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Real Property Law

Susan Lytle Dresnick

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REAL PROPERTY LAW

SUSAN LYTLE DRESNICK*

The adoption of a new constitution,¹ judicial construction of the Marketable Record Title Act,² and litigation involving condominiums³ are a few of the noteworthy developments in real property law during the period of this survey.⁴ The homestead provisions continue as fruitful sources of litigation,⁵ but the aspect of void gratuitous conveyances⁶ should recede into oblivion at some indefinite time in the future as a result of the new constitutional provision which permits alienation by gift.⁷ Cooperative and condominium apartments are now sufficiently individualized parcels of real property to qualify for the homestead tax exemption.⁸ Landlords of more than five rental housing units must keep security deposits of their tenants in trust accounts.⁹ Full compensation has become the sole standard for awarding compensation in all eminent domain cases.¹⁰

Because of the large number of decisions and the breadth of the subject matter, this material represents the writer's selection of the most noteworthy and significant developments. A reaffirmation of well-established principles, particularly as they apply to commonly recurring fact situations, is generally excluded.

The style of the article is similar to that of previous surveys except that the order has been rearranged. The material is discussed in order under the following headings:

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* Editor-in-Chief, *University of Miami Law Review*, Student Instructor, Freshman Research & Writing. The author wishes to thank Prof. Ralph E. Boyer, University of Miami School of Law, for his invaluable assistance with research, writing, editing, and illuminating comments, culled from his long experience in the study of real property law.

1. FLA. CONST. (1968). See *infra* I and VI.

2. See *infra* VIII.

3. See *infra* V.

4. The period covered is the 1967-69 biennium, or more specifically, from volume 198 through 225 of the Southern Reporter, Second Series.

5. See *infra* I.

6. See *infra* I.

7. FLA. CONST. art. X, § 4(c) (1968).

8. See *infra* I.

9. See *infra* II.

10. FLA. CONST. art. X, § 6 (1968). See *infra* VI.

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I. ESTATES AND RELATED INTERESTS

A. *Homestead*

1. 1968 CONSTITUTION: LEGISLATION

The 1968 Florida Constitution makes some significant changes in the troublesome Florida homestead law and also lays the groundwork for possible future legislative changes. Perhaps, the most important of these changes is in the field of conveyances. The new constitution succinctly provides that the homestead may be alienated "by mortgage, sale or gift."¹¹ By the insertion of the word "gift," this new document changes that whole line of bothersome cases which voided gratuitous conveyances when the head of the family had children or lineal descendants.¹² The new constitution also provides that the homestead owner may "transfer the title to an estate by the entirety with the spouse."¹³ This change was long overdue. The restriction on alienation by gift not only caused embarrassing and unfortunate title problems, it also thwarted the desires of the homeowner. It is to be pointed out, however, that the problem will remain for a considerable time to come.¹⁴ The new constitution has no retroactive effect and conveyances which occurred before its effective date, January 7, 1969, will necessarily be governed by the former law.

The requirement that both spouses join in a conveyance of the homestead, when that relationship exists, is retained under the new constitution, as is the requirement of two witnesses (because of the conveyancing statute).¹⁵ Nothing specifically is mentioned about acknowledgment, but this is still required for recording purposes, if nothing

11. FLA. CONST. art. X, § 4(c) (1968).

12. See, e.g., *Reed v. Fain*, 145 So.2d 858 (Fla. 1962), *aff'g* 122 So.2d 322 (Fla. 2d Dist. 1960); *Florida National Bank v. Winn*, 158 Fla. 750, 30 So.2d 298 (1947); *Jackson v. Jackson*, 90 Fla. 563, 107 So. 255 (1925); *Gotshall v. Taylor*, 196 So.2d 479 (Fla. 4th Dist. 1967); *Cahill v. Chesley*, 189 So.2d 818 (Fla. 2d Dist. 1966); *Porter v. Childers*, 162 So.2d 301 (Fla. 3rd Dist. 1964); *Marsh v. Hartley*, 109 So.2d 34 (Fla. 2d Dist. 1959).

13. FLA. CONST. art. X, § 4(c) (1968).

14. *Reed v. Fain*, 145 So.2d 858 (Fla. 1962) demonstrated that a deed void under the homestead law because it was gratuitous could be set aside more than 20 years later, and that claimants under the title predating the void deed were not barred by the statute of limitations, the recording act, or other considerations. The Marketable Record Title Act (FLA. STAT. § 712.01 *et seq.* (1969)) was not in effect at that time and was not considered.

15. FLA. CONST. art. X, § 4(c) (1968) requires both spouses to join in a deed of the homestead. The conveyancing statute, FLA. STAT. § 689.01 (1969) requires two witnesses for any conveyance. See R. BOYER, *FLORIDA REAL ESTATE TRANSACTIONS* § 21.03[2][a] for a discussion of requirements under the former constitution and § 21.03[2][b] as to the new constitution.

else.¹⁶ A significant factor in the new constitution is the provision that if the owner or spouse is incompetent, then the method of alienation or encumbrance shall be as provided by law.¹⁷ There was no similar provision in the former constitution, which required alienation by the owner joined by the spouse when that relationship existed. Thus, if either were incompetent, there was apparently no method of conveying or encumbering the homestead. The new provision is most salutary.

The new constitution has restrictions on the devise of the homestead which are not identical to those under the old document. The former constitution provided that the homestead could not be devised if the owner were survived by children;¹⁸ the new constitution prohibits the devise of a homestead if the owner is survived by a spouse or minor child.¹⁹ Unless or until the legislature changes the provisions regulating the descent of homesteads,²⁰ however, the prohibition against devise and the descent thereof should remain the same under both documents.²¹

Owners of cooperative and condominium apartments became eligible for the homestead taxation exemption in 1969 as a result of 1967 legislation²² and the ratification of the new constitution.²³ The exemption was extended by 1969 legislation to include condominiums organized on a long-term lease.²⁴

2. CASE LAW²⁵

The definitional enigmas of the elements of "homestead" for creditor-exemption and descent purposes were once again the subject of appellate controversy.

The "head of the household" element was not lost in *Beensen v. Burgess*²⁶ when the divorced owner's daughter married so long as she

16. FLA. STAT. § 695.03 (1969).

17. FLA. CONST. art. X, § 4(c) (1968).

18. FLA. CONST. 1885 *as amended*, art. X, § 4.

19. FLA. CONST. art. X, § 4(c) (1968).

20. *Saxon v. Rawls*, 51 Fla. 555, 41 So. 594 (1906) and *Thomas v. Williamson*, 51 Fla. 332, 40 So. 831 (1906) upheld an early statute limiting the devise of a homestead.

21. FLA. STAT. § 731.05(1) (1969) prohibits the devise of a homestead when the owner leaves either a "widow or lineal descendants or both." Note the difference in language between this statute, the 1885 constitutional provision, and the 1968 Constitution. The matter is discussed at length in R. BOYER, *FLORIDA REAL ESTATE TRANSACTIONS* § 21.03[3]. FLA. STAT. § 731.27 (1969) regulates the descent of homestead.

22. Fla. Laws 1967, ch. 67-339, *codified in a note to* FLA. STAT. § 192.12 (1967). The statute was to be effective January 1 of the year following the adoption of a constitutional provision. *Id.*

23. FLA. CONST. art. VII, § 6(a) (1968) provides in part: "The real estate may be held . . . as a condominium, or indirectly by stock ownership or membership representing the owner's or member's proprietary interest in a corporation owning a fee or a leasehold initially in excess of ninety-eight years . . ."

