunct to a regular meal precluded operation of a cocktail lounge and package store, and prohibited any sales except to customers who ordered a regular meal. In determining whether the benefit and burden ran with the land in another case, the court concluded that the benefit did not run where the covenant used the words “successors and assigns” on the part of the grantee, but did not use them on behalf of the grantor. In another decision a covenant was upheld providing that no building should be erected unless the plans were submitted to and approved by the grantor.

The extent of riparian rights and the construction of the Florida Statute vesting the title to submerged lands of navigable rivers in upland owners was at issue in Duval Engineering and Contracting Co. v. Sales. It was held that the act vesting such title in the upland owners was contingent on their bulkheading and filling in to the edge of the channel, and until that was done, the upland owner did not get a fee simple title, but that a reversion remained in the I.I.F. Further, under the facts of the case, the I.I.F. had conveyed a perpetual easement for the construction of a bridge over the St. John’s River prior to such improvement by the upland owner. It was further decided that the upland owner’s riparian

127. Ibid.
130. Board of Public Instruction v. Bay Harbor Islands, 81 So.2d 637, 643 (Fla. 1955). The same considerations were paramount in Sackett v. Los Angeles City School District, 118 Cal. App. 254, 5 P.2d 23 (1931).
133. Engvalson v. Webster, 74 So.2d 113 (Fla. 1954).
134. FLA. STAT. §§ 271.01-271.08 (1953).
135. 77 So.2d 431 (Fla. 1955).
real property

rights were so negligibly interfered with by the bridge that he was not entitled to compensation.

In a number of other cases it was held that an implied easement for hauling water for limited purposes by mule teams and barrels could not be enlarged to permit the installation of pipes and a modern irrigation system; that a two foot encroachment on an easement where the specified width was merely descriptive and where the encroachment did not materially obstruct the way, was not actionable; and that a person has no right to divert the natural flow of surface waters and cast it in quantity on the lands of another although such result may follow the improvement of one's own land. In a return engagement before the Supreme Court in a dispute involving subsurface waters the plaintiff was again successful. In the previous case it was held that he could recover for the intentional interference with the flow of subterranean water. In the latest decision between the parties, a judgment for the defendant was set aside on the ground that the evidence did not show that he was not negligent in interrupting the flow of subterranean waters.

VI. Mortgages and Liens

Mortgages.—Perhaps the most significant development in the law of mortgages resulted from the decision in the Kirtley case which held that although foreclosure of a mortgage might be barred by the twenty year statute of limitations, the mortgagee could still recover for taxes paid on the mortgaged property. The rule of the case has since been changed by statute and is discussed supra under Legislation. In another suit involving the application of the same statute of limitations, foreclosure of the mortgage in issue was subject to two conditions precedent: (1) foreclosure of mortgages on other land, and (2) transfer of the land by the mortgagor. Since the record contained evidence and matters relating solely to the second condition, namely that the mortgagor still owned the land in litigation, the court refused to decree whether the lien was void because of the statute of limitations, but reversed the lower court and ordered a dismissal with leave to amend so that evidence could...

136. I.e., the right of unobstructed view over the river, the right of ingress and egress, and the right to fish and bathe in the waters. 77 So.2d 431, 434 (Fla. 1955).
137. 77 So.2d 431 (Fla. 1955).
139. Robinson v. Feltus, 68 So.2d 815 (Fla. 1953).
140. Lawrence v. Eastern Air Lines and Miami Springs, 81 So.2d 632 (Fla. 1955).
141. Labrizzo v. Atlantic Dredging and Const. Co., 73 So.2d 228 (Fla. 1954).
142. 74 So.2d 673 (Fla. 1951); Boyer, Survey of Real Property Law, 8 MIAMI L.Q. 389, 424 (1954).
143. See note 141 supra.
144. H.K.L. Realty Corp. v. Kirtley, 74 So.2d 876 (Fla. 1954).
145. FLA. STAT. § 95.28 (1953).
146. See note 144 supra.
147. Laws of Fla., c. 29977 (1955); FLA. STAT. § 95.28 (1955).
148. Supra page 391.
149. Hubbard v. Tebbetts, 76 So.2d 280 (Fla. 1954).
be introduced concerning the other condition, that is whether the other mortgages were foreclosed or not.\textsuperscript{150}

