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Real Property Law

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REAL PROPERTY LAW*

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I. INTRODUCTION

Both legislative and judicial activity in the property area have been prolific during the past biennium.[1] During the period covered by this survey, some of the noteworthy legislative enactments included: the adoption of condominium and cooperative buyer protection statutes;[2] the creation of a uniform judicial sales procedure;[3] changes in the usury laws;[4] and new procedures for the conveyance of partnership realty.[5] Litigation, as usual, covered all principal areas of property law with some of the more notable decisions involving usury,[6] an alimony judgment and homestead immunity,[7] the duty, if any, of a cotenant in exclusive possession to account for rents and profits,[8] and the effect of a donative conditional delivery of a deed.[9]

Because of the large number of legislative and judicial pronouncements, this survey represents a selection of the most noteworthy and significant developments. A recounting of well established principles in Florida is generally excluded.

II. MORTGAGES

A. *Foreclosures*

A suit upon a note secured by a mortgage has been held not to discharge the indorser of the note. In *Lisbon Holding & Investment Co. v. Village Apartments, Inc.*,[10] the defense contended that the legal effect of

1. The period covered is the 1969-71 biennium, or more specifically, from volume 226 through 249 of the Southern Reporter, Second Series.
2. *See* section X *infra.*
3. *See* section II *infra.*
4. *See* section II *infra.*
5. *See* section III *infra.*
6. *See* section II *infra.*
7. *See* section III *infra.*
8. *See* section III *infra.*
9. *See* section VIII *infra.*
10. 237 So.2d 197 (Fla. 3d Dist. 1970), *cert. dismissed*, 241 So.2d 859 (Fla. 1970).

the suit was an election not to foreclose the mortgage and, therefore, a waiver of the security which discharged the indorser. In rejecting the defense, the court pointed out that in Florida, and generally, a suit on the note does not constitute an election of remedies barring a subsequent foreclosure action. Therefore, since the security was not waived, the indorser was not released.

The District Court of Appeal, Second District, in two separate cases,[11] held that a mortgagee may not foreclose his mortgage when his security has not been placed in jeopardy. In *Schechtman v. Grobbel*,[12] the mortgagors paid escrow tax monies to a bank instead of to the mortgagee. The court ruled that this was merely a technical breach of the mortgage contract and did not place the security in jeopardy. Similarly, in *Clark v. Lachenmeier*,[13] the same court held that the mortgagor's failure to obtain the consent of the mortgagee when the property was sold did not impair the security of the indebtedness. Consequently, the foreclosure complaint was dismissed.

Another case arose where a single indebtedness was secured by two separate mortgages on two different parcels of land, one located in North Carolina and the other in Florida. After foreclosing the mortgage on the North Carolina realty, the mortgagee sought to foreclose the second mortgage which was on Florida realty. The District Court of Appeal, Fourth District, held that the acquisition of a deficiency judgment on the first mortgage in North Carolina was not a prerequisite to filing the second foreclosure suit in Florida.[14] However, evidence was admissible to determine the true value of the North Carolina property so that an appropriate credit could be used in the Florida suit.

A mortgagor's willingness to pay all delinquent amounts to make his mortgage current does not entitle him to have a foreclosure action dismissed.[15] Furthermore, a mortgagor, even of homestead property, may be estopped to deny the validity of the mortgage or the proper execution thereof, especially if the mortgage has followed the note into the hands of a holder in due course. This was the situation in *Harris v. Dikman*,[16] where the mortgagors claimed homestead protection and also alleged that the two subscribing witnesses had not been present at the execution of the mortgage instrument. In rendering its decision, the court did not rely on the principle that a mortgage follows the debt, but instead predicated the decision on the proposition that a bona fide assignee of a note and mortgage who is without notice of any latent defect should

11. Clark v. Lachenmeier, 237 So.2d 583 (Fla. 2d Dist. 1970); Schechtman v. Grobbel, 226 So.2d 1 (Fla. 2d Dist. 1969).

12. 226 So.2d 1 (Fla. 2d Dist. 1969).

13. 237 So.2d 583 (Fla. 2d Dist. 1970).

14. Symon v. Charleston Capital Corp., 242 So.2d 765 (Fla. 4th Dist. 1970). The North Carolina property was sold at public sale without any judicial proceedings as is permitted under the laws of North Carolina.

15. Campbell v. Werner, 232 So.2d 252 (Fla. 3d Dist. 1970). The mortgagor must have notice that the mortgagee has elected to declare the entire indebtedness due.

16. 235 So.2d 529 (Fla. 2d Dist. 1970), *cert. denied*, 238 So.2d 428 (Fla. 1970).

be protected against the mortgagor whose conduct caused the situation. The result is justified since the mortgagors got what they bargained for. However, it may be a little difficult to accept the homestead character of the mortgage transactions in the first instance. The court noted that prior to the execution of the mortgage the realty in question was a vacant lot, and that the mortgage had been given to secure the construction of a house. The court simply stated that the trial judge resolved all homestead issues in favor of the mortgagors, including the fact that the wife was the head of the family. If, however, homestead status is predicated upon at least two persons living on the land in a family relationship,[17] then this holding is a bit difficult to understand.

B. *Usury*

Since *Holland v. Gross*,[18] a long line of cases have dealt with the situation where a lender requires his borrower to incorporate so that higher rates of interest may be exacted.[19] It has constantly been recognized that the facts in each case will determine whether the court will find that a loan was made to individuals and not a corporation. In *Tel Service Co. v. General Capital Corp.*,[20] the supreme court held that testimony establishing that the lender required the borrower to change its form from a partnership to a corporation, without more, was not sufficient to constitute the basis for disregarding the corporate entity.

Recent changes in the usury statutes have contributed to the problems of proper interpretation and application of the statutes. Thus, in *Tel Service*,[21] one statute, Florida Statutes section 687.07 (1963),[22] had provided for forfeiture of both principle and interest where there occurred an intentional charge of more than 25 percent interest per year. In addition, later-enacted Florida Statutes section 687.11 (1965)[23] provided that all interest would be forfeited if a corporation were charged at a rate in excess of 15 percent each year. There were also provisions in Florida Statutes section 687.04 (1965) allowing for forfeiture of double the interest paid in case of charges to corporations in excess of 15 percent per annum. The supreme court concluded that Florida Statutes section 687.11 (1965) impliedly repealed prior inconsistent statutory provisions that would impose greater penalties than forfeiture of the interest[24] and also expressly agreed with the appellate court that legislation enacted in 1969 providing for the repeal of Florida Statutes section

17. *See* 1 R. BOYER, Florida Real Estate Transactions § 2301[1], at 474.6 (1969).

18. 89 So.2d 255 (Fla. 1956).

19. FLA. STAT. § 687.03 (1969) provides that a rate of interest greater than ten percent per annum charged to an individual shall be usurious and unlawful, whereas the same transaction with a corporation may exact yearly interest payments up to fifteen percent.

20. 227 So.2d 667 (Fla. 1969) [hereinafter cited as *Tel Service*].

21. *See* note 20 *supra* and accompanying text.

22. *Added by* Fla. Laws 1909, ch. 5960, § 5; *repealed by* Fla. Laws 1969, ch. 69-135.

23. Fla. Laws 1965, ch. 65-299, *creating* FLA. STAT. § 687.11 (1965).

24. *See* Tel Service Co. v. General Capital Corp., 227 So.2d 667, 669 (Fla. 1969).

687.07 (1967)[25] would be applicable to existing litigation.[26] The court noted that an action predicated on remedies provided by the usury statute created no vested substantive right, but only an enforceable penalty. Accordingly, such penalty or forfeiture was held to possess no immunity against statutory repeal or modification.[27] This would appear especially true in situations, as in the instant case, where the modifications favored the wrongdoer as a result of a penalty reduction.

The case of *Fields v. Wilensky*[28] involved a suit by a lender against a guarantor of a corporation's note and dealt with a further modification of the usury laws. This time, however, the court was faced with an added twist. In *Tel Service*,[29] the supreme court had held that Florida Statutes section 687.11 (1965) impliedly repealed provisions of Florida Statutes section 687.07 (1963), thus permitting only a forfeiture of interest, rather than interest and principal, when usurious interest rates were levied, even though section 687.11 (1965) had not been in effect at the time that the action had been commenced. Thus, a penalty reduction was effected. In *Fields*, the District Court of Appeal, Fourth District, was faced with the application of another later-enacted statute, Florida Statutes section 687.071(7) (1969).[30] That statute provided criminal penalties for usury, but also provided that neither the principal nor interest on a loan would be enforceable in the courts of Florida if the interest levy was in excess of 25 percent.[31] The court ruled that this provision conflicted with section 687.11 (1969) [originally enacted in 1965] and that portions of the latter statute had been impliedly overruled by the enactment of section 687.071(7).[32] Thus, the application of the later-enacted statute in this case would lead to the increase in a penalty, rather than a decrease as in *Tel Service*. Analogizing their holding to the rationale employed by the supreme court in *Tel Service*, the Fourth District held that just as there was no vested right in a penalty so as to require a lender to forfeit both interest and principal on a loan after legislation had been enacted to lessen the penalty,[33] that same reasoning could lead to no other conclusion but that a lender would also be liable for any stiffer penalty set by the legislature. The court so held and declared the debt to be completely unenforceable, but did certify the question to the supreme court as presenting a matter of great public concern.[34]

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25. Fla. Laws 1969, ch. 69-135.

26. Tel Service Co. v. General Capital Corp., 227 So.2d 667, 669 (Fla. 1969).

27. *Id.* at 671.

28. 247 So.2d 477 (Fla. 4th Dist. 1971).

29. Tel Service Co. v. General Capital Corp., 227 So.2d 667 (Fla. 1969). *See* notes 20-21 *supra* and accompanying text.