24. Fla. Laws 1969, ch. 69-68, *amending* FLA. STAT. § 192.13 (1967), extends eligibility to "lessees owning the leasehold interest in a bona fide lease having an original term of ninety-eight (98) years or more, in a condominium parcel as defined in Chapter 711 Florida Statutes . . ."

25. Needless to say, all the cases arose under the former constitution.

26. 218 So.2d 517 (Fla. 4th Dist. 1969).

continued living with her father. The owner had sold a prior homestead to purchase his present home and had given up the prior home to the vendee two weeks before the sale. The court ruled that this was not an abandonment.²⁷ Therefore, the "head of the household" status was retained irrespective of the "family's" residing in another home temporarily.

*In re Estate of Van Meter*²⁸ involved the question of whether the homestead (for purposes of descent and distribution) had been abandoned. The claimant (widow of the landowner) had separated from her husband eleven years prior to his death and had filed suit for and obtained separate maintenance. The court reversed the lower court's holding that the property constituted homestead and ruled that the family relationship must have existed at the time of death. There were no children of the marriage and no "family" living on the husband's land at the time of his death. Certainly, the Van Meter house was not a "home" to Mrs. Van Meter and the court ruled that it was not a homestead.

Property which is contiguous to an already-established homestead and which is purchased after a judgment has been awarded against the owners is exempt from the claims of creditors under the circumstances of the following case. The supreme court in *Quigley v. Kennedy & Ely Insurance, Inc.*²⁹ held that when a husband and wife established a homestead, and then, after a judgment had been levied, purchased an adjacent tract making the aggregate acreage for the rural home less than 160 acres (*i.e.*, 15 acres), the entire acreage could be claimed as homestead. The high court reiterated the principle that the exemption provision should be liberally construed in the interest of protecting the family home.³⁰

The *Quigley* case also decided that although at the time the owners purchased the property they were already judgment debtors, the property was exempt. The reasoning was that since the property immediately became homestead upon purchase, the lien and the homestead right attached at the same time and priority should therefore be given to the claimant of the homestead right.³¹

Liens and homestead rights, however, do not attach to the same types of estates, and this legal consequence produced a tragic effect in the final appellate determination of the *LaGasse* case.³² The facts of that case, as more sympathetically stated by the district court,³³ are as follows: Kathleen LaGasse signed an indemnity agreement on a bond for

27. *Id.* at 519.

28. 214 So.2d 639 (Fla. 2d Dist. 1968), *aff'd*, 231 So.2d 524 (Fla. 1970).

29. 207 So.2d 431 (Fla. 1968), *rev'g*, 202 So.2d 610 (Fla. 3d Dist. 1967).

30. *Id.* at 432. *Weiss v. Stone*, 220 So.2d 402 (Fla. 3d Dist. 1969) upheld the trial court's determination that the owner of three contiguous parcels, one of which had a five-unit building, could only claim as homestead the property actually occupied (he lived in one unit) and an easement for ingress and egress.

31. *Id.* at 433.

32. *Aetna Ins. Co. v. LaGasse*, 223 So.2d 727 (Fla. 1969).

33. *LaGasse v. Aetna Ins. Co.*, 213 So.2d 454 (Fla. 2d Dist. 1968).

her husband's business. Upon the husband's default, plaintiff creditor got a judgment against all indemnitors, except the husband, and including Kathleen.

Kathleen and her daughter were deserted by her husband. Kathleen took a job as a waitress. Kathleen's father died and the property Kathleen later claimed as homestead descended to her mother for life with a remainder to Kathleen.

Kathleen went home (to the homestead property) to care for her mother who had terminal cancer and paid most of the expenses out of her meager earnings. Her other house was lost through foreclosure. On her mother's death, the plaintiff creditor attempted to levy on the property.

The district court found for Kathleen and held that her title was only prospective at the time of her father's death and therefore the question of whether the lien attached was immaterial.³⁴ The supreme court, however, reversed. The title in fee vested in the remainderman, Kathleen, at the time of her father's death, not at the death of the life tenant who had the right of possession during the life tenancy. Thus, the *recorded* lien attached instantly when title passed, but the homestead right did not because the *life tenant* still had the right of use and occupancy essential to the homestead claim. Kathleen's residence in the home and caring for her mother did not divest the life tenant of her paramount present interest.³⁵

In the case of *Heath v. First National Bank*,³⁶ the married woman was more successful in avoiding an encumbrance on the homestead. In that case, Mrs. Heath joined in a mortgage on the homestead so that her husband could borrow funds for his business. The first district court held that a mere signature by the wife was not sufficient to hold her liable. The signature must be made after the party was named in the instrument. The decision was also based on the fact that the mortgagee failed to adduce sufficient evidence to show that the wife had signed in the presence of two subscribing witnesses. In this case, the problem concerned the proper method of encumbering a homestead held by the entireties. In *La-Gasse*, the validity of the judgment as against the wife was not questioned, and the court held that the lien attached before the property became the homestead of the claimant.

Certain claims are specifically excluded from homestead exemption. The petitioner in *Graham v. Azar*³⁷ argued that her claim against the

34. *Id.* at 457.

35. 223 So.2d 727, 728-29 (Fla. 1969). Even if we accept the logic of the majority opinion, the question remains as to the applicability of FLA. CONST. art. 10, § 2 (1885). This section states that "the exemptions provided in Section 1 shall inure to the widow and heirs of the party entitled to such exemption . . ." Chief Justice Ervin, one of two dissenting justices, referred to this section without elaboration as a supporting reason for granting the exemption. Prima facie it would seem applicable. The majority's opinion should have explained why it was not.

36. 213 So.2d 883 (Fla. 1st Dist. 1968).

37. 204 So.2d 193 (Fla. 1967).

respondent, her former husband, should, by judicial interpretation, also be excluded from the homestead (personal property) exemption. The claim was for child support of the owner's (respondent's) children by a previous marriage. The supreme court ruled that the claim was protected by the homestead exemption since it was not specifically excepted in the constitution. The vigorous dissent by Justice Ervin is very convincing—why should a father be relieved of the obligation of supporting his children because of a divorce decree and subsequent remarriage? Again, the homestead provisions effected the result which was the antithesis of their underlying spirit—protecting the family.

The homestead provision also includes the business house, if it is on the same property as the home and is the means of livelihood for the family. In *Heil Co. v. Lavieri*,³⁸ the debtor was a franchised agent of the creditor and signed promissory notes to the creditor to help finance his business. Pending an action on the notes, the defendant was divorced and moved into the building on his business property and then remarried. The second district held the business-residence property exempt.

B. *Concurrent Estates*

1. TENANCY BY THE ENTIRETIES

An estate by the entireties may be created by a "strawman" conveyance of the homestead to the husband and wife if it is supported by valuable consideration.³⁹ Accordingly, such a conveyance was upheld in the case of *Betts v. Hawkins*.⁴⁰ The husband married his second wife and conveyed an interest in the homestead to her as an estate by the entireties. Thereafter, she sold her former home and deposited the money in a joint bank account. Her money was used to make repairs on the homestead property. When the daughter of the first marriage sought to attack the conveyance, the second district ruled that the conveyance was good since it was supported by valuable consideration.

The new constitution, article 10, section 4, now validates conveyances, without consideration, to the husband and wife as tenants by the entireties. A wife who held title with her husband as a tenancy by the entirety in business property (another portion of the property stood in the husband's name alone) conveyed the property to a corporation for the sake of convenience. She received nothing in return, but the husband received shares of stock. In a later action for divorce, the wife received alimony but no compensation for her "interest" in this property. The Fourth District Court of Appeal held that since ordinarily upon divorce a tenancy by the entireties becomes a tenancy-in-common, and since the wife had received no stock for a transfer of these rights at a happier period of time in the marriage, a constructive trust for the benefit of the

38. 205 So.2d 21 (Fla. 2d Dist. 1967).