In one case\textsuperscript{151} involving the defense of usury, it was held that since an assumption of the mortgage by a corporation did not relieve the original mortgagor of liability, the original mortgagor could plead the defense of usury although such a defense was not then available to corporations.\textsuperscript{152} The debt could thus be cancelled when the acceleration under the terms moved the due date forward so that the ratio of outstanding indebtedness to interest and bonus was usurious.\textsuperscript{153} Since the legislative changes in 1953\textsuperscript{154} a corporation can now plead usury as a defense.\textsuperscript{155} An interesting decision\textsuperscript{156} involving condemnation proceedings held that a mortgagee has no estate or interest in land, but only a lien, and hence is not entitled to be named as party defendant in such proceedings, nor entitled to attorney fees nor interest after the mortgage is satisfied from the award.\textsuperscript{157}

An interesting decision\textsuperscript{158} involving the recording Act\textsuperscript{159} held that a creditor taking a mortgage for a pre-existing debt and forbearing to sue without any definite time specified for such forbearance, was not a bona fide purchaser entitled to priority over a previous unrecorded mortgage.\textsuperscript{160} If the forbearance had been for a definite time, although for a short period, then he would have been entitled to priority.\textsuperscript{161} The decision is justified on the basis that only subsequent bona fide purchasers are entitled to priority over prior unrecorded instruments,\textsuperscript{162} but the statute also protects creditors and does not require the creditors to be subsequent creditors.\textsuperscript{163} Presumably, if the creditor in the instant case had obtained a judgment rather than taken a mortgage, he would have obtained priority.\textsuperscript{164} Creditors taking mortgages to secure pre-existing debts should make certain that their forbearance to sue is for a definite period or otherwise exercise care to come within the scope of the subsequent bona fide purchaser concept.

\textsuperscript{150} Ibid.
\textsuperscript{151} Sonz v. Eisenstat, 70 So.2d 373 (Fla. 1954).
\textsuperscript{152} Ibid.
\textsuperscript{153} Ibid.
\textsuperscript{154} FLA. STAT. §§ 608.01-608.67 (1953).
\textsuperscript{155} Sodi, Inc. v. Solitan, 68 So.2d 882 (Fla. 1953).
\textsuperscript{156} Shaivers v. Duval, 73 So.2d 684 (Fla. 1954).
\textsuperscript{157} Ibid.
\textsuperscript{158} Gabel v. Drewrys, Ltd., U.S.A., 68 So.2d 372 (Fla. 1953).
\textsuperscript{159} FLA. STAT. § 695.01 (1953).
\textsuperscript{160} Gabel v. Drewrys, Ltd., U.S.A., note 158 supra.
\textsuperscript{161} Ibid.
\textsuperscript{162} FLA. STAT. § 608.01 (1953).
\textsuperscript{163} FLA. STAT. § 695.01 (1953).
\textsuperscript{164} FLA. STAT. § 608.01 (1953).
\textsuperscript{165} The statute 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: . . ." (emphasis supplied.)
\textsuperscript{166} See Hull v. Maryland Casualty Co., 79 So.2d 517 (Fla. 1954), where the judgment creditor did not get priority because he was charged with notice. The case is discussed supra p. 402. See also comment, 6 MIAMI L.Q. 595, 601 (1952).
Other cases involving mortgages were only significant factually and involved such issues as cancellation for duress, construing deeds as mortgages or conditional sales, and the parol evidence rule.

Mechanics' Liens.—The Mechanics' Lien law continues to be a fruitful source of litigation. The protection afforded materialmen by the 1953 amendment to the lien law is illustrated by the case of Beam v. Jerome Lumber and Supply Co., which held that a materialman who failed to notify the owner of his intention of claim a lien until the owner had paid the contractor all but a small balance was entitled to a claim only against the balance due. Under the legislation now in force, the owner is seemingly required to withhold 20% of each progress payment for the protection of mechanics and materialmen. That portion of the statute which extends the lien to specially fabricated materials, although not incorporated into the property if the non-incorporation was not the fault of the materialman, was construed in Surf Properties, Inc. v. Markowitz Brothers, Inc. It was therein held that specially fabricated was not the same as specially ordered, and hence the lien would not cover unused stock items which could readily be used for a swimming pool elsewhere.