30. FLA. STAT. § 687.071 (1969), *created by* Fla. Laws 1969, ch. 69-135.

31. FLA. STAT. § 687.071(7) (1969).

32. Fields v. Wilensky, 247 So.2d 477, 482 (Fla. 4th Dist. 1971).

33. Tel Service Co. v. General Capital Corp., 227 So.2d 667 (Fla. 1969). *See* notes 20-21 *supra* and accompanying text.

34. The court also emphasized that in this case the provisions in effect at the time of execution (FLA. STAT. § 687.07 (1964)) provided for forfeiture of both principal and in-

The question of what will be considered as interest in determining if a loan is usurious was dealt with in *Curtiss National Bank v. Solomon.*[35] In that case the plaintiff agreed to pay the debt of another, for which he was not obligated, but which was due the lender in order to obtain an extension on plaintiff's own loan. The court held that this payment by the plaintiff should be classified as interest under the broad language of the usury statute involved, Florida Statutes section 687.03 (1969).

C. *Title Insurance and Mortgagees*

After losing its attempt to foreclose on a mortgage which secured a forged note, a plaintiff-mortgagee instituted suit against three insurance companies to recover its loss. The supreme court ruled in that case, *Bank of Miami Beach v. Fidelity & Casualty Co. of New York,*[36] that a defect in the note was not a defect in the mortgage securing the indebtedness.[37] Therefore, the insurance companies would not be liable under the title policy issued. The insurance contract guaranteed that the mortgage constituted a valid mortgage on the property described therein and was silent with respect to the note. The court stated that a "mortgage lien and a mortgage debt are two entirely different legal concepts or 'species'."[38] Therefore, the defect in the note did not come within the coverage of the policy.

In *Miller v. Commercial Standard Insurance Co.,*[39] the mortgagee, upon learning that the mortgagors did not own the land described in the mortgage, immediately filed suit against the title insurance company. The court held that a title insurance contract obligated the insurer to defend the title against a claim of its validity and that even though liability was established,[40] damages should be fixed at zero. The mortgagee should have brought an action against the mortgagors, rather than directly against the insurer.

D. *Balloon Mortgages*

The Supreme Court of Florida upheld the constitutionality of the Balloon Mortgage Statute[41] in the case of *Winner v. Westwood.*[42] The

terest. "The fact that between the time of its execution and the time of its enforcement Chapter 65-299 reduced the forfeiture provisions relating to usurious promissory notes is of little consequence . . . ." Fields v. Wilensky, 247 So.2d 477, 482 (Fla. 4th Dist. 1971).

35. 243 So.2d 475 (Fla. 3d Dist. 1971).

36. 239 So.2d 97 (Fla. 1970).

37. The defect involved here was a forgery of the signatures on the note by the son of the mortgagors. The mortgage itself was not forged, but was legally and properly executed and was therefore valid. Furthermore, the son was held liable for all sums disbursed as a result of the forged note.

38. Bank of Miami Beach v. Fidelity & Cas. Co. of New York, 239 So.2d 97, 99 (Fla. 1970).

39. 248 So.2d 675 (Fla. 2d Dist. 1971).

40. The insurer admitted that it allowed the mortgagee to place a mortgage on property which was not owned by the mortgagor.

41. FLA. STAT. § 697.05 (1969).

42. 237 So.2d 151 (Fla. 1970) [hereinafter cited as *Winner*].

court further stated in *Winner* that a second mortgage at the time of its execution, which later became a first mortgage as a result of the satisfaction of the original first mortgage, did not come within the exemptions found in subsection 5 of the statute.[43]

E. *Miscellaneous*

The standard of proof necessary to establish that signatures on mortgages and deeds are forgeries is by a preponderance or greater weight of the evidence and not by clear and convincing evidence.[44]

In *Indian River Orange Groves, Inc. v. Dickinson*,[45] it was resolved that documentary stamp taxes are due on a deed given in satisfaction of a mortgage.[46] The amount of the tax is based on the value of the debt discharged which is presumed to be the face value of the debt.

F. *Legislation*

Chapter 71-5 of the 1971 Florida Session Laws provides for a uniform judicial sales procedure which eliminates those statutes which provide for judicial sales in specific situations.[47] That act provides for other aspects of procedure including: 1) clarification that a person having an equity of redemption may redeem the property at any time before the sale, and 2) that the amount bid at the sale may be considered by the court as one of the factors in determining a deficiency.

III. Estates and Related Interests

A. *Homestead*

1. LEGISLATION

The 1968 Florida Constitution made several significant changes in homestead law including a new provision specifically authorizing the homestead owner to transfer the title to an estate by the entirety.[48] However, the question of whether it is necessary to have the grantee join in an interspousal transfer of homestead property was not resolved by the new constitution. The 1971 Legislature has attempted to solve this question by amending Florida Statutes section 689.11(1) (1969) to

43. Fla. Stat. § 697.05(5) (1969) provides that the statute shall not apply to the following: any first mortgage; any mortgage created for a term of more than five years; and any mortgage whose periodic payments consist of interest only with the original principal sum to be payable upon maturity.

44. Pate v. Mellen, 237 So.2d 266 (Fla. 1st Dist. 1970). *Accord*, Security Trust Co. v. Calafonas, 68 So.2d 562 (Fla. 1953) in which the supreme court stated that all the law requires is that the record contain substantial, competent evidence to support the finding of forgery.

45. 238 So.2d 125 (Fla. 1st Dist. 1970), *cert. denied*, 240 So.2d 645 (Fla. 1970).

46. Fla. Stat. § 201.08 (1969).

47. *Amending* Fla. Stat. § 45.031 (1969); *repealing* Fla. Stat. §§ 702.02, 702.021, 713.26(2) (1969).

48. Fla. Const. art. X, § 4(c) (1968), *discussed in* Dresnick, *Real Property Law*, 1967-69 *Survey of Florida Law*, 24 U. Miami L. Rev. 578, 580 (1970).

include homestead property and allow both interspousal transfer and transfer to an estate by the entirety without the joinder of the grantee spouse.[49] The statute, however, may be of doubtful constitutionality since the constitution generally still requires joinder of both spouses in a conveyance of homestead.[50] Perhaps a grantee spouse's acceptance of the deed is equivalent to a joinder in the deed, perhaps reasonable men would so conclude, and perhaps the requirement of the grantee spouse signing the deed is a mere formality; but the homestead has always been sacred in Florida, and the constitutional provision does not explicitly exclude the joinder requirement in interspousal transfers.

2. CASE LAW

The respect for the sanctity of the homestead has been evident in the reported cases covered by this biennium. In *Daniels v. Katz*,[51] a divorced husband placed a mortgage on his undivided one-half interest in property on which his former wife and children were residing. The property had been previously owned as an estate by the entirety. After the divorce, the property retained its homestead status, and the court held that the lien created by the former husband would not be enforceable on his one-half interest until such time as the homestead character was lost.[52]

In accordance with the non-retroactive effect of the new constitution, the case of *Moore v. Moore*,[53] involving a 1964 conveyance, was decided under the old constitution. In *Moore*, a deed from the husband to himself and his wife purporting to convey homestead property was found to be void *ab initio*.[54] Presumably, the attempted conveyance was void because it was gratuitous, because the grantee did not join as grantor, or perhaps because of both reasons.

Bendl v. Bendl[55] involved a very interesting fact pattern. In that case, a first wife sued a second wife to enforce an unpaid judgment against their common husband. The husband owned property with his first wife as an estate by the entirety. After they were divorced, the husband took up residence with his second wife on the property in which he now owned an undivided one-half interest in common with his former wife. The property attained a homestead status, and in 1968, after the new constitution was ratified, the husband and his second wife conveyed his interest in the property to themselves as an estate by the entirety. In the meantime, the first wife recorded a final money judgment against the husband

49. Fla. Laws 1971, ch. 71-54.
50. FLA. CONST. art. X, § 4(c) (1968).
51. 237 So.2d 58 (Fla. 3d Dist. 1970).
52. *Id.*
53. 237 So.2d 217 (Fla. 4th Dist. 1970) [hereinafter cited as *Moore*].
54. Of course, if the conveyance had taken place subsequent to the new constitution it would have been good had the wife joined in the deed. *See* section III, B, 1, *infra*.
55. 246 So.2d 574 (Fla. 3d Dist. 1971).

based on alimony. The husband died in 1969, and the court held that during his lifetime the judgment was not a lien upon the property because of the homestead status and the estate by the entirety.[56] In addition, when he died, his undivided one-half interest vested by operation of law in the second wife and was not available to satisfy the judgment debts of the husband individually.[57]

B. *Dower and the Ownership of Property by Married Women*

1. LEGISLATION

The last survey of Florida property law[58] explained that the new constitution provides no distinction between married women and married men in the holding, control, disposition, or encumbering of property.[59] Since that time, the Florida Legislature has enacted a law[60] clarifying this constitutional provision and virtually making all married women free dealers of non-homestead property.[61] A married woman may now convey her separate property without the joinder of her husband, and all such conveyances since the effective date of the 1968 constitution are made valid.[62]

The time in which a widow must elect to take dower in property which her husband conveyed during his lifetime without her joinder (or relinquishment of dower) has been limited under new legislation.[63] Now, a widow must file an election to claim dower within three years after her husband's death or her interest will be barred.

2. CASE LAW

In two cases involving a married woman dealing in real property, without her husband's joinder, before the effective date of the new constitution, the Supreme Court of Florida approved opposite results by distinguishing two cases on their facts. In *Zofnas v. Holwell*,[64] the married woman attempted to eject the defendant from the property she conveyed. The court imposed the doctrine of estoppel to disallow the

56. *Id.*

57. *Id.* at 576-77. The court cited various authorities which stand for the proposition that property held by the entirety does not pass by descent, but vests by operation of law in the surviving spouse free from any liens against the deceased individually.

58. Dresnick, *Real Property Law*, 1967-69 *Survey of Florida Law*, 24 U. MIAMI L. REV. 578, 591 (1970).

59. FLA. CONST. art. X, § 5 (1968).

60. Fla. Laws 1970, ch. 70-4, *amending* FLA. STAT. §§ 694.04, 708.08-.09 (1969); *repealing* FLA. STAT. §§ 62.021, 633.01-.05, 633.13-.14, 708.01-.04, 708.06-.07 (1969).