39. See *Hay v. Wanner*, 204 F.2d 355 (5th Cir. 1953).

40. 202 So.2d 135 (Fla. 2d Dist. 1967).

wife should be imposed on a portion of the husband's stock.⁴¹ One judge dissented, arguing a constructive trust required strong, unequivocal evidence of misconduct.⁴²

The frequent case of the older children suing the second wife, contesting her succession to an estate by the entirety, presented an interesting twist in *Losey v. Losey*.⁴³ The first wife and husband conveyed a $\frac{1}{4}$ interest in lands which they held as an estate by the entirety to each of their three children, also executing partnership agreements acknowledging that all parties had an equal interest in the property. The first wife died devising her property to her children. The husband remarried and executed a deed creating a tenancy by the entirety in one-fourth of the property with the second wife. The husband and the children then sought to set aside the conveyance. The supreme court reversed the third district and held that the tenancy by the entirety between the first wife and the husband continued after the conveyance to the children,⁴⁴ therefore he owned a one-fourth interest in the land when he made the conveyance to the second wife. The Chief Justice dissented, arguing that the partnership agreements, and events leading thereto, showed that the husband and first wife created a tenancy-in-common out of their tenancy by the entirety.⁴⁵

When the husband purchases property and takes the deed in his name and that of his wife, the presumption arises that he intended to make a gift. This presumption can only be overcome by conclusive evidence. This does not mean that the burden of going forward shifts to the party disclaiming the gift, but that the evidence is tested by "beyond a reasonable doubt, rather than preponderance."⁴⁶

2. LIFE ESTATE AND REMAINDER

An orange crop, cultivated by the life tenant, was growing on her property at the time of her death. The Second District Court of Appeal ruled that the crop passed as real property to the remainderman, not as personal property to the life tenant's administrator.⁴⁷ The court followed cases holding that in Florida, the fruit follows the realty unless specifically reserved (for the tenant of the defeasible fee).⁴⁸ The remainderman, however, was liable for the cost of cultivation on the theory of unjust enrichment.

41. *Hoke v. Hoke*, 202 So.2d 118 (Fla. 4th Dist. 1967).

42. *Id.* at 121 (dissenting opinion).

43. 221 So.2d 417 (Fla. 1969).

44. *Id.*

45. *Id.* at 419 (dissenting opinion).

46. *Schoenrock v. Schoenrock*, 202 So.2d 571, 574 (Fla. 2d Dist. 1967).

47. *Peer v. Willson*, 210 So.2d 495 (Fla. 2d Dist. 1968).

48. See *Adams v. Adams*, 158 Fla. 173, 28 So.2d 254, 255 (1946), which refused to distinguish between *fructus industriales* and *fructus naturales*.

3. MINERAL ESTATES

The 1969 legislature amended Florida Statutes section 193.22(1) providing for separate taxation of subsurface rights in real property.⁴⁹

*P & N Investment Co. v. Florida Ranchettes, Inc.*⁵⁰ combined the questions of the rights of the holder of a mineral estate versus the surface owner and the rights of a cotenant of a mineral estate versus his fellow cotenant. Plaintiff was the holder of the surface rights to the land and also owner of one-half the mineral estate. The court held on rehearing that as a subsurface owner defendant could enter the land for exploration and mining without the permission of the plaintiff as surface owner. He could also mine the land without the permission of plaintiff as cotenant, with a right to reimbursement of expenses and subject to an accounting.

C. Easements

*Hurt v. Lenchuk*⁵¹ dealt with the problem of the easement rights of owners in a subdivision to the streets and facilities on the plat to which their deeds refer. Defendant owners abutted on a street which appeared on the plat but had been vacated by the city and also abutted on a park which appeared on the plat. Defendants obstructed the street and placed along the park fences and hedges which encroached onto park property. The other owners sued to have these obstructions removed. The court held that the encroachments on the park area should be removed because owners in the subdivision, having purchased their property with reference to the plat, acquired by implied covenant a private easement in *all* of the park.⁵² The court said if the city vacated the street, the abutting landowners became the legal owners of the portion vacated subject to any easements which may have become vested in other owners in the subdivision. The court, however, refused to apply the "liberal view" as to the rights of subdivision owners to platted streets because it would not be practical. The owner's rights were limited to such rights as are reasonably and materially beneficial to the grantees, deprivation of which would reduce the value of their property.⁵³ The street involved in this case did not meet that criteria.

D. Dedication

In addition to statutory dedication under Florida Statutes Section 337.31, it is also possible to have a common-law dedication in Florida. Unlike statutory dedication, common-law dedication can result in an acceptance of the full width of the property offered without the necessity of the public's improving or repairing the full amount of the property

49. Fla. Laws 1969, ch. 69-60.

50. 220 So.2d 451 (Fla. 1st Dist. 1969), *as amended on rehearing*.

51. 223 So.2d 350 (Fla. 4th Dist. 1969).

52. *Id.* at 352.

53. *Id.*

offered.⁵⁴ In *Smith v. City of Melbourne*,⁵⁵ the grantor did not object when a road was built over his property. He conveyed the property to the grantee, subject to a plat showing a 30-foot easement across the property for the street. The city had not used the entire 30 feet, but the court applied common-law dedication and ruled it had an easement for the entire 30 feet.

City of Miami v. Eastern Realty Co.,⁵⁶ was an unusual case involving concepts of dedication, easement, and water rights. In 1914, the plaintiff's predecessor platted a subdivision containing a dedication of a park strip along Biscayne Bay. In 1963, when the defendant City of Miami was negotiating to fill in submerged lands along Biscayne Bay to create public parks, it passed a resolution accepting the dedication of the park strip on the assumption that it had been dedicated to the public. A zoning commission meeting was noticed and held to decide plans for the park, and no objection was interposed by the subdivider or his successors in interest.

The trustees of the internal improvement fund transferred title to the adjoining land to the city, for public purposes only, so that the land could be filled. While this was going on, unknown parties acquired the subdivider's old corporation and quitclaim deeds to the land. The corporate plaintiff then brought suit claiming that the dedication had been a private, not a public one, and claiming title to the adjacent filled-in land as part of its riparian rights.⁵⁷ The third district ruled that although originally the dedication had been a private one, the facts indicated an abandonment of the original offer of a private dedication and a resulting public dedication.⁵⁸ Thus, the City of Miami obtained an easement in the park strip for the use of the public.⁵⁹

E. Water Rights

1. RIPARIAN RIGHTS

City of Miami v. Eastern Realty Co., Inc., discussed *supra*, also ruled on the issue of riparian rights. The court stated that: 1) an owner of land who has dedicated it does not retain the riparian rights unless they are expressly reserved;⁶⁰ 2) assuming the plaintiff were the owner of the land, he did not have a right to the submerged lands but only a preferential right to purchase them;⁶¹ 3) when the trustees of the Inter-

54. *Indian Rocks Beach So. Shore, Inc. v. Ewell*, 59 So.2d 647 (Fla. 1952).

55. 211 So.2d 66 (Fla. 4th Dist. 1968).

56. 202 So.2d 760 (Fla. 3d Dist. 1967).

57. The courts decision as to these riparian rights is discussed at p. 587 *infra*.

58. 202 So.2d at 763.

59. *Id.* This public easement was said to blend with the private easement of the lot owners and that the two could exist contemporaneously.

60. *Id.* at 770.