A mechanics' lien extends to architect's services, but failure of the complaint to allege that the services or materials were used on the improved property fails to state a cause of action. A sub-sub-contractor has no protection and is unable to file liens against owners or contractors in case of default of subcontractors. The contractor's sworn statement to the owner concerning full payment of all lienors is a condition precedent to filing suit by the contractor although the owner may not have demanded it. Further, a supplier may be estopped to assert a lien where he remains silent and lets the owner settle with the contractor. The estoppel is invoked even though the owner did not ask the contractor for the sworn statement since the supplier is at an advantage over the owner and is presumed to know the law. Similarly, the owners may be estopped when they let occupants of the land hold themselves forth as the owners. In such case the claimant is entitled to the lien on the basis

165. Loew v. Friedman, 80 So.2d 672 (Fla. 1955).
166. Videon v. Hodge, 72 So.2d 396 (Fla. 1954); Rosenthal v. Le May, 72 So.2d 289 (Fla. 1954).
167. Schwartz v. Zaconick, 68 So.2d 173 (Fla. 1954); 74 So.2d 108 (Fla. 1954).
169. 74 So.2d 537 (Fla. 1954).
170. Ibid.
171. Ibid.
173. 75 So.2d 298 (Fla. 1954).
174. Ibid.
175. Peterson v. Petersen, 67 So.2d 682 (Fla. 1953).
177. Moore v. Crum, 68 So.2d 379 (Fla. 1953); Barton v. Horwick, 78 So.2d 569 (Fla. 1955).
178. Southern Supply Corp. v. Lansdell, 76 So.2d 266 (Fla. 1954).
179. Ibid.
that the occupants were the agents of the owners.\textsuperscript{180} Similarly, a husband contracting with the knowledge of the wife may be held to be agent of the wife for purposes of subjecting the land to a mechanics' lien, but if the issue of knowledge or consent is denied, then the case should be tried on that point.\textsuperscript{181}

Failure to foreclose the lien within a year extinguishes it,\textsuperscript{182} and failure to foreclose within the time also precludes the imposition of an equitable lien.\textsuperscript{183} Property of an unincorporated church association cannot be subject to a mechanics' lien because of the lack of authority to make a binding contract,\textsuperscript{184} but the property can be subjected to an equitable lien, and the lien can be litigated in a representative suit.\textsuperscript{185} The vendor's interest as well as the vendee's is subject to a mechanics' lien when the vendor requires as a condition of the sale the construction of improvements by the vendee.\textsuperscript{186}

\textbf{VII. SPECIAL TITLES}

\textit{Adverse possession and disputed boundaries.—} The roles of adverse possession and acquiescence in disputed boundary cases were again reviewed in the case of \textit{Holley v. May}.\textsuperscript{187} The dispute involved an encroachment of defendant's building on plaintiff's land. It was correctly held that the doctrine of acquiescence\textsuperscript{188} was inapplicable to relocate the boundary when the only evidence of acquiescence existed prior to the parties' becoming aware of the encroachment. As soon as the encroachment was discovered, the dispute developed. Similarly, adverse possession could not be applied to relocate the boundary since the owner of the encroaching structure did not return the land in dispute for taxation.\textsuperscript{189} The former case of \textit{Euse v. Gibbs},\textsuperscript{190} discussed in the previous Survey of Real Property Law,\textsuperscript{191} was distinguished. In that case the doctrine of acquiescence established a new or true boundary so that the taxes paid on the land according to its legal description constituted payment of taxes on all the land. In the instant case the court also explained the decree asserting that the plaintiff had title to the land encroached upon, and pointed out that it