61. Apparently all distinctions between married men and women in the management and control of their property have now been abolished by Fla. Laws 1970, ch. 70-4.

62. Fla. Laws 1970, ch. 70-4, *amending* FLA. STAT. § 708.08 (1969).

63. Fla. Laws 1971, ch. 71-25, *adding* FLA. STAT. § 731.35(4). The effective date of the act is January 1, 1972. However, it specifically states that the limitation shall apply even though the decedent died prior to the effective date, with the exception that no dower interests will be barred if the claim is filed prior to January 1, 1973.

64. 234 So.2d 1 (Fla. 1970).

action, even though her deed was void, due to nonjoinder of her husband. However, in *Bogle v. Perkins*,[65] the court held that the married woman's execution of a contract for the sale of real property was unenforceable against her under the old constitution. There was no question of estoppel inasmuch as the parties agreed that there was no issue of material fact involved.[66]

In a case of first impression, the District Court of Appeal, Fourth District, held that a wife's inchoate right of dower in her husband's lands is extinguished when the lands are condemned under the right of eminent domain.[67] The court chose to follow the weight of authority in the United States,[68] which is consistent with Florida statutory[69] and case law.[70]

In another case of first impression, the District Court of Appeal, Second District, held in *In Re Estate of Johnson*[71] that a Florida widow has no right of dower in out-of-state property which was validly conveyed by her husband during his lifetime. In that case, a widow attempted to obtain one-third of the value of Michigan land which was not part of the probate assets. The court ruled that the county judges' court could not consider the value of this land in calculating the widow's forced share. Rather, the widow would have to go to the situs of the non-Florida land to determine if she had a dower interest.[72] One judge dissented, arguing that the law of the domicile, in this case, Florida, should have governed in the determination of the widow's dower, and that it was "contrary to law and good conscience" to allow the husband to divest his wife of her distinct interest in property which she acquired as a matter of law.[73]

C. *Tenancies in Common*

A tenancy in common results after the divorce of a couple holding title to property by the entireties, and there are often problems in determining who it entitled to what. *Coggan v. Coggan*[74] dealt with this situation with respect to both residential and rental properties. The supreme court affirmed the lower court's holding[75] which held that the husband was not entitled to immediate possession nor present partition since the wife had been granted exclusive possession of the residence by the final

65. 240 So.2d 801 (Fla. 1970).

66. *Id.* at 803.

67. Dal Brun v. City of West Palm Beach, 227 So.2d 347 (Fla. 4th Dist. 1969).

68. *Id.* at 348.

69. FLA. STAT. § 731.34 (1969) provides that a widow shall be entitled to a one-third fee simple interest in real property owned by her husband at the time of his death or which he had conveyed before his death without the relinquishment of dower.

70. *E.g., In re* Hester's Estate, 158 Fla. 170, 28 So.2d 164 (1946), which held that a sheriff's sale pursuant to an execution against the husband extinguishes dower.

71. 240 So.2d 840 (Fla. 2d Dist. 1970).

72. *Id.* at 841. It appears that the widow would have no dower right in the land according to that state's law.

73. *Id.* at 844 (dissenting opinion).

74. 239 So.2d 17 (Fla. 1970).

75. Coggan v. Coggan, 230 So.2d 34 (Fla. 2d Dist. 1969).

divorce decree. However, the court reversed the lower court's decision to hold the husband liable to account for the rental value of the office building which they held as tenants in common.[76] After the divorce, the husband had continued in possession of the building and had used it as his medical office. The court found that he was not holding adversely to his ex-wife. Therefore, the case came within the general rule that an occupying cotenant in exclusive possession is not liable in the absence of an agreement to account to the other cotenants.

D. *Adverse Possession*

Section 96.16 of the Florida Statutes (1969) provides that one may acquire title to property through adverse possession under color of title. In order to meet the requirements of this section, the instrument upon which the color of title is based must purport to convey the land involved. In *Armstrong Cork Co. v. Crook*,[77] the property involved was a forty acre square bounded on the north by water. The court ruled that even though the legal description was not very clear, if it was sufficient to enable a surveyor to ascertain and locate the land, it may be acceptable. In this case, the sufficiency of the description should have been a question for the jury.[78]

E. *Boundaries*

1. ACQUIESCENCE AND PAROL AGREEMENTS

Abutting property owners often invoke either the doctrine of boundary by agreement or the doctrine of boundary by acquiescence[79] to determine disputes concerning common boundary lines. However, both of these principles apply only where the boundary is uncertain or in dispute.[80] In *King v. Carden*,[81] the abutting owners agreed to use a certain fence as the dividing line between the two parcels of land. One of the owners acquired the other parcel, and the titles merged. Subsequently, this same owner conveyed one parcel to the plaintiff's assignor, describing the boundary line as a quarter section line and not the fence. The court held[82] that the previous undisclosed oral agreement was not binding on the plaintiff and that since there was no dispute between him and the owner, the boundary line in the deed should prevail.

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76. Coggan v. Coggan, 239 So.2d 17, 19 (Fla. 1970).

77. 227 So.2d 64 (Fla. 1st Dist. 1969).

78. *Id.* at 66. The trial court had directed a verdict.

79. Three elements are necessary to prove boundary by agreement: 1) uncertainty or dispute as to the true boundary; 2) an agreement that a certain line will be treated by the parties as the true line; and 3) subsequent occupation by the parties in accordance with that agreement. Boundary by acquiescence involves two elements: 1) a dispute; and 2) continued occupation and acquiescence in a line other than the true boundary line. *See* King v. Carden, 237 So.2d 26, 28 (Fla. 1st Dist. 1970).

80. *See generally* 1 R. BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 13.09 (1969).

81. 237 So.2d 26 (Fla. 1st Dist. 1970).

82. *Id.*

2. PARTY WALLS AND IMPROVEMENTS ON THE WRONG LOT

In *Esquire Estates, Inc. v. Krakow*,[83] the plaintiff attempted to enjoin the owner of adjacent property from demolishing a common wall on the theory that it was a party wall. Evidence disclosed that the wall was one inch inside the defendant's property line. The court ruled that for a true party wall to exist it is usually necessary that both properties have once been owned by one owner.[84] Since this was not the case there, the injunction was lifted.

Jim Walter Corp. v. Bracht[85] involved more than just a dispute over a wall on the defendant's land. The plaintiff had built a house on the wrong parcel of land and sought to have the defendant who had occupied the house vacate the premises so that it could be removed. It was held that the plaintiff failed to prove his allegation that such construction was the result of a mutual mistake. Hence, authorization to remove the house was refused.[86]

F. *Water Rights*

1. RIPARIAN RIGHTS

In *Silver Blue Lake Apartments, Inc. v. Silver Blue Lake Home Owners Association*,[87] the supreme court upheld the appellate court's enforcement of a restrictive covenant limiting the use of a man-made lake to members of a property owners association and denying such use to apartment tenants whose apartment building abutted a small portion of the lake.[88] The court refused to answer the certified question as to whether the tenant of a riparian artificial non-navigable lakebottom owner derives the right through the owner to use the waters of the lake. However, it did state as an abstract proposition that the right of the owners of a portion of such a bed to rent their rights to use the water surface to tenants of an apartment complex is only the right of lawful and reasonable use not detrimental to other owners or lawful users, and that such use may be held to be subordinate to valid deed restrictions.[89]

83. 249 So.2d 503 (Fla. 3d Dist. 1971), *noted in* 25 U. MIAMI L. REV. 768 (1971).

84. *Id.* at 505. The court also refused to find that a right to a party wall grew out of a type of adverse possession. There was no proof that the plaintiff-user was open and obvious in his possession during a twenty-year period.

85. 239 So.2d 643 (Fla. 1st Dist. 1970).

86. *Compare with* Voss v. Forgue, 84 So.2d 563 (Fla. 1956); Chavis v. Citizens Federal Savings and Loan Ass'n, 95 So.2d 581 (Fla. 1957). In both of these cases, the chancellor ordered the parties to exchange lots because the lots had no peculiar or unique value. In *Chavis*, there were houses on both lots, and the court, guided by equity, ruled that the houses had the same value, and the lots were the same size. Therefore, an exchange was thought to be the fairest resolution of the problem.

87. 245 So.2d 609 (Fla. 1971).

88. Silver Blue Lake Apts., Inc. v. Silver Blue Lake Home Owners Ass'n, 225 So.2d 557 (Fla. 3d Dist. 1969). That decision is *discussed in* Dresnick, *Real Property Law, 1967-69 Survey of Florida Laws*, 24 U. MIAMI L. REV. 578, 588 (1970).

89. Silver Blue Lake Apartments v. Silver Blue Lake Home Owners Ass'n, 245 So.2d 609, 612 (Fla. 1970). Justice Drew, concurring in part and dissenting in part, upheld the

2. SUBMERGED LANDS

The state of Florida held title to certain submerged lands by virtue of its sovereignty. As a result of a hurricane, these lands suddenly became dry. This sudden avulsion was held not to affect the status of the title to the land, which was held to remain in the state; thus defeating the claims of two adjoining property owners who were claiming the land.[90]

G. *Partnership and Limited Partnership Property*

In 1970, the legislature attempted to clarify its position on the conveyancing of property owned by a limited partnership.[91] This attempt proved incomplete, forcing the 1971 legislature to revise and expand the 1970 law to more clearly delineate a limited partnership's powers relative to the acquisition of real property.[92] The new law defines partnership property and states that it may be acquired and dealt with in the partnership name. A conveyance, encumberance, or any other instrument affecting title to real property shall be executed by one of the general partners in the partnership name. Furthermore, inchoate dower shall not exist, and spouses need not join in the execution of any instruments affecting title.