61. *Id.* at 771. See also *Tri-State Enterprise, Inc. v. Berkowitz*, 182 So.2d 40 (Fla. 2d Dist. 1966).

nal Improvement Fund give an easement to the city in submerged lands to create a public park thereon, they do not violate the statute against sale to one other than the owner;⁶² and 4) after submerged lands are filled in, the owner's right is limited to a conveyance from the trustees of land not used for a public or municipal purpose.⁶³ Therefore, the plaintiffs did not have any rights in the filled-in submerged lands adjoining a park strip which they had dedicated.⁶⁴

An apartment building was constructed on a lake surrounded by homes, and the tenants in the apartment building used the lake excessively and without regard to water safety. The third district, in *Silver Blue Lake Apartments, Inc. v. Silver Blue Lake Home Owners Association*,⁶⁵ held that it was proper to restrain *all* tenants from use of the lake and to allow only owners of land lying under the lake to use all of the waters.

Florida Statutes section 298.74 requires written consent of abutting owners to draw water so as to lower the level of a lake over two square miles in area. *Brown v. Ellingson*⁶⁶ held that the statutory permission applies not only to drainage of a lake but also to an abutting land owner drawing water for irrigation purposes if the level of the lake is lowered.

When a man-made lake in a subdivision was joined by man-made canals also in the subdivision and the lake was platted as being dedicated to the joint and several use of the owners of lots fronting on the lake, those owners were entitled to erect a fence preventing the access of owners of lots on the canal.⁶⁷ The court concluded that the easement for recreational use was exclusively for the benefit of the property owners abutting the lake.

2. SUBMERGED LANDS

a. Legislation

Article 10, section 11 of the new constitution provides that the state shall have title to lands under navigable waters within the boundaries of the state if the lands have not been alienated as sovereignty lands.⁶⁸ Sale or private use of the lands may be authorized by law when it is not contrary to the public interest.

The 1969 legislature amended section 253.12 of the Florida Statutes to provide that title to *all* sovereignty tidal and *submerged bottom lands* is vested in the trustees of the Internal Improvement Fund.⁶⁹ This

62. FLA. STAT. § 253.12 (1965). See *City of Miami v. Eastern Realty Co.*, 202 So.2d 760, 771 (Fla. 3d Dist. 1967).

63. 202 So.2d at 771-72.

64. *Id.* at 772.

65. 225 So.2d 557 (Fla. 3d Dist. 1969).

66. 224 So.2d 391 (Fla. 2d Dist. 1969).

67. *Reiger v. Anchor Post Prod., Inc.*, 210 So.2d 283 (Fla. 3d Dist. 1968).

68. FLA. CONST. art. 10, § 11 (1968).

69. Fla. Laws 1969, ch. 69-308. The Trustees of the Internal Improvement Fund were renamed "Board of Trustees." Fla. Laws 1969, ch. 69-106, § 27.

gives the trustees the same authority over *fresh* water as over *salt* water lands.

The legislature also provided that the trustees may lease submerged lands for aquaculture activity for a maximum initial term of 10 years.⁷⁰ Other legislation dealt with conservation of submerged lands.⁷¹

b. Case Law

The grants made by Franklin County of rights to plant oyster beds did not convey a valid, vested right because such grants did not comply with article IV, section 14 of the Florida Constitution of 1885, requiring the seal of the state and signature and countersignature of the Governor and Secretary of State. Based on this premise, the supreme court in *Bryant v. Lovett*⁷² held that the 1961 act of the legislature requiring registration and rental of oyster leases⁷³ and grants was not invalid as to holders of the Franklin County grants.

A review of rulings by the city commission on a petition to establish bulkhead lines may be had by certiorari to the circuit court since the Bulkhead Act of 1967⁷⁴ took precedence over the earlier administrative procedure act.⁷⁵

The Bulkhead Act requires that "formal approval" of the trustees of the Internal Improvement Fund is necessary to obtain a dredge and fill permit after approval by the board of county commissioners. Based on a prior similar holding,⁷⁶ the third district held that the trustees had no discretion in the approval of such a permit.⁷⁷

F. Boundaries

1. SETTLEMENT OF DISPUTES

Title and boundary line disputes between adjoining property may be resolved by a line agreed to as the true boundary line between the disputing parties, either by express or implied agreement, or by acquiescence. In *Williams v. Johntry*,⁷⁸ the court held that where the parties and their predecessors had occupied land recognizing a fence as a boundary, that boundary was established although the line was not the true one according to a subsequent survey. The court did not distinguish clearly be-

70. Fla. Laws 1969, ch. 69-46.

71. Fla. Laws 1969, ch. 69-342 (established Boca Ciega Aquatic Preserve); ch. 69-337 (requires conservation reports be requested from state boards within 30 days after an application for sale, bulkhead lines or dredging or filling of submerged land); ch. 69-64 (makes it a crime to obstruct navigable waters with traps).

72. 201 So.2d 720 (Fla. 1967).

73. Fla. Laws 1961, ch. 61-502, now codified as FLA. STAT. § 370.161 (1967).

74. FLA. STAT. § 253.122 (1967).

75. FLA. STAT. § 120.31(1) (1967).

76. Trustees of Internal Improvement Fund v. Venetian Isles Development Corp., 166 So.2d 765 (Fla. 1st Dist. 1964).

77. Burns v. Wiseheart, 205 So.2d 708 (Fla. 1st Dist. 1968).

78. 214 So.2d 62 (Fla. 1st Dist. 1968).

tween acquiescence and agreement. *Reil v. Myers*⁷⁹ did distinguish a boundary established by agreement from one established by acquiescence. In that case, the parties had *disputed* over the boundary, *agreed orally* that a surveyor's line would be treated as the one true line, and complied with this agreement for two years. The court upheld the boundary line as established by agreement.

2. LOCATION OF BOUNDARIES

When a description of property is ambiguous, a natural monument prevails over courses and distances, and courses and distances prevail over quantity. In the case of *Trustees of the Internal Improvement Fund v. Wetstone*,⁸⁰ however, the natural monument was the high tide line which could not be located with any precision. As a result, the court held that the meander line (described by courses and distances) prevailed. One judge dissented, saying that the difficulty of locating the natural monument was no excuse for not using the highwater line.⁸¹

*Mogee v. Haller*⁸² held that although the first part of a description did not make sense, a sufficient description remained for purpose of identification, with the call controlling.

G. Adverse Possession

*Chasteen v. Chasteen*⁸³ involved adverse possession under the color of title. After the death of grandfather Chasteen, his widow lived with the children and grandchildren on his 200-acre property. The sheriff sold the property to a creditor of grandfather Chasteen although the widow claimed the property as homestead. The creditor then deeded the property to one of the Chasteen sons who cut timber on the property, maintained it, and paid taxes on it since 1942. The first district court ruled that although adverse possession operated against the older children since they knew of their brother's deed and claim on the land; the minor grandchildren did not have actual knowledge of the deed and did not know their uncle was claiming the land for himself, so adverse possession was not valid against them.

The district courts are split on whether one who adversely possesses a strip of land, contiguous to land he owns under a valid deed, can be deemed to be possessing under "color of title" within the meaning of the Florida Statutes.⁸⁴ In *Seaboard Air Line R.R. Co. v. California Chemical Co.*,⁸⁵ the fourth district accepted the first-district view that such adverse

79. 222 So.2d 42 (Fla. 4th Dist. 1969).

80. 222 So.2d 10 (Fla. 1969).

81. *Id.* at 16 (Ervin, J. dissenting).

82. 222 So.2d 468 (Fla. 1st Dist. 1969).

83. 213 So.2d 509 (Fla. 1st Dist. 1968).

84. FLA. STAT. § 95.17(2) (1967). See *Blackburn v. Florida W. Coast Land & Devel. Co.*, 109 So.2d 413 (Fla. 2d Dist. 1959) holding that it does not qualify as color of title and *Kiser v. Howard*, 133 So.2d 746 (Fla. 1st Dist. 1961) holding that it does.