\begin{tabular}{l}
\textsuperscript{180} Kimbrell v. Fink, 78 So.2d 96 (Fla. 1955). Relief was denied in the instant case, however, because the plaintiffs were barred by the one-year statute of limitations, infra note 182. \\
\textsuperscript{181} Barton v. Horwick, supra note 177. \\
\textsuperscript{182} Fla. Stat. § 84.21 (1953). \\
\textsuperscript{183} Blanton v. Young, 80 So.2d 351 (Fla. 1955); Kimbrell v. Fink, supra note 180. \\
\textsuperscript{184} Ross v. Gerung, 69 So.2d 650 (Fla. 1954). \\
\textsuperscript{185} Ibid. \\
\textsuperscript{186} Tremont Co. v. I. A. Popeche, 81 So.2d 489 (Fla. 1955). \\
\textsuperscript{187} 75 So.2d 696 (Fla. 1954). Previous decision, 59 So.2d 646 (Fla. 1952). \\
\textsuperscript{188} The doctrine is that acquiescence in a line established after a dispute determines the boundary between the properties. See Boyer, \textit{Survey of Real Property Law}, 8 Miami L.Q. 389, 419 (1954). \\
\textsuperscript{189} Fla. Stat. § 95.19 (1953). \\
\textsuperscript{190} 49 So.2d 843 (Fla. 1951). \\
\textsuperscript{191} Boyer, op. cit. supra note 188, at 419. \\
\end{tabular}
did not give him the right to demolish the building or entitle him to re-
ceive income.\textsuperscript{192} Apparently he would be left to his action at law for damages under the authority of previous decisions.\textsuperscript{193} In another case\textsuperscript{194} it was held that a deed by one co-tenant under the facts disclosed could constitute color of title to the whole tract and from a predicate for a claim of title by adverse possession.

\textit{Tax deeds.}—Among several decisions involving the validity of tax deeds was the case of Addoms v. Dolan\textsuperscript{195} concerning the effect of a tax sale certificate. The dispute involved competing claimants under tax deeds. The holder of the earlier deed in point of time sought priority on the basis that the tax certificate forming the predicate of the later deed was merged with the legal title and hence extinguished prior to the issuance of the deed. To support this claim of merger, it was shown that a predecessor in title had at one time owned both the tax certificate in issue and also had later acquired a tax sale certificate issued pursuant to a sale of the same land for the foreclosure of other delinquent taxes. In denying the claim of merger, it was pointed out that the tax sale certificate was not a conveyance of the legal title. Although the holder may have been entitled to have a tax deed issued after the tax sale was approved, no such tax deed was in fact issued. The court concluded that thus the effect of the tax sale was nothing more than a lien, and that the holder simply held two liens on the land at that time. Hence, there was no merger and no extinction of the former tax certificate, and therefore a deed later procured on the predicate of such certificate would be valid.

The validity of the notice sent to delinquent owners was the controlling issue in two recent cases. In the one case\textsuperscript{196} an official notice was properly sent only to the husband when the land was owned by a married couple as tenants by the entirety. Because of a clerical error the notice sent to the wife was misaddressed. It was held that such notice was insufficient and that a tax deed issued pursuant thereto was void.\textsuperscript{197} In the other case\textsuperscript{198} the tax payer's name did not appear on the tax rolls, and hence the clerk resorted to the records of the tax collector in accordance with the statute.\textsuperscript{199} These records were incorrect, and the last known taxpayer's name and address was wrong. It was nevertheless held that such notice was effective, and that a tax deed issued pursuant thereto was valid. The court stated that to hold otherwise would place an intolerable burden on the clerk of court, and make it possible for land owners to

\textsuperscript{192} Holley v. May, 75 So.2d 696 (Fla. 1954).
\textsuperscript{193} Johnson v. Killian, 157 Fla. 754, 27 So.2d 345 (Fla. 1946); McCreary v. Lake Boulevard Sponge Exchange Co., 133 Fla. 740, 183 So. 7 (1938).
\textsuperscript{194} Morrison v. Byrd, 72 So.2d 657 (Fla. 1954).
\textsuperscript{195} 67 So.2d 213 (Fla. 1953).
\textsuperscript{196} Montgomery v. Gipson, 69 So.2d 305 (Fla. 1954).
\textsuperscript{197} Ibid.
\textsuperscript{198} Mullin v. Polk County, 76 So.2d 282 (Fla. 1954).
\textsuperscript{199} FLA. STAT. § 194.51 (1953).
thwart the orderly collection of taxes by furnishing tax officials with incorrect addresses.\textsuperscript{200}

The validity of the \textit{in rem} foreclosure proceedings for the foreclosure of drainage taxes under Florida Statute Section 298.75 was evaded in the case of \textit{Sarasota-Fruitville Drainage Dist. v. Certain Lands}.\textsuperscript{201} In this case the Drainage District brought foreclosure proceedings and the trial court refused to issue notices to appear because of doubt as to the constitutionality of the statute. The Drainage District appealed. The Supreme Court refused to rule on the matter because there were no defendants before the court. The Court based its decision on the familiar principle that only actual controversies are reviewed by appellate courts, and pointed out that it was authorized to issue advisory opinions only to the Governor of the State and then only concerning his powers and duties under the Constitution.\textsuperscript{202} Perhaps mandamus was the proper remedy.