A law almost identical to the one dealing with limited partnerships was enacted by the 1971 legislature with respect to partnerships generally.[93] However, this statute contains an obvious problem which may well have to be rectified by subsequent action. The law provides that instruments affecting title to real property shall be executed in the partnership name by at least one of the partners. Since a partnership is not required to file a certificate with the Secretary of State as is required in the formation of a limited partnership,[94] some procedure will have to be set up to determine if the person executing the instrument actually is a partner of the partnership.

H. *Easements*

In 1970, the legislature created a twenty year statute of limitations on any easement given or reserved, including rights of entry, in any conveyance or devise of real property for the purpose of mining, drilling,

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decision on the basis of equitable servitudes. He then discussed the right of tenants of an abutting owner to use the waters of a non-navigable lake. Chief Justice Ervin, dissenting, discussed at length the question of navigability and the question of public versus private character of the lake.

90. Bryant v. Peppe, 238 So.2d 836 (Fla. 1970). The supreme court also affirmed the rule that the plea of equitable estoppel is not available to establish title, but only to defend apparent title.

91. Fla. Laws 1970, ch. 70-301, *amending* FLA. STAT. § 620.03 (1969).

92. Fla. Laws 1971, ch. 71-9, *amending* FLA. STAT. § 620.03(1) (Supp. 1970); *repealing* FLA. STAT. § 620.03(2) (Supp. 1970); *adding* FLA. STAT. § 620.81(1)-(4). The effective date of this enactment is January 1, 1972.

93. Fla. Laws 1971, ch. 71-71. The effective date of this enactment is January 1, 1972.

94. FLA. STAT. § 620.02 (1969).

exploring or developing.[95] The legislature also provided a method for the owner of such property to file suit to eliminate these easements from his title by means of a suit to quiet title in the circuit court. The limitation applies only when proof is shown that such rights have not been exercised within the twenty year period, and the period, itself, runs from the recording of such conveyance or devise. There would seem to be no doubt as to the validity of the statute's prospective operation, but a constitutional question is immediately suggested as to its retrospective application as it affects rights accruing prior to the effective date of the act, October 1, 1970. Also, many mineral rights, for example, have been reserved in favor of the state or one of its agencies. The statute does not specifically apply to such rights created in favor of the state, and it is possible that it could be construed to not apply to state-retained rights.

IV. LANDLORD AND TENANT

A. *Lease Provisions*

A lease provision forbidding a tenant from selling anything that would compete with any other tenant within a neighborhood shopping center was held to impose a reciprocal obligation on the landlord.[96] The appellate court affirmed the trial court's reasoning that if the landlord allowed a competing business to operate within the center, the tenant would be considered in violation of his lease by continuing his own business.[97] This would create an absurd result, and therefore, the injunction against the landlord was determined to be reasonable.

Coastal Bay Golf Club, Inc. v. Holbein[98] dealt with a lease clause which gave the lessee a right of first refusal should the lessor receive a bona fide offer from a third party to purchase the leased property. The landlord brought a declaratory judgment action to determine if the lessee complied with the first refusal provision. The court held that the lessee's offer had not complied with the provision[99] because it required a disposition of the property by a different method and under different conditions than the third party's offer. In order for the lessee to have properly exercised his right, his offer had to have matched the existing offer; that is, the essential terms of the offers had to have been identical.[100]

In *Tollius v. Dutch Inns of America, Inc.*,[101] the lessee, in order to assign his interest in the lease, was required to obtain written consent

95. Fla. Laws 1970, ch. 70-100, *adding* FLA. STAT. § 704.05 (Supp. 1970).
96. White Star Realty Co. v. Schreiber, 229 So.2d 300 (Fla. 3d Dist. 1969).
97. *Id.* at 301.
98. 231 So.2d 854 (Fla. 3d Dist. 1970).
99. *Id.* The court defines a right of first refusal as:
> a right to elect to take specified property at the same price and on the same terms and conditions as those continued in good faith offer by a third person if the owner manifests a willingness to accept the offer.

Id. at 857.
100. *Id.* at 858.
101. 244 So.2d 467 (Fla. 3d Dist. 1970), *cert. denied*, 247 So.2d 437 (Fla. 1971).

from the lessor. When the present lessees attempted to assign the motel lease involved, the landlord accepted the assignment subject to satisfactory evidence of the financial condition of the assignees. After much delay, the lessor refused to approve the assignment. The court, however, held this refusal to be arbitrary,[102] since the lessor had based his refusal on the failure of the assignee to supply assumption agreements and not because of any lack of financial responsibility on the part of the assignee. The court stated that equity would not permit the landlord to cancel this lease and reap the improvements on the property.[103] The court did not, however, indicate whether the landlord might have been able to recover his property had there been no improvements.

B. *Requesting Tenant's Immediate Departure*

Provisions of the Florida Statutes[104] permit the notice requirements due a tenant before eviction to be circumvented, circumvented in the case of certain designated guests and "tenants," and immediate departure effected in certain circumstances. In *Kent v. Wood*,[105] the tenant was living under an oral month-to-month lease when the landlord notified him that he was no longer desired as a guest. The court ruled that the landlord's failure to demand that the tenant immediately depart and to tender a refund of unearned rent constituted noncompliance with the statutory requirements of Florida Statutes section 509.141 (1969), and therefore necessitated notice[106] before eviction could be effective. The court pointed out that Florida Statutes section 509.141 (1969) was created to provide for immediate ejection of guests whose conduct is undesirable, but since it was penal in nature, exact compliance with the statutory provisions was necessary, and the courts would strictly construe the law.[107]

C. *Limitations on the Landlord after Eviction*

Geiger Mutual Agency, Inc. v. Wright[108] presented a question of first impression regarding acceleration of rents. There, the District Court of Appeal, Fourth District, was faced with a lessor who had elected to accelerate the rental payments of a tenant who had breached his lease after the lessor had re-entered the property and resumed possession.[109] Following the majority rule in the United States,[110] the court

102. *Id.*

103. *Id.* at 472, 473. The property had a gross value of $950,000.00 and a net value of approximately $500,000.00 as a result of the construction of a Holiday Inn Motel on the property by the original lessees.

104. FLA. STAT. § 509.141 (1969).

105. 235 So.2d 60 (Fla. 1st Dist. 1970).

106. *See* FLA. STAT. § 83.03 (1969). Under that statute, fifteen days notice prior to the end of any monthly period is required when there is a tenancy from month to month.

107. Kent v. Wood, 235 So.2d 60, 62-63 (Fla. 1st Dist. 1970).

108. 233 So.2d 444 (Fla. 4th Dist. 1970) [hereinafter cited as *Geiger*].

109. There are three alternatives open to a landlord when a tenant breaches a lease prior to its expiration:

held that the right to recover the full rental of a leased property through acceleration is lost upon re-entry by the lessor.[111] In a factually similar case to *Geiger*, the District Court of Appeal, Second District, encountered a lessor who had accelerated the rental payments of a lessee-assignor who had refused to re-enter the leased property after the sublessee-assignee had departed the premises.[112] The court held that any rents collected as a result of reletting the premises had to be applied against the amount due from the lessee to mitigate its liability for damages. In *Geiger*, the court had refused to allow a landlord to take possession and accelerate simultaneously. In *Jimmy's Morningside*, the Second District, while allowing that a landlord has the right to re-enter and relet a property when a tenant breaches his lease, held that the breaching tenant is entitled to an accounting and a refund of any rents collected during the affected term. Under either case a landlord is not entitled to a windfall when a tenant defaults on a lease.

D. *Miscellaneous*

Whenever a landlord wrongfully breaches a lease by unlawfully evicting the tenant, the landlord will be held liable for general damages. In *McCone v. Adams*,[113] the District Court of Appeal, First District, reaffirmed the general rule that the measure of these damages is the difference between the market value of the lease and the stipulated rent payable therein.

G.M.A.C. Corp. v. Noni, Inc.[114] held that a chattel mortgage against a liquor license was inferior to a prior landlord's lien. The court followed the principle that a landlord's lien attaches either at the beginning of the tenancy or when a chattel is brought onto the premises.[115]

In another case, a tenant was not estopped from asserting that an unsigned five year lease came within the Statute of Frauds.[116] Since the

(a) he may treat the lease as terminated and resume possession of the premises, thereafter using the same exclusively as his own for his own purposes; or

(b) he may retake possession of the premises for the account of the tenant, holding the tenant in general damages for the difference between the rentals stipulated to be paid and what, in good faith, the landlord is able to recover from a reletting; or

(c) he may stand by and do nothing, and sue the lessee as each installment of rent matures, or for the whole when it becomes due.

4 J. ADKINS, FLORIDA REAL ESTATE LAW AND PROCEDURE, § 106.04, at 1970 (1960), *as quoted in* Jimmy Hall's Morningside, Inc. v. Blackburn & Peck Ent., 235 So.2d 344, 345 (Fla. 2d Dist. 1970). *See also* Kanter v. Safran, 68 So.2d 553, 557-58 (Fla. 1953); Geiger Mutual Agency, Inc. v. Wright, 233 So.2d 444, 447 (Fla. 4th Dist. 1970).

110. *See, e.g.*, Pirkle & Williams v. Shreveport Jitney Jungle, 19 La. App. 729, 140 So. 837 (1932); DeLong Hook & Eye Co. v. Tait, 108 Pa. Super. 369, 164 A. 848 (1933).

111. Geiger Mutual Agency, Inc. v. Wright, 233 So.2d 444, 447 (Fla. 4th Dist. 1970).

112. Jimmy Hall's Morningside, Inc. v. Blackburn & Peck Ent., 235 So.2d 344 (Fla. 2d Dist. 1970) [hereinafter cited as *Jimmy's Morningside*].

113. 239 So.2d 859 (Fla. 1st Dist. 1970).

114. 227 So.2d 891 (Fla. 3d Dist. 1969).

115. *Id.*

116. Besco Electric Supply Co. v. Moses, 226 So.2d 5 (Fla. 1st Dist. 1969), *cert. denied*, 234 So.2d 118 (Fla. 1969).

record showed that the parties did not operate under the terms of the unsigned lease, the landlord was not entitled to enforce the lease which was for a period longer than one year.