85. 210 So.2d 757 (Fla. 4th Dist. 1968).

possession was under color of title. The court also held that the possession is adverse when one takes possession up to the mistaken boundary line believing the property to be his.

*Forman v. Ward*⁸⁶ held that adverse possession without color of title was acquired when the description of land, returned to the tax assessor, merely contained a reference to the book and page number of the deed filed with the clerk because the statute for the assessment recognized the method.⁸⁷

H. *Covenants and Equitable Servitudes*

*Voight v. Harbour Heights Improvement Association*⁸⁸ involved covenants running with the land which required owners in a development to file their building plans with an agent of the subdivider and receive his approval before building. Such plans had to meet the requirements of the Fort Lauderdale building code. The agent rejected the defendants' plans for a seven-story, multi-family unit, which appeared to be within the building code. The court held that covenants for approval of construction would be upheld if they were exercised reasonably. Since the deed restrictions provided for multi-family units on these lots, the limitations on building them could only be as to height. Therefore, approval of the agent must be given if there was conformance with the express requirements of the building code. The deed covenants in the case of *Henthorn v. Tri Par Land Development Corp.*⁸⁹ provided for an annual charge to be paid by all owners. The covenants were to run until the year 2000 according to an accompanying agreement of record, and were thereafter subject to renewal. The court upheld the covenants because they were not indefinite but did not uphold the renewals. The renewals were invalid for the same policy reasons which applied to the rule against perpetuities.

I. *Dower, Curtesy, and the Ownership of Property by Married Women*

Section V of article X of the new constitution now provides that there is to be no distinction between married men and married women in the holding, control, disposition, or other encumbering of their property, except that dower and curtesy may be established and regulated by law. This not only invites the legislature to establish curtesy in Florida, it also abrogates the requirement in Florida Statutes section 708.04 that the husband join in the wife's conveyances.

After the time for electing dower had expired, the executrix filed a petition for a declaratory decree determining heirs and next of kin. After

86. 219 So.2d 68 (1st Dist. 1969).

87. FLA. STAT. § 193.20 (1967).

88. 218 So.2d 803 (Fla. 4th Dist. 1969).

89. 221 So.2d 465 (Fla. 2d Dist. 1969).

the court order, the widow elected dower. The first district held that the widow's right of reelection was not reinstated by the petition.⁹⁰

A wife who jointly and severally with her husband executed a demand note secured by stock to a bank could not complain of the bank's selling the stock as executor, discharging the debt, and only including the excess in the estate for purposes of calculating the widow's dower.⁹¹

II. LANDLORD AND TENANT

A. Security Deposits—Legislation

The 1969 Legislature made an addition to chapter 83 of the Florida Statutes dealing with landlord and tenant. Applicable only to the rental of housing units, section 83.39 now requires a landlord to hold in trust any security deposit in excess of \$100 in an escrow account or to post a bond to secure refund of the deposit.⁹² Section 3 of the statute provides that upon termination of the lease, the landlord has 15 days to return the deposit or to give a tenant a 15-day notice of his intent to claim the deposit. This section also contains a prophylactic provision that a tenant can not waive his rights under the statute, thus preventing circumvention by standard form and adhesion contracts. Landlords who rent fewer than five individual housing units are excepted from coverage. One problem with the legislation is that no penalty for its violation is provided.

B. Damages for Termination of Lease

An interesting factual situation presented several appellate contests for the third district on the issue of damages. The defendant had leased Miami Beach Convention Hall for the World Heavyweight Championship boxing match from the plaintiff, the City of Miami Beach. The plaintiff-city's boxing commission was informed that the champion had a bad knee so the commission ordered him examined (the law so required),⁹³ and advised the defendant that the champion should not participate. Defendant acquiesced, postponed the fight, and then refused to pay. The court held that this was not a frustration of purpose which would excuse performance by the lessee. The lessor had not brought about the frustration because the disabling injury, *not* the city's examinations, was the cause of the fight's postponement.⁹⁴ Further, the lease provided that the risk of loss was on the lessee, and the event which happened was a foreseeable one. The lessee could have provided for such a contingency in the lease.

90. *In re* Estate of Arner, 218 So.2d 471 (Fla. 1st Dist. 1969).

91. *In re* Estate of Trinter, 212 So.2d 355 (Fla. 4th Dist. 1968).

92. Fla. Laws 1969, ch. 69-282.

93. FLA. STAT. § 548.04 (1961) requires that it be attested by a physician that the boxer is physically fit.

94. *City of Miami Beach v. Championship Sports, Inc.*, 200 So.2d 583 (Fla. 3d Dist. 1967).

On the question of the amount of damages, the case was again appealed. The court finally held, withdrawing an earlier opinion,⁹⁵ that the provision in the lease that liquidated damages would equal the full rent, including any disbursements or expenses, would not be conclusive.⁹⁶ Damages should be awarded on the amount actually proved.

A subsidiary of Jefferson stores sued United States Rubber, its lessee, for breach of an agreement to lease. The case, *Jefferson Realty v. United States Rubber Co.*,⁹⁷ after summary judgment as to liability, went to trial on the issue of damages. The jury returned a verdict only for the parent corporation. The supreme court held that the verdict did not mean a lack of proof of damages.⁹⁸ It only indicated that the parent alone had suffered and was entitled to damages. The court also held the joinder of the parent after summary judgment was proper, although necessarily amounting to a grant of summary judgment as to liability for the benefit of the parent corporation.

Following the majority rule in the United States,⁹⁹ the third district held that pro rata recovery of the broker's commission is not recoverable as damages by the lessor.¹⁰⁰

C. Distress

A case of first impression arose in the fourth district. *Dobbs v. Petko*¹⁰¹ held that when a lease provided for acceleration of the rent upon default of the tenant, the remedy of distress was available to the landlord to obtain a warrant *for the entire sum due*.¹⁰²

D. Provision in Lease for Title to Goods to Pass to Landlord

A rent lien is superior to a tax warrant.¹⁰³ But, is it still superior when the lease provides that upon abandonment by the tenant, the landlord will get title to the stock of goods of the tenant? The Fourth District Court of Appeal answered no¹⁰⁴ on the basis that such transfer after

95. Filed November 26, 1968, apparently not published.

96. *Championship Sports, Inc. v. City of Miami Beach*, 221 So.2d 24 (Fla. 3d Dist. 1969). Although the court did not in so many words so state, the provision for liquidated damages was apparently construed as a penalty since under its terms the city would have recovered the rent plus expenses on a breach, whereas if there were no breach the city would have recovered only the rent and would have had to bear the expenses itself.

97. 222 So.2d 738 (Fla. 1969).

98. The district court seemed to think it did. *United States Rubber Co. v. Jefferson Realty*, 208 So.2d 110, 112 (Fla. 3d Dist. 1968).

99. See, e.g., *Manning v. Pounds*, 2 Conn. Cir. 344, 199 A.2d 188 (1963); *Wihelm Lubrication Co. v. Bratrud*, 197 Minn. 626, 268 N.W. 634 (1936).

100. *Mutual Employees Trademan v. Silverman*, 202 So.2d 826 (Fla. 3d Dist. 1967).

101. 207 So.2d 11 (Fla. 4th Dist. 1968). The court's only cited authority was a federal case discussing Florida law, *In re J. E. DeBelle Co.*, 286 F. 699 (S.D. Fla. 1923), indicating that a landlord's lien is available only for the amount of rent accrued. The *Dobbs* court distinguished the case of an acceleration clause.

102. 207 So.2d at 12.

103. *Jacob v. Kirk*, 223 So.2d 795, 797 (Fla. 4th Dist. 1969), and cases cited therein.