\textbf{Eminent domain.}—The effectiveness of the statute\textsuperscript{203} providing for a summary method of obtaining possession pending the completion of condemnation proceedings, previously held valid when utilized by governmental units,\textsuperscript{204} was extended to apply to eminent domain proceedings exercised by public utility corporations clothed with such power.\textsuperscript{205} The relationship between eminent domain and the police power was again involved in the return engagement of \textit{Miami v. Romer}.\textsuperscript{206} After the court had previously held that setback lines could be established under the police power without the necessity of compensation,\textsuperscript{207} the plaintiff landowner amended his complaint to allege in substance that the setback lines were used as a subterfuge for the acquisition of land for street and sidewalk purposes. The court held that the amended complaint could be construed to charge that the ordinance establishing the setback lines was an unreasonable exercise of the police power enacted without regard to the public health, safety and general welfare, and hence stated a cause of action.\textsuperscript{208}

The rights of mortgagees were involved in two condemnation proceedings. It was concluded that the mortgagee was not a proper party as he had no estate in the land but only a lien, and hence was not entitled to attorneys' fees.\textsuperscript{209} It was further held that upon satisfaction of his

\begin{itemize}
\item \textsuperscript{200} Mullin v. Polk County, note 198 supra.
\item \textsuperscript{201} 80 So.2d 335 (Fla. 1955).
\item \textsuperscript{202} Ibid.
\item \textsuperscript{203} Fla. Stat. §§ 74.01-74.15 (1953).
\item \textsuperscript{204} State Road Dept. v. Forehand, 56 So.2d 901 (Fla. 1952).
\item \textsuperscript{205} Belcher v. Florida Power and Light Co., 74 So.2d 56 (Fla. 1954).
\item \textsuperscript{206} 73 So.2d 285 (Fla. 1954).
\item \textsuperscript{208} Miami v. Romer, 73 So.2d 285 (Fla. 1954)
\item \textsuperscript{209} Shavers v. Duval County, 73 So.2d 684 (Fla. 1954).
\end{itemize}
mortgage out of the award money he was entitled to no further interest. He could, of course, decline to take satisfaction at that time and let the mortgagor make payments in accord with the original note, but if he does so he necessarily waives his lien. The lien on the award money will be impressed only until final distribution, and the award money will not be held by the court until natural expiration of the mortgage. The mortgage, in effect, is subject to the power of eminent domain the same as other property, and such acceleration of payment is not violative of the due process or impairment of contract clauses of the State or Federal Constitutions. In another case it was held proper for the court to protect a discharged attorney by impressing a lien on the award although the landowner had not requested it.

Dedication and accretion.—In a factually interesting case involving dedication and accretion, the plaintiff sought to acquire title to a large portion of alluvion land. To do this, of course, he had to prove that he was a riparian owner. He had owned land in a platted subdivision which was never actually improved. His lot was bordered by a platted highway, across from which was originally a small irregular tract of land bordered by New River Sound. The street was never laid out and the whole area was wild and unimproved. The accretion was added to the small irregular tract. As the tract had not been originally labeled on the plat, plaintiff alleged that it was dedicated since it was of no use to anyone. He further alleged that the dedicated areas were abandoned by the public, and that title to all of the street and the tract on the other side reverted to him. In denying the plaintiff's claim, the court reaffirmed a previous decision to the effect that unlabeled space on a plat is evidence of a reservation rather than a dedication, and it further found that the offer to dedicate the street had been accepted when the municipality accepted a deed thereto, and that failure to open the street was not an abandonment when there was no need to open it. Hence, plaintiff could not get the land by accretion since he was not an upland owner, not having title beyond the street. In another case involving abandonment of dedicated streets, it was held that a street was not abandoned and, accordingly, it did not revert to the grantor when the State Road Department, after constructing a new road, turned it over to the county to maintain for residents of the area.

212. Supra note 210.
213. Winn v. Cocoa, 75 So.2d 909 (Fla. 1954).
215. Ibid.
216. Dickson v. St. Lucie County, 67 So.2d 662 (Fla. 1953).