In *Brownlee v. Sussman*,[117] the landlord brought an action to recover possession of the premises under the Delinquent Tenant Act,[118] and the tenant raised affirmative equitable defenses. The court rejected these equitable defenses and held that the only defense cognizable under the statute is payment of the rent due.

V. Eminent Domain

A. *Necessity of Taking*

The Supreme Court of Florida decided three companion cases[119] involving condemnation proceedings in conjunction with the construction of the Cross Florida Barge Canal. The court held that a condemning authority has the burden of establishing a reasonable necessity, as opposed to an absolute necessity, for condemnation.[120] Once reasonable necessity is demonstrated, the landowner's only affirmative defense is to show bad faith or gross abuse of discretion.[121] In *Canal Authority v. Miller*,[122] the condemning authority initially obtained an easement which, it conceded, would satisfy its needs. It then sought to acquire a fee simple title, and the court denied it saying that no additional evidence beyond that admitted to justify the easement was produced.[123] Therefore, the condemning authority failed to fulfill its burden of establishing a necessity. On the other hand, in *Canal Authority v. Litzel*,[124] the court recognized that the condemning authority introduced adequate reasons to establish a necessity. Although the facts in *Litzel* were similar to those in *Miller*, and an easement might well have been adequate, the Canal Authority in its discretion had initially elected to seek a fee simple title. Consequently, its election was upheld since there had been no showing of bad faith or abuse of discretion.[125]

B. *Procedure*

In a recent case decided by the supreme court, it was held that a trial judge is permitted to determine and grant attorney's fees in a con-

117. 238 So.2d 317 (Fla. 3d Dist. 1970).

118. Fla. Stat. § 83.05 (1969).

119. Canal Authority v. Litzel, 243 So.2d 135 (Fla. 1970); Canal Authority v. Miller and Canal Authority v. Hayman, 243 So.2d 131 (Fla. 1970) [both cases will be cited as *Canal Authority v. Miller* for purposes of this survey].

120. Canal Authority v. Miller, 243 So.2d 131, 134 (Fla. 1970).

121. *Id.*

122. 243 So.2d 131 (Fla. 1970) [hereinafter cited as *Miller*].

123. The court stated that an acquiring authority will not be permitted to take a greater interest than is necessary to serve the particular public use for which the property is being acquired. *Id.* at 133.

124. 243 So.2d 135 (Fla. 1970) [hereinafter cited as *Litzel*].

125. *Id.* at 138.

demnation proceeding in which the condemnor has filed a notice of dismissal where there has been no taking or appropriation.[126] Thus, an apparent conflict with some prior decisions[127] was resolved when the court explained that a statute[128] enacted in 1963 had subsequently altered the law. This legislation has removed the necessity of having a trial on the merits and a separate trial to determine attorney's fees and has included these fees as court costs. The supreme court recognized[129] that this holding was in accord with the Florida Rules of Civil Procedure.[130]

In *O'Sullivan v. City of Deerfield Beach*,[131] the District Court of Appeal, Fourth District, held that when a condemnor has seized property prior to final judgment,[132] a voluntary dismissal will not be allowed without an order of the court. The reasoning advanced was that too many matters such as title, compensation, deposit, and damages would be left in limbo if the condemnor could unilaterally dismiss the proceedings.[133]

The City of Miami Beach attempted to file successive suits for condemnation against the same property until it received a judgment which it considered satisfactory. In *City of Miami Beach v. Cummings*,[134] the District Court of Appeal, Third District, held that the city's failure to deposit with the court the amount of compensation fixed by the jury rendered the proceedings null and void. In addition, a subsequent proceeding would not comply with the statutory requirements in that the resolution relied on by the city had also become null and void as a result of the prior proceedings.

In a case surrounded by extensive controversy,[135] the Supreme Court of Florida set a balance between the protection of the state's natural resources and the completion of public works, both matters of public interest. The court held that Florida Power and Light Co. was entitled to condemn lands for the purpose of constructing a drainage canal prior to obtaining approval of the project from various federal, state and local authorities.[136] Although ultimate approval was essential, the court felt that in the interim the public interest was safeguarded since the utility had demonstrated that 1) there was a reasonable probability of obtaining approval; and 2) the

126. City of Hallandale v. Chatlos, 236 So.2d 761 (Fla. 1970).

127. *See* DeSoto County v. Highsmith, 60 So.2d 915 (Fla. 1952); Jacksonville Terminal Co. v. Blanshard, 77 Fla. 855, 82 So. 300 (1919).

128. FLA. STAT. § 73.091 (1969).

129. City of Hallandale v. Chatlos, 236 So.2d 761, 763 (Fla. 1970).

130. FLA. R. CIV. P. 1.420.

131. 232 So.2d 33 (Fla. 4th Dist. 1970).

132. FLA. STAT. ch. 74 (1969) provides a procedure in which a condemnor may take possession and title in advance of final judgment.

133. O'Sullivan v. City of Deerfield Beach, 232 So.2d 33, 34-35 (Fla. 4th Dist. 1970). The court also explained that FLA. R. CIV. P. 1.420(a)(1), which allows for voluntary dismissal without court order, does not encompass proceedings where property has been seized.

134. 233 So.2d 845 (Fla. 3d Dist. 1970), *cert. denied*, 238 So.2d 112 (Fla. 1970).

135. Seadade Industries, Inc. v. Florida Power & Light Co., 245 So.2d 209 (Fla. 1971).

136. *Id.*

condemnation would not result in irreparable harm should the approvals be denied.[137]

C. *Circumstances Entitling Compensation*

The State Road Department coverted a road into a limited access facility, and abutting property owners brought an action for damages for loss of access.[138] The court held for the plaintiffs and pointed out that access for ingress and egress is a right which must be protected.[139] In another case, *Pinellas County v. General Telephone Co.*,[140] the court held that a franchise agreement gave the telephone company a property right within the right-of-way of a dedicated alley which could not be taken away without just compensation.

D. *Miscellaneous*

In *Ragland v. State Department of Transportation*,[141] the landowner contended that his land should not be allowed to be bisected by a highway because of ecological and environmental considerations. Although the court sympathized with the pollution arguments, it was compelled to find that the condemnation award was in substantial compliance with the law.[142] However, the landowner was urged to direct his self-labelled "plea for life" to the legislative and executive branches of the government.

Levit v. State Department of Transportation[143] held that evidence showing that a highway improvement would enhance the value of the property remaining after a taking should be admitted and allowed to be set off against severance damages.

The question of business damages versus severance damages was involved in *LeSuer v. State Road Department*.[144] There, the court ruled that the cost of effecting physical changes or modifications necessitated by a taking are severance damages.[145]

VI. ZONING

A. *Proper Classification*

A landowner challenged the zoning of his property as single family residential in the circuit court, and the District Court of Appeal, Second District, affirmed the lower court ruling that the zoning was invalid.[146]

137. *Id.* at 214-15.

138. State Road Dept. v. McCaffrey, 229 So.2d 668 (Fla. 2d Dist. 1969).

139. *Id.* at 669. However, when reasonable access is furnished, such as a service road in this case, the resulting damages may be nominal.

140. 229 So.2d 9 (Fla. 2d Dist. 1969).

141. 242 So.2d 475 (Fla. 1st Dist. 1970).

142. *Id.* at 477.

143. 248 So.2d 542 (Fla. 1st Dist. 1971).

144. 231 So.2d 265 (Fla. 1st Dist. 1970).

145. Business damages usually involve the reduction of the profit-making capacity of an enterprise.

146. Watson v. Mayflower Property, Inc., 177 So.2d 355 (Fla. 2d Dist. 1965).

The appellate court said that the highest and best use for the property would be for hotels and apartments (R-4 zoning). The city then received a new application and upon deliberation rezoned the property as R-3-A instead of R-4. In subsequent litigation, the case reached the supreme court which held that the city was not bound to classify the property as the Second District had directed, *i.e.*, R-4.[147] The supreme court also observed that in the interim the community had changed, and that the city, after examining new evidence, had not abused its power by attaching a more restrictive classification to the property.[148]

B. *Procedure*

1. SPECIAL DAMAGES

When a county resolution creating a planned apartment district resulted in the rezoning of land to multiple use, a landowner in a nearby single family development challenged the reclassification. The court, in *Florida Palm-Aire Corp. v. Delvin*,[149] ruled that the rezoning ordinance could not be attacked since the plaintiff had not shown special damages. To successfully contest the validity of rezoning, according to the court, one must demonstrate "special or irreparable damage differing in kind, rather than in degree, from that sustained by the community as a whole."[150]

2. INVALIDATION OF ORDINANCES

There are many bases upon which a zoning ordinance may be found invalid. For example, in *Knowles v. Town of Kenneth City*,[151] the court found that the ordinance was passed without the requisite public hearing and was therefore invalid under the provisions of Florida Statutes section 176.05 (1969).[152] In *Florida Tallow Corp. v. Bryan*,[153] a local law requiring that any zoning changes be first submitted to the zoning commission was held to be mandatory; therefore, the failure to do so constituted invalidation of the ordinance. Finally, in *City of Homestead v. Schild*,[154] a special permit for a use contrary to zoning was invalidated on the basis that the enabling ordinance authorizing the city council to grant special use permits was void due to a lack of standards or guidelines which could be followed.

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147. Mayflower Property, Inc. v. Watson, 233 So.2d 390 (Fla. 1970).

148. *Id.* at 392.

149. 230 So.2d 26 (Fla. 4th Dist. 1969), *cert. discharged*, 234 So.2d 357 (Fla. 1970). Certiorari was discharged by the supreme court because the contesting parties had parted with their interest in the property, rendering the issues moot.

150. Florida Palm-Aire Corp. v. Delvin, 230 So.2d 26, 27 (Fla. 4th Dist. 1969).

151. 247 So.2d 748 (Fla. 2d Dist. 1971).

152. This section provides that no regulation or restriction can become effective until after there is a public hearing.

153. 237 So.2d 308 (Fla. 4th Dist. 1970).