104. *Id.*

tenant's abandonment amounts to a sale. Therefore, the statutory provisions relating to a dealer's sale of his stock of goods applies.¹⁰⁵ Thus, not only is the property subject to the tax warrant, but the landlord, as successor owner of the personal property, is personally liable for the taxes.¹⁰⁶ An alternative basis of the decision was that the landlord's lien was effective only for accrued rent, not for future rent or other sums owed the landlord, and since the landlord had already recovered that much, the enforcement of the tax warrant as to the remainder of the goods was permissible.

E. *Renewals of Leases*

Leases which endure in perpetuity are not favored. With this principle underlying its decision, the first district held that a lease providing for an option of renewal every five years could only have one renewal. The court declared that the lease's lack of specificity as to the manner of paying rent beyond the first five years prevented it from being clear and unequivocal enough to allow perpetual renewal.¹⁰⁷

F. *Forcible Entry and Unlawful Detainer*

If possession is not nine-tenths of the law, as an old saying goes, it is indeed a protected interest as first-year property students know. In *Floro v. Parker*,¹⁰⁸ the court reversed a summary judgment for the plaintiff in an unlawful detainer proceeding in view of the need for factual determinations, *i.e.*, whether the plaintiff was in possession; not whether the plaintiff had the legal right of possession. A person out of possession is not entitled to resort to self-help in asserting ownership, but instead he must bring a proper legal action.¹⁰⁹

*Tollius v. Dutch Inns of America, Inc.*¹¹⁰ held that equitable defenses could not be determined by unlawful detainer action because the action did not bar a subsequent suit in equity. The court then enjoined the unlawful detainer action because actions at law may be enjoined when equitable relief is available.

G. *Repair and Improvements of the Leasehold*

A lessor fee owner who conveys the reversionary interest subject to a leasehold is thereby relieved of any obligation to repair defects which

105. FLA. STAT. § 212.10(1) (1967).

106. *Jacobs v. Kirk*, 223 So.2d 795 (Fla. 4th Dist. 1969). The tax lienor did not seek imposition of personal liability so it was not imposed in this case.

107. *Hutson v. Knabb*, 212 So.2d 362 (Fla. 1st Dist. 1968).

108. 205 So.2d 363 (Fla. 2d Dist. 1967). See *Goffin v. McCall*, 91 Fla. 514, 108 So. 556 (1926) for a historical discussion of the action.

109. 205 So.2d 363 (Fla. 2d Dist. 1967).

110. 218 So.2d 504 (Fla. 3d Dist. 1969).

occur subsequent to the transfer. In accordance with the general rule, the covenant to repair runs with the land.¹¹¹

The lessee rented property for the purpose of building a gas station. At the time of leasing, the lessor consented to raising the grade of the property so that the lessor could utilize it better. When traffic near the property increased, the lessee needed to regrade the premises. He could not get the permission of the lessor. The lessee offered to post sufficient bond to cover restoration of the property when the leasehold terminated and brought a declaratory judgment to permit regrading. The First District Court of Appeal affirmed the judgment for the lessee because eminent domain had created a situation not anticipated by the parties.¹¹²

III. MECHANIC'S LIEN AND RELATED LIENS

A. *Mechanic's Liens*

The sub-subcontractor was held to be within the purview of the mechanic's lien statute¹¹³ in *Ceco Corp. v. Goldberg*.¹¹⁴ The court said that the statute should be construed liberally according to general equitable principles so as to best protect the interests of those enhancing realty. The holding, however, was in direct conflict with the earlier decision of *J. P. Driver Co., v. Claxton*¹¹⁵ in the second district.

The vendee or equitable owner of property constitutes an owner within the definition of the Florida Statutes.¹¹⁶ Based on this premise, the second district held that when the vendee contracted with the plaintiff for surveying, then the vendee purchased the land and in turn sold it to a third party who executed a mortgage, thereon, the lien was perfected as to the owner (the vendee) and to the creditors with notice. Until notice was filed, however, the lien was not perfected and not valid as to purchasers and creditors without notice.¹¹⁷

*Boux v. East Hillsborough Apartments Inc.*¹¹⁸ held that in cases where the owner corporation is wholly owned by the contractor, the corporation will be looked through so that the subcontractor is in privity with the owner. In this situation the subcontractor does not have to file notice to the owner.

111. *General Cigar Co., Inc. v. Davis*, 204 So.2d 227 (Fla. 3d Dist. 1967).

112. *Blow v. Colonial Oil Co.*, 225 So.2d 167 (Fla. 1st Dist. 1969). The lessor's original amenability to regrade the property swayed the court so as to find this to be a practical construction of the intent of the parties.

113. FLA. STAT. § 713.01(16)(17) (1967).

114. 219 So.2d 475 (Fla. 3d Dist. 1969).

115. 193 So.2d 440 (Fla. 2d Dist. 1967), *discussed in Boyer, Real Property Law*, 22 U. MIAMI L. REV. 278, 295 (1967) (Florida Survey). Judicial prediction is certainly difficult in this area.

116. FLA. STAT. § 713.54 (1967).

117. *Roberts v. First Federal Sav. & Loan Ass'n*, 222 So.2d 32 (Fla. 2d Dist. 1969). The mortgagee of the property had brought an action to foreclose his lien. The court held that the mortgagee's lien was superior because he was a creditor without notice.

118. 218 So.2d 202 (Fla. 2d Dist. 1969).

B. *Mechanic's Lien—Conditions*

1. FURNISHING OF MATERIALS

One of the conditions of obtaining a mechanic's lien under the statute is to prove the "furnishing of materials."¹¹⁹ One could furnish materials by either supplying materials that were incorporated in the improvement or by specially fabricating materials for incorporation into the improvement. Since it would be an insurmountable burden to prove that every item of material supplied by the materialman was actually incorporated into the improvement, section 713.01(6) (formerly section 84.011(6)) of the Florida Statutes provides that it is sufficient to prove delivery of materials to the construction site. This is prima facie evidence that they were incorporated into the improvement. Applying these principles, the court in *Beautyware Plumbing Supply Co. v. Columbiad Apartments, Inc.*¹²⁰ held that when the materialman showed that all materials were delivered to the job site or the plumbing contractor's job site for fabrication, this was insufficient to furnish prima facie proof of furnishing materials because the evidence did not show what portion was delivered to the contractor's shop and what portion to the job site. The statute does not protect a materialman supplying a contractor when he does not show that the materials were specifically fabricated for incorporation into the improvement.

2. NOTICE

Persons not in privity with the owner must file a notice of their claim.¹²¹ When must the claim be filed and what happens to the prospective lienor who fails to file within the specified time period? In the prior biennium, the second district cases of *Babe's Plumbing Inc. v. Maier* and *Stancil v. Gardner*¹²² held that notice must be filed by a materialman within 45 days after the commencing of the furnishing of materials. In the early part of the biennium, *Bard Manufacturing Co. v. Albert & Jamerson Building Supply Corp.*¹²³ followed the second district cases.

In *Fine v. Crane Company*,¹²⁴ the third district followed the line of cases holding that notice must be filed within 45 days and the supreme court *reversed*. The supreme court distinguished *Babes Plumbing* and *Stancil* in *Crane Co. v. Fine*¹²⁵ and held that liens not filed within the 45 day period *but* which *were* filed could still be asserted, but would be on

119. FLA. STAT. § 713.01(6) (1967).

120. 215 So.2d 42 (Fla. 4th Dist. 1968).

121. FLA. STAT. § 713.06(2)(a) (1967).

122. 194 So.2d 666 (Fla. 2d Dist. 1966) and 192 So.2d 340 (Fla. 2d Dist. 1966), *discussed in* Boyer, *Real Property Law*, 22 MIAMI L. REV. 278, 297 (1967) (Florida Survey).