154. 227 So.2d 540 (Fla. 3d Dist. 1969).

3. RIGHTS OF SUCCESSORS IN INTEREST

In a case decided by the District Court of Appeal, Third District, a purchaser of a parcel of land attempted to continue reclassification proceedings which were initiated by the seller six months prior to the sale. The court held[155] that an action involving a change in zoning was in rem. Therefore, the purchaser, being an aggrieved person,[156] had standing to continue the proceedings. On the other hand, in another case litigated in the same district,[157] the owner's application for special exception and special permit was denied on the ground that the matter was res judicata in that the owner's predecessor in interest had been denied a prior application.

C. *Unconstitutionality*

In *Saar v. Town of Davie*,[158] a local zoning ordinance prohibiting the construction of gas stations within designated distances from churches, playgrounds, schools, or hospitals was declared unconstitutional by a federal district court. The court felt that the absence of a reciprocal ordinance that would prohibit the construction of churches and schools within similar designated distances from gas stations dictated a determination that the law was arbitrary and unreasonable. This "indefensible contradiction" and others compelled the court to impose a permanent injunction against the town.[159]

VII. TAXES

A. *Exemptions*

In a case decided under the Florida Constitution of 1885, the supreme court held that it was not necessary that a municipality possess title to property in fee simple to obtain an exemption from ad valorem taxes, as long as the property was used exclusively for public purposes.[160] The property involved in the case was a privately owned street and bridge which was leased to the municipality and used by the public. The court affirmed the opinion of the District Court of Appeal, Second District,[161] that it is the use, and not ownership, that determines if a tax exemption is proper. However, in dicta, the supreme court stated that the changes in the new constitution appear to impose a requirement that the property

155. Wollard v. Metropolitan Dade County, 234 So.2d 719 (Fla. 3d Dist. 1970).

156. The court determined that the purchasers were aggrieved persons within the meaning of FLA. STAT. § 176.16 (1969), which provides for review of zoning decisions.

157. Metropolitan Dade County Bd. of County Comm'rs v. Rockmatt Corp., 231 So.2d 41 (Fla. 3d Dist. 1970).

158. 308 F. Supp. 207 (S.D. Fla. 1969).

159. *Id.* The court also found that two variances had been granted and that there was no showing of an extraordinary situation. It also determined that spatial limitations between gas stations, also a part of the ordinance, were not based on safety factors.

160. Overstreet v. Indian Creek Village, 248 So.2d 2 (Fla. 1971).

161. 239 So.2d 149 (Fla. 2d Dist. 1970).

must both be owned by the municipality and used for public purposes in order to obtain an exemption.[162] This opinion was based on the change in constitutional language from "be held and used exclusively"[163] to "owned by a municipality and used exclusively by it."[164]

Orlando Utilities Commission v. Milligan[165] also involved municipal tax exemptions, but the determination centered around the type of use of the property. The court indicated that the exemption would not be granted unless the land was used "exclusively" for municipal purposes, and the property in that case was owned by a public utility and used as a recreational area for its employees and their families. The court found no element of public or municipal purpose in the use of the property and held that the property was not entitled to an exempt status.[166]

The Supreme Court of Florida was confronted with a federal constitutional question in *Johnson v. Presbyterian Homes of Synod of Florida, Inc.*[167] The case involved a state statute which provided that properties used as homes for the aged were exempt from taxation.[168] The particular home in this case was affiliated with a religious institution, and the taxing authorities denied an exemption on the basis that the statute was unconstitutional. They claimed that the statute violated the establishment and free exercise clauses of the first amendment to the United States Constitution and similar clauses in the Florida Constitution in its application to the present facts. On review, the supreme court held that although a state cannot enact legislation that will aid one religion or all religions, it can provide for the promotion of the general welfare of society, even though religious interests may be indirectly benefited.[169] This statute allows for an exemption for *any* bona fide home for the aged, and it therefore neither establishes religion nor supports any or all religions.[170]

B. *Assessments*

There was considerable litigation during this biennium concerning the interpretation of the phrase, "substantially completed," contained in Florida Statutes section 193.11(4) (1967) which provides for the assessment of new construction. The controversy ultimately was laid before the bar of the Supreme Court of Florida in *Markham v. Sherwood Park Ltd.*[171] The court held that property would be taxed as unimproved unless construction was completed to a point where it could be used for the purposes

162. Overstreet v. Indian Creek Village, 248 So.2d 2, 4 (Fla. 1971).
163. FLA. CONST. art. XVI, § 16 (1885).
164. FLA. CONST. art. VII, § 3 (1968).
165. 229 So.2d 262 (Fla. 4th Dist. 1969), *cert. denied*, 237 So.2d 539 (Fla. 1970).
166. *Id.*
167. 239 So.2d 256 (Fla. 1970).
168. FLA. STAT. § 192.06(14) (1967), *transferred to* FLA. STAT. 196.191(14) (1969) *by* Fla. Laws 1969, ch. 69-55.
169. Johnson v. Presbyterian Home of Synod of Florida, Inc., 239 So.2d 256, 261 (Fla. 1970).
170. *Id.*
171. 244 So.2d 129 (Fla. 1971).

intended. The court affirmed the ruling of the District Court of Appeal, Fourth District,[172] which had held that formulas using percentage estimates of completion do not satisfy the statutory requirements. As a result, the fact that a building is almost completed is not necessarily sufficient. Rather, before a new building may be assessed, it must have reached the point where it can be used for the purposes intended.[173]

Haines v. Holley[174] involved a tax assessment which was considerably in excess of the sale price received for the home during the taxable year. The court held that the tax assessor was correct in valuing the property for ad valorem taxes as of January 1. The actual selling price in a subsequent bona fide sale is not controlling on the tax assessor, and even if considered by him, is not the sole criterion in determining a just valuation.[175]

In another case, the year's taxes were assessed on a property under construction and were paid based on the assessment. A successor tax assessor attempted to reassess the property, including the improvements, for a considerably higher amount. The District Court of Appeal, Fourth District, held that the taxes could not be back-assessed since the original tax had been paid, and there was no showing of fraud or illegality on the part of the previous assessor.[176] On the other hand, *Mills v. Korach*[177] held that where an assessor valued the land and the improvements separately, and due to a clerical error only the land valuation was used, a back assessment would be allowed, and it did not constitute double taxation. The omitted valuation of the improvements constituted an escape from taxation, and its subsequent inclusion did not amount to a reassessment or a change in valuation.[178]

C. *Agricultural Classification*

Since 1957, agricultural lands have been afforded special tax treatment.[179] During this biennium there was much discussion as to when land should be classified agricultural, thus according more favorable tax assessments. In *Walden v. Borden Co.*,[180] the supreme court stated that land must be "exclusively"[181] or "primarily"[182] used for agricultural purposes

172. Markham v. Sherwood Park, Ltd., 234 So.2d 702 (Fla. 4th Dist. 1970).

173. Of course, this will be a factual determination in each particular case. In Culbertson v. Seacoast Towers East, Inc., 232 So.2d 753 (Fla. 3d Dist. 1970), the court based its decision on the fact that the highrise apartment house had already been extensively occupied. Therefore, the court considered it substantially completed even though there was some work remaining to be done.

174. 234 So.2d 152 (Fla. 2d Dist. 1970), *cert. denied*, 238 So.2d 428 (Fla. 1970).

175. *Id.*

176. Markham v. Friedland, 245 So.2d 645 (Fla. 4th Dist. 1971).

177. 249 So.2d 765 (Fla. 1st Dist. 1971).

178. *Id.* at 769.

179. FLA. STAT. § 193.11(3) (1963), *discussed in* Boyer, *Real Property Law, 1963-65 Survey of Florida Law*, 20 U. MIAMI L. REV. 313, 346-47 (1965).

180. 235 So.2d 300 (Fla. 1970).

181. FLA. STAT. § 193.201 (1967), *transferred to* FLA. STAT. § 193.461 (1969) *by* Fla. Laws 1969, ch. 69-55.

182. FLA. STAT. § 193.461 (1969).

to be classified as such. In *Walden*, an incidental agricultural use by a lessee did not bring land used by the owner for phosphate operations within the statute.[183] The court seemed to indicate that dual use of land would probably defeat the classification, and that the agricultural use had to be the only use.

Three cases decided by The District Court of Appeal, First District, involved the question of when timberland should be classified as agricultural. In the first case, *Sapp v. Conrad*,[184] the court held that a bona fide forestry operation was present on lands which were used for active timber and turpentine operations by the previous owner. The fact that the present owners were not using the best and most economical forestry practices did not necessitate loss of the classification. In the second case, *Oates v. Bailey*,[185] the court followed *Sapp*, fortifying the position that the absence of clearing, thinning, cultivation, or controlled burning did not necessarily destroy an agricultural classification. However, in the third case,[186] a seemingly inconsistent result was achieved. There, the First District upheld the trial court's finding that there was no bona fide forestry operation because there was no management program or actual forestry operations being conducted.[187] The apparent distinction between this case and the two previous cases was a factual one of degree.

D. *Miscellaneous*

Rasberry v. Dickson[188] held that the amount of the documentary stamp tax required on a conveyance of property is to be computed on the full consideration paid. The value of assumed outstanding liens or mortgages is not to be deducted as is done for the computation of the surtax.[189] This rule was expanded in *Kendall House Apartments, Inc. v. Department of Revenue*[190] to include the value of any mortgages not expressly assumed by the purchaser in the total consideration figure. Thus, although the grantee does not assume a mortgage, but rather takes subject to it, the value of the mortgage is still included for documentary stamp tax purposes.

The valuation of parking areas can be a substantial factor in the total assessment of a shopping center. In *Homer v. Dadeland Shopping Center, Inc.*,[191] the owner of the center contested the tax assessor's valuation of the parking lots as equal to that of the improvements on a per

183. Walden v. Borden Co., 235 So.2d 300, 302 (Fla. 1970).

184. 240 So.2d 884 (Fla. 1st Dist. 1970).

185. 241 So.2d 730 (Fla. 1st Dist. 1970), *rev'd sub nom.* Greenwood v. Oates, 251 So.2d 665 (Fla. 1971).

186. St. Joe Paper Co. v. Mickler, 241 So.2d 415 (Fla. 1st Dist. 1970).

187. *Id.* at 417. Subsequent to the period covered by this survey, the supreme court decided Greenwood v. Oates, 251 So.2d 665 (Fla. 1971). There, all three cases were discussed, and the court listed ten criteria to be employed to determine whether an agricultural classification should be granted. *See* Note, 26 U. MIAMI L. REV. 000 (1971).

188. 243 So.2d 236 (Fla. 1st Dist. 1971).

189. *Id.* at 238.

190. 245 So.2d 221 (Fla. 1971).

191. 229 So.2d 834 (Fla. 1969).

foot basis. The appellate court[192] held that the lessee's right to have a parking area provided by the lessor for the use of customers and employees was a restrictive covenant and detracted from the value of the property. On certiorari,[193] the supreme court reversed. It found that the obligation to provide parking created an easement, an inherently legal interest in land, that must be included in the assessment valuation. According to that court, the parking area is an integral part of a unified complex of stores and may justifiably be valued equivalently to the stores themselves.[194]

The question of interest levies arises where a taxpayer is held liable for taxes which he has unsuccessfully contested, and finds himself in a position where he has paid part, but not all of the taxes due. In these situations, a problem arises as to the proper rate of interest to be charged the taxpayer on the difference between the sum tendered and the judicially determined amount due. In litigation involving the construction of general legislation[195] relating to delinquent taxes, the supreme court held that the rate of interest for the first year of such delinquent payments was a mandatory eighteen percent. However, it was held that a court had the power to reduce the penalty if the taxpayer acted in good faith in calculating and paying the amount due.[196] This problem is now moot (except as to pending litigation) since a statute was passed which imposes an interest charge of six percent on unpaid taxes arising out of contested assessments.[197]

VIII. VENDOR AND PURCHASER

A. *Specific Performance*

Radabaugh v. Ware[198] held that a contract for the sale of homestead property in which the sellers' signatures were not attested by two subscribing witnesses did not create obligations between the parties. Therefore, no action would lie for specific performance or for damages for its breach. The court based its decision on an implied requirement of witnesses because of the conveyancing statute[199] and a 1957 supreme court decision.[200] Subsequently, the District Court of Appeal, Third District, in

192. 217 So.2d 844 (Fla. 3d Dist. 1969).

193. Homer v. Dadeland Shopping Center, Inc., 229 So.2d 834 (Fla. 1969).

194. *Id.* at 836-37.

195. FLA. STAT. § 193.51(1) (1967), *transferred to* FLA. STAT. § 197.081 (1969) *by* Fla. Laws 1969, ch. 69-55. At the time the suits arose, this statute, imposing an interest charge of eighteen percent for the first year of delinquency, was the only legislation directly relating to the question.

196. Universal American Realty Corp. v. Dade County, 232 So.2d 16 (Fla. 1970), *rev'g in part*, 227 So.2d 317 (Fla. 3d Dist. 1969); Adler-Built Indus., Inc. v. Metropolitan Dade County, 231 So.2d 197 (Fla. 1970).

197. FLA. STAT. § 194.192 (1969), *added by* Fla. Laws 1969, ch. 69-140, which amended and transferred provisions of FLA. STAT. § 196.01 (1967) and other taxing statutes, particularly those relating to assessment contests.

198. 241 So.2d 738 (Fla. 4th Dist. 1970) [hereinafter cited as *Radabaugh*].

199. FLA. STAT. § 689.01 (1969).

200. Zimmerman v. Diedrich, 97 So.2d 120 (Fla. 1957).

Kroner v. Esteves,[201] recognizing a possible conflict with *Radabaugh*,[202] reversed a summary judgment in favor of the vendors where there had only been one subscribing witness to the instrument. The court indicated, however, that if the homestead character of the property had been clear on the record, the summary judgment would have been sustained.[203]

Another requirement necessary to sustain an action for specific performance was reaffirmed in *Tumulty v. Severdija*.[204] It was held in that case that a plaintiff seeking to enforce a contract for the sale of real property must prove the contract by competent and satisfactory proof, which must be clear, definite, and certain.[205] In *Tumulty*, the contract was too indefinite, and the court refused to make a new contract for the parties.

Ferrer v. Sanchez[206] held that service by publication against a nonresident vendor is permissible in an action for specific performance in accordance with Florida Statutes section 49.011 (1969).[207]

B. *Actions for Rescission and Cancellation*

There are many suits involving an attempt by one party to a deposit receipt to rescind the contract on the basis of misrepresentation. The outcome of each case usually depends on the factual situation. In *Gonzalez v. Patane*,[208] the court refused to allow the purchaser of a piece of property to rescind his deposit receipt contract or recover his deposit because a broker had allegedly estimated the property taxes to be $300 less than they actually were. The court observed that the tax information was readily available to the purchaser as a matter of public record, and that the purchaser had made no effort to obtain it. On the other hand, an assignee of a purchase and sale contract was permitted to rescind the assignment on the basis that the return on investment was considerably less than that represented.[209] The transaction had already closed with the seller, but a return to the status quo was still effected by substituting the assignor for the assignee in the purchase.

Popwell v. Abel[210] reaffirmed the Florida position that damages for a breach by the vendee of contract to purchase land should be measured by the difference between the value on the date of breach and on the date of sale. Furthermore, the seller may also obtain damages contemplated

201. 245 So.2d 141 (Fla. 3d Dist. 1971).

202. The rationale of *Radabaugh, supra* note 198, is broad enough to encompass all contracts for the sale of realty.

203. Kroner v. Esteves, 245 So.2d 141, 142 (Fla. 3d Dist. 1971).

204. 233 So.2d 837 (Fla. 3d Dist. 1970) [hereinafter cited as *Tumulty*].

205. *Id.*

206. 247 So.2d 512 (Fla. 3d Dist. 1971).

207. Although the statute does not expressly provide for specific performance actions, the court felt that the language sufficiently covered such an action.

208. 234 So.2d 8 (Fla. 3d Dist. 1970).

209. Cohen v. Landow, 242 So.2d 801 (Fla. 3d Dist. 1971).

210. 226 So.2d 418 (Fla. 4th Dist. 1969).

by the parties that are natural and proximate.[211] The court in *Satchell v. Van Brode*[212] also reaffirmed a well settled rule that a purchaser will not be entitled to recover his deposit in the event of his own default in the absence of a liquidated damages provision.

In *Stener v. Glevis*,[213] the purchaser sought to cancel the deposit receipt and recover his deposit, contending that a race restriction common to the whole subdivision made the seller's title neither marketable nor insurable. The District Court of Appeal, Fourth District, held that the restriction was void and could not constitute an exception to title. In addition, it was observed that title insurance was available.

C. *Deeds*

Videon v. Cowart[214] considered the effectiveness of a donative conditional delivery of a deed to a third person. In that case, the grantor delivered a deed to his wife, who was to hold it until their son requested it. The son would then hold it until the daughter grantee would renounce all claim to the grantor's estate, at which time delivery would be made to her. The court held that the condition was in the sole control of the grantee, and therefore, delivery to the wife was effective.[215] The court upheld the deed on the grounds that the grantor had no power to retake, repossess, or exercise control over it.[216]

A landowner is not entitled to compensation for an interest in an abutting street in a condemnation proceeding if he would not have been so entitled in a sale to a bona fide purchaser.[217] Furthermore, any interest which one may have in an abutting street will automatically pass in a deed that refers to the property by lot and block from a recorded plat.[218]

D. *Marketable Record Title Act*

No major litigation occurred in this area during the biennium except for two cases which have been discussed in a previous survey of Florida property law.[219] One of the cases, *Marshall v. Hollywood, Inc.*,[220] which held that a root of title *derived from* a forged or wild deed will operate to give one a good title as long as the strict requirements of the act are met, was affirmed by the Supreme Court of Florida.[221] In a later case, *Wilson v. Kelley*,[222] a quitclaim deed was held not to constitute a root of title.

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211. *Id.* at 422.
212. 248 So.2d 245 (Fla. 3d Dist. 1971).
213. 243 So.2d 453 (Fla. 4th Dist. 1971).
214. 241 So.2d 434 (Fla. 1st Dist. 1970), *cert. denied*, 245 So.2d 88 (Fla. 1971).
215. *Id.*
216. *Id.* at 435-36.
217. Langston v. City of Miami Beach, 242 So.2d 481 (Fla. 3d Dist. 1971).
218. *Id.* at 483.
219. Dresnick, *Real Property Law*, 1967-69 *Survey of Florida Law*, 24 U. MIAMI L. REV. 578, 614-15 (1970).
220. 224 So.2d 743 (Fla. 4th Dist. 1969).
221. 236 So.2d 114 (Fla. 1970), *cert. denied*, 400 U.S. 964 (1970).
222. 226 So.2d 123 (Fla. 2d Dist. 1969).