123. 212 So.2d 13 (Fla. 4th Dist. 1968).

124. 211 So.2d 219 (Fla. 3d Dist. 1968).

125. 221 So.2d 145 (Fla. 1969).

a lower priority than liens filed within 45 days from the commencing of furnishing materials.¹²⁶

The notice must, of course, be given to the owner within the limitations period prescribed for the recording of a Claim of Lien and, for obvious reasons, before the owner has paid out (either in a progress or the final payment) that portion of the sums due under the direct contract to which the lienor would be entitled.¹²⁷

The case also resolved, by conflict certiorari, the question of whether a materialman who failed to perfect a mechanic's lien was barred from an equitable lien, discussed *infra*.

In order to institute suit against the owner, the contractor must file an affidavit stating that all lienors have been paid in full or listing those who have not been paid and the amount due. The architect must file the same affidavit according to *Davis Engineering, Inc. v. Purcel*.¹²⁸ Under the Mechanic's Lien Law, there are three basic categories—contractor, laborer, and materialman—and an architect is in the first.¹²⁹

C. Equitable Liens

The major mechanic's lien question which reverberated among the appellate courts of this state was whether a materialman who failed to perfect his mechanic's lien was thereafter precluded from seeking an equitable lien. The supreme court reviewed the question by conflict certiorari in *Crane Co. v. Fine*¹³⁰ and held one who fails to perfect a mechanic's lien is not thereafter automatically barred from asserting an equitable lien if he can show special and particular equities in his favor. In the *Crane* case, the materialman had specially fabricated materials for the plumbing subcontractor who later abandoned the job. At the time of the abandonment, the general contractor was holding sums due the subcontractor for labor and materials under a hold-back provision. Under the circumstances, an equitable lien was held proper.

In sharp contrast, the supreme court ruled that there was no cause for an equitable lien in *Merritt v. Unkefer*,¹³¹ reversing the district court.¹³² In that case, the plaintiff architect postponed billing when so requested by the owner of the property who said that he would pay the architect following a final judgment in a condemnation proceeding. The

126. *Id.* at 152.

127. *Id.*

128. 202 So.2d 827 (Fla. 4th Dist. 1967).

129. *Id.* at 829.

130. 221 So.2d 145 (Fla. 1969). Following the *Crane* case, the fourth district vacated its first decision in 1800 North Federal Corp. v. Westinghouse Electric Supply Co., 224 So.2d 384 (Fla. 4th Dist. 1969).

131. 223 So.2d 723 (Fla. 1969).

132. *Unkefer v. Merritt*, 207 So.2d 726 (Fla. 4th Dist. 1968).

court, one judge dissenting,¹³³ held that an equitable lien based on "unjust enrichment" or a "general consideration of right and justice" has been in each instance based on mistake or misrepresentation of a material fact beyond the circumstances of this particular case.¹³⁴

D. Sureties

In *National Union Fire Insurance Co. v. Robuck*,¹³⁵ the principal (contractor) secured a bond from the surety for the construction of a shopping center based on a forged construction contract. The electrical and plumbing contractors sued the surety to collect their mechanic's liens. The court held that the fraud of the principal did not vitiate the liability of the surety to the mechanic. The fact that the surety bonded a fictitious contract did not negate its liability because it was the duty of the surety to discover the true terms of the contract.¹³⁶

E. Procedure

A general contractor is liable to lien claimants. In *Morris & Esner, Inc. v. Olympia Enterprises, Inc.*,¹³⁷ the court held that a contractor could include in his complaint for foreclosure amounts owed to lien claimants who had not filed their own suit, but not those amounts due to lien claimants who had filed suit. The court pointed out that under rule 1.270¹³⁸ the judge could try the lien claimants suits together with the suit of the contractor. The court also held that only amounts expended pursuant to the direct contract were claimable.¹³⁹

IV. FIXTURES, PLANTS AND CROPS

A. Legislation

Chapter 69-97 of the 1969 Session Laws amended section 713.02 of the Florida Statutes by providing liens for any person who furnished trees, shrubs, bushes, or plants on real property and for any person providing carpets or rugs which are permanently affixed to the building.

B. Case Law

Is wall-to-wall carpeting real or personal property? That answer, ruled the court in *United Bonding Insurance Co. v. Minichiello*,¹⁴⁰ depends on what the parties intend. In that case, it was held a fixture—

133. 223 So.2d at 724 (dissenting opinion).

134. *Id.* (majority opinion).

135. 203 So.2d 204 (Fla. 1st Dist. 1967).

136. *Id.* at 206-07.

137. 200 So.2d 579 (Fla. 3d Dist. 1967).

138. FLA. R. CIV. PRO. 1.270.

139. 200 So.2d at 582.

140. 221 So.2d 220 (Fla. 1st Dist. 1969).

the contract provided for the installation of fixtures and carpeting, and the carpeting was specified as the original floor covering.

In a case arising before the effective date of the Uniform Commercial Code in Florida,¹⁴¹ a mortgagor of real property, after final judgment had been rendered for the mortgagee, executed a crop lien to his attorney for his fee. Invalidating the lien, the court stated that before default a chattel mortgage could be given on the existing crops, but not as to crops which came into being after default. Nor could the mortgagor give a lien after default, and certainly not in this case where judgment had been given.¹⁴²

V. MORTGAGES

A. Legislation

The Home Improvement Act now requires that when a promissory note and mortgage are given to finance home improvement construction, it must state that the note is subject to the terms of a home-improvement contract.¹⁴³ This much needed legislation is intended as a stop-gap measure to prevent such notes from being negotiated to a holder in due course who is not subject to the defense of failure of consideration. It was a legislative attempt to put a damper on one of the con man's favorites—the home improvement game.

B. Foreclosure Sales and Deficiency Decrees

The important question of whether the foreclosure price is conclusive of the value of the property in a subsequent action at law for the balance due on the note was certified to the supreme court in *Fulton v. R. K. Cooper Construction Company*.¹⁴⁴ In that case, the note was \$19,500 and the price paid at the foreclosure sale was \$10. The supreme court held in a three-to-three decision that the price paid was *not* conclusive of the value of the property, even though no objection had been made to the sale within the 10-day period.¹⁴⁵ The court reasoned that the alternative sale chapter providing for 10 days in which to make an objection so the chancellor may set aside the sale does not determine the value of the property for subsequent actions at law but is only conclusive as to sufficient consideration to support the transfer of title.¹⁴⁶

141. *Bryan v. First National Bank*, 217 So.2d 129 (Fla. 2d Dist. 1968). The Code went into effect on January 1, 1967.

142. *Id.* at 131-32.

143. Fla. Laws, 1969, ch. 69-44. This will be FLA. STAT. § 520.80 (1969).

144. 208 So.2d 863 (Fla. 3d Dist. 1967). The court did not hold that the price was not conclusive based on the holding of the second district case of *Bobby Jones Garden Apartments, Inc. v. Connecticut Mutual Life Ins. Co.*, 202 So.2d 226 (Fla. 3d Dist. 1967) which had so ruled on the same question.

145. FLA. STAT. § 702.02(5) (1967).

146. *R. K. Cooper Construction Co. v. Fulton*, 216 So.2d 11, 13 (Fla. 1968).

*Klondike, Inc. v. Blair*¹⁴⁷ ruled that the mortgagee's bringing of an action at law on the note did not bar a subsequent suit in equity to foreclose the mortgage, nor amount to an abandonment of the security interest, when there was no satisfaction or payment. The action did not amount to an election of remedies since they were not inconsistent, and no satisfaction was received.¹⁴⁸

The mortgage foreclosure is a different concept in Florida under the "lien theory" than it was at common law when title passed to the mortgagee and the principles of foreclosure were very strict. Foreclosure in Florida is an equitable remedy. Thus, the appellate court in *Watson v. Vafides*¹⁴⁹ approved the lower court's action in refusing to confirm a sale and in ordering a resale. The mortgagor bid the highest price for his land (\$50,000) and was then unable to come up with the money. The next bidder at \$41,000 was the judgment creditor of the mortgagor, but when the property was offered for sale after the mortgagor failed to pay, he secured the land for \$30,000. The court held that resales should be made on the spot before bidders disperse and had the resale been made immediately, the clerk should have started at the next highest bid.¹⁵⁰

C. Consideration

In *Contractors Construction Corp. v. Michael Development Corp.*,¹⁵¹ the mortgagor was in substantial default. Michael, holder of the second mortgage, obtained the first mortgagee's signature on a subordination agreement, reciting it was in consideration of ten dollars and other good and valuable considerations. Michael told the first mortgagee that if he did not agree to subordinate, Michael would foreclose. The majority of the court upheld the forbearance of the first mortgagee as consideration for the agreement.¹⁵² The dissent, after dismissing the recital as consideration, vigorously argued that forbearance was not the consideration since it was not shown to have been bargained for by the first mortgagee.¹⁵³ The dissenting judge also apparently believed that there was a failure of consideration.¹⁵⁴ Indeed, it is not readily apparent why a holder of a prior mortgage would be particularly concerned about the foreclosure of a junior mortgage, and why he would subordinate just to prevent foreclosure of the junior.

147. 211 So.2d 41 (Fla. 4th Dist. 1968).

148. *Id.* at 43.

149. 212 So.2d 358 (Fla. 1st Dist. 1968).

150. *Id.* at 362.

151. 213 So.2d 430 (Fla. 4th Dist. 1968).

152. *Id.*

153. *Id.* at 431 (Cross, J. dissenting).

154. *Id.* at 434-35.

D. Clogging

The common-law rule against clogging was designed to prevent the mortgagee from impairing the mortgagor's equity of redemption. Thus, the mortgagee could not cut-off the mortgagor's equity of redemption by obtaining from the mortgagor a contemporaneous deed of fee simple absolute which could be recorded on default.

The rule against clogging may have been weakened by the case of *MacArthur v. North Palm Beach Utilities, Inc.*¹⁵⁵ The mortgagor purchased land from the mortgagee and at the same time executed a mortgage on the water and sewer system to be constructed by proceeds advanced by the seller-mortgagee. A contemporaneous agreement under seal gave the mortgagee the option to repurchase the sewer and water system at cost. The chancellor and the appellate court both denied the mortgagee the right to exercise the option, based on the doctrine of clogging.¹⁵⁶

The majority of the supreme court held that clogging did not apply because the option was a part of the original sale and financing arrangement; the mortgagor in effect purchased, subject to an option, that part of the land so affected and such land remained subject to an option.¹⁵⁷ The convincing dissent argued that clogging did apply because the mortgage was taken to construct a sewer system and the option was to buy back at cost the *very* property the mortgage was taken to finance.¹⁵⁸

E. Acceleration

Prepayments were made by the mortgagor which exceeded the amount of periodic payments due. The second district held that this prevented an acceleration of payments and a foreclosure which was based solely on the failure to make payments.¹⁵⁹ The holding was based on the maxim "He who seeks equity, must do equity."

The acceleration provisions of a mortgage may possibly result in usury, but the test of usury is what actually happens. Thus, when the mortgagor defaulted twice on payments and later made them up and the mortgagee delayed any action and acceleration until the third default, the fact that acceleration would have been usurious if the mortgagee had acted earlier did not matter.¹⁶⁰

155. 202 So.2d 181 (Fla. 1967).

156. 187 So.2d 681 (Fla. 4th Dist. 1966), *discussed in Boyer, Real Property Law*, 22 U. MIAMI L. REV. 278, 308-09 (1967) (Florida survey).

157. 202 So.2d at 186.

158. *Id.* at 187 (dissenting opinion).

159. *Gulf Life Ins. Co. v. Pringle*, 216 So.2d 468 (Fla. 2d Dist. 1969).

160. *Green Ridge Corp. v. South Jersey Mtg. Co.*, 211 So.2d 70 (Fla. 2d Dist. 1968).

F. Attorney's Fees

A mortgage contained the provision that the mortgagor would pay to the mortgagee "all cost . . . including reasonable attorney's fees" which the mortgagee might incur "collecting any sum secured, whether by foreclosure or otherwise."¹⁶¹ The fourth district held that such a provision embraced an allowance for reasonable attorney's fees on appeal.¹⁶²

G. Miscellaneous

In *D.A.D., Inc. v. Moring*,¹⁶³ one of two joint tenants procured a mortgage and recorded the deed and mortgage without the knowledge of the other joint tenant. The mortgagee began foreclosure proceedings, but the mortgagor-cotenant died before the cause came to issue. The court held that the mortgage was no longer enforceable because of the right of survivorship. The contention that the mortgage should still be enforceable against the undivided one-half interest of the dead joint tenant (which went to the surviving joint tenant) was rejected.¹⁶⁴ Since the mortgage was a lien and not a transfer of title, the unities were not destroyed when the mortgage was executed.

The grantor sued for reformation of a deed given as a security device, claiming it was a mortgage. The trial court held that the deed was a deed absolute, but ordered the plaintiff grantor to pay the defendant because a debt still existed.¹⁶⁵ The appellate court reversed the trial court holding that if the debt still existed; such a result would be an anomaly. The grantor, having divested himself of the property by a deed absolute, should not still be obligated to pay a substantial part of the purchase price.

Where a utility owning easement rights was not made a party to a foreclosure, but the utility agreement was attached to the complaint, the utility was not an unknown claimant. Therefore, service of process by publication was insufficient, and the utility's rights were not extinguished by the foreclosure.¹⁶⁶

VI. CONDOMINIUMS AND COOPERATIVES

These hybrids of property and corporation concepts, instant commercial successes in the housing starved Southeast Gold Coast, are slowly emerging as something short of universal panaceas and as not entirely

161. *Empress Homes, Inc. v. Levin*, 201 So.2d 475 (Fla. 4th Dist. 1967).

162. *Id.*

163. 218 So.2d 451 (Fla. 4th Dist. 1969).

164. Of course, it did not apply to the interest of the tenant who did not know of the mortgage.

165. *O'Neal v. MacNeill*, 216 So.2d 465 (Fla. 3d Dist. 1968).

166. *Consolidated Utility Services, Inc. v. Indian Lake Properties, Inc.* 217 So.2d 137 (Fla. 2d Dist. 1968).

unmixed blessings. An objective appraisal of life in these predominantly vertical subdivisions becomes increasingly feasible as experiences multiply. Although undoubtedly many controversies concerning such things as occupancy control, regulations of common facilities, and the regularity of association proceedings, never reach the litigation stage; some litigation has already proceeded through the appellate levels. These cases will be discussed, but first, it is noted again that the owners of these units used for residential purposes may now qualify for the homestead taxation exemption on their individual units.¹⁶⁷

In *Fountainview Association, Inc. No. 4 v. Bell*,¹⁶⁸ the condominium associations were formed by the defendant promoters who were their sole officers, directors, and members. The promoters then sold and leased lands to the associations and entered into management contracts at exorbitant prices and fees. Thereafter, the purchasers of the condominium units were let into the associations and the promoters left, retaining, of course, the benefits of those transactions previously entered into with the associations. The associations then brought suit to obtain relief from these contracts