IX. MECHANICS' AND SIMILAR LIENS

A. *Mechanics' Liens*

The liability of a lessor for a mechanics' lien, when his lessee makes improvements on the land, is specifically controlled by statute.[223] The lien will operate against a lessor if there is an agreement between him and the lessee that the improvements are to be made.[224] The court in *Jenkins v. Graham*[225] ruled that the installation of a toilet facility for the lessee's public amusement center was clearly contemplated by both parties. Therefore, the contractor's lien extended to the fee simple interest of the landlord. In contrast, *Surf Developers, Inc. v. H. E. Nason, Inc.*[226] held that the legal owner would not be liable to repairmen for work done at the request of the purchaser under an agreement for deed. The court stated that the owner had no knowledge of the improvements which were neither expressly nor impliedly anticipated by the parties in their agreement for deed.[227]

In a case decided under a 1963 law,[228] an owner was not allowed to offset the contract price by the cost of completion when a subcontractor filed a lien after the contractor abandoned the project.[229] The offset was prohibited since the owner failed to properly file a notice of abandonment, and therefore was not entitled to an offset against any lienor other than the contractor.[230] Because of subsequent legislation, the result in this case may no longer be the same.[231] A similar suit, *Bill Adler, Inc. v. Maule Industries, Inc.*,[232] involved a lien by a subcontractor entered after the abandonment of a project by a general contractor. The court held that improper payments by the owner to the general contractor were detrimental to the subcontractor's claim of lien. Consequently, the improper payments were not permitted to reduce the liability of the owner and act as a set off.[233]

B. *Mechanics' Liens—Conditions*

There have been numerous cases interpreting various aspects of the Florida Mechanics' Lien Law.[234] For example, the District Court of Appeal, Third District, held in *Art Berman Concrete, Inc. v. Sey Construc-*

223. FLA. STAT. § 713.10 (1969).
224. FLA. STAT. § 713.10 (1969).
225. 237 So.2d 330 (Fla. 4th Dist. 1970).
226. 233 So.2d 412 (Fla. 3d Dist. 1970).
227. *Id.* at 413.
228. FLA. STAT. § 84.071(4) (1963).
229. Melnick v. Reynolds Metals Co., 230 So.2d 490 (Fla. 4th Dist. 1970).
230. *Id.* at 491.
231. FLA. STAT. § 713.07(4) (1969). This statute no longer requires the owner to file a notice of default or abandonment. Rather, the owner is given two methods of proceeding when construction ceases before completion. Under one of these methods, he is required to file a notice of intention to recommence.
232. 230 So.2d 182 (Fla. 4th Dist. 1969).
233. *Id.*
234. FLA. STAT. §§ 713.01-.36 (1969).

tion Co.[235] that the statute requiring a contractor to give five days notice before instituting a suit[236] does not apply to a subcontractor. With respect to notice of service to an owner, which must be accomplished within forty-five days,[237] another case held that the notice becomes effective when received and not when mailed.[238] Furthermore, if the last day falls on a Sunday, receipt on the forty-sixth day will be considered timely.[239]

In the absence of an adverse effect on the defendant-owner, an error in the lienor's name on the claim of lien will not destroy substantial compliance with the statute.[240] For example, in one case, the names were similar enough so that the owner was aware of who the claimant actually was in the lien.[241] Another case held that an affidavit containing positive statements of fact would be sufficient to satisfy the requirement that full performance be substantiated by affidavits based on personal knowledge.[242]

C. *Equitable Liens*

Goldberg v. Banner Supply Co.[243] followed the recent supreme court case of *Crane Co. v. Fine*[244] which held that a materialman is not automatically barred from asserting an equitable lien if he loses on his mechanics' lien action. However, in the instant case, the supplier was not entitled to an equitable lien because he failed to show that his claim had special and peculiar equities.[245] In *Imler Earthmovers, Inc. v. Schatten*,[246] the District Court of Appeal, First District, also followed the principles of the *Crane* case, but found that if the alleged facts were proven, the lienor might have a right to an equitable lien. There, the defendant owner caused the lienor to fail to comply with the Mechanics' Lien Law, and therefore, the granting of the defendant's motion to dismiss the complaint was error, and the case should have proceeded to a determination of the facts.[247]

X. CONDOMINIUMS AND COOPERATIVES

A. *Case Law*

In an attempt to quiet title to a swimming pool area of a condominium, the condominium association instituted a class action on behalf of the

235. 247 So.2d 791 (Fla. 3d. Dist. 1971).
236. FLA. STAT. § 713.06(3)(d) (1969).
237. *See* FLA. STAT. § 713.06 (1969).
238. Daly Aluminum Products, Inc. v. Stockslager, 244 So.2d 528 (Fla. 2d Dist. 1970), *cert. denied*, 246 So.2d 97 (Fla. 1971).
239. *Id.*
240. George J. Motz Constr. Corp. v. Coral Pines, Inc., 232 So.2d 441 (Fla. 4th Dist. 1970).
241. *Id.*
242. United Bonding Ins. Co. v. Dora-Stress, Inc., 243 So.2d 244 (Fla. 2d Dist. 1971).
243. 230 So.2d 714 (Fla. 3d Dist. 1970).
244. 221 So.2d 145 (Fla. 1969), *discussed in* Dresnick, *Real Property Law, 1967-69 Survey of Florida Law*, 24 U. MIAMI L. REV. 578, 597 (1970).
245. Goldberg v. Banner Supply Co., 230 So.2d 714, 716 (Fla. 3d Dist. 1970).
246. 240 So.2d 76 (Fla. 1st Dist. 1970).
247. *Id.*

owners of the condominium units. The court, in *Hendler v. Rogers House Condominium, Inc.*,[248] ruled that the association did not allege facts sufficient to show that it was a proper party to bring a class action. Its interest was not coextensive with that of the owners of individual units, and no explicit provision of the declaration of condominium providing for the authority to maintain a class suit had been attached to or recited in the complaint.

In another case, an agreement between apartment owners provided for a right of first refusal in the remaining owners when any owner desired to sell his apartment. After notification of the defendant's proposal to sell, the plaintiff exercised her right to buy. However, the defendant refused to sell the apartment to her. The court held that in order for the plaintiff to be entitled to her preemptive right, it was not necessary that there be a binding contract for sale between the defendant and a third party.[249]

B. *Legislation*

1. IN GENERAL

Legislation designed to protect buyers of cooperative and condominium units was enacted in 1970.[250] Three areas of possible abuse covered by the new laws are: maintenance or management contracts, disclosure before sale, and deposits in connection with unit purchases.

2. MAINTENANCE, MANAGEMENT OR OPERATION CONTRACTS

Provisions of the Florida Statutes provide that any initial or original contract by a cooperative or condominium association is subject to cancellation at any time after the individual unit owners assume control of their association,[251] but a concurrence of 75 percent of the individual unit owners is required for cancellation.[252] In cases of multiphase projects, original maintenance and similar contracts as for individual buildings may be cancelled by 75 percent of the individual unit owners in residence whenever control is acquired by the unit owners. However, contracts relating to the entire project, including recreational areas, may not be cancelled under such provisions until the last association or corporation in the entire project comes under the control of the individual unit owners.[253] These statutes were obviously designed to provide relief from unconscionable contracts entered into or negotiated by a developer before the sale of individual units.

248. 234 So.2d 128 (Fla. 4th Dist. 1970).

249. Victor v. Sill, 243 So.2d 198 (Fla. 4th Dist. 1970).

250. Fla. Laws 1970, ch. 70-135, *adding* FLA. STAT. §§ 711.30-.32 (Supp. 1970) as to cooperatives; and Fla. Laws 70-274, *adding* FLA. STAT. §§ 711.13(4), 711.24-.25 (Supp. 1970) as to condominiums.

251. FLA. STAT. § 711.13(4) (Supp. 1970), *as amended by* Fla. Laws 1971, ch. 71-277 as to condominiums; and FLA. STAT. § 711.30 (Supp. 1970) as to cooperatives.

252. *See* authorities cited in note 251 *supra*.

253. *See* authorities cited in note 251 *supra*.

3. FULL DISCLOSURE BEFORE SALE

Prior to the initial sale or offering for sale of any cooperative or condominium unit, the seller or developer or his agent must make full disclosure of items bearing on the rights and obligations of the purchaser and costs of operation. Specifically included in the items to be disclosed in the case of condominiums are the following:[254]

(a) copy of the declaration;
(b) copy of the articles of incorporation or charter of association;
(c) copy of the by-laws of the association;
(d) copy of the underlying ground lease or similar document, if any;
(e) copy of the management or maintenance contract, if any, which shall specify the services to be rendered and the charges to be made;
(f) copy of the projected operating budget for the unit to be sold; and
(g) copy of the sales brochure and a floor plan of the apartment, including information on recreational, parking and other common areas.

Such disclosures are required to be made prior to the execution of the contract for sale. Thereafter, no changes shall be made which materially affect the rights of the buyer without obtaining his approval. If all of the above information is not available at the time of execution, the contract shall provide that it is voidable at the option of the buyer at any time within fifteen days after the last item of required information is furnished. Such information is required to be furnished no later than ninety days prior to the closing of the sale. Failure to comply on behalf of the seller or his agents authorizes the buyer to rescind at any time prior to closing.[255]

In the case of cooperatives, the requirements are essentially the same, except that the first document will be a proprietary lease or other instrument by which the purchaser will acquire the right to use and occupy a unit.[256]

4. DEPOSITS

Whenever a deposit is made in connection with a purchase contract, prior to the filing of a notice of commencement pursuant to the Mechanics' Lien Law, it is now required that such money be deposited in a special escrow account, and commingling with other funds is forbidden.[257] After

254. FLA. STAT. § 711.24 (Supp. 1970). An amendment in 1971 limits the operation of the statute to the initial sale or offering for sale. Fla. Laws 1971, ch. 71-277.

255. FLA. STAT. § 711.24 (Supp. 1970), *as amended by* Fla. Laws 1971, ch. 71-277.

256. FLA. STAT. § 711.31 (Supp. 1970). The operation of this statute is not limited to the first sale or offering.

257. FLA. STAT. § 711.25 (Supp. 1970) as to condominiums; FLA. STAT. § 711.32 (Supp. 1970) as to cooperatives.

notice of commencement is filed, the developer may use such advance deposits for the actual construction and development of the property if the contract of sale so provides. None of the funds, however, may be used for salaries, commissions or expenses of salesmen, or for advertising. Further, to permit such deposits to be used for construction purposes, the right to do so must be clearly printed or stamped in bold face on the face of the contract and immediately above the place of the buyer's signature. Failure to comply with these provisions renders the contract voidable, and the buyer then acquires the right to recover his deposit with interest. Further, use by the developer of any of the advance funds for purposes other than as provided, with the intent to defraud, constitutes embezzlement.[258]

258. *See* authorities cited in note 257 *supra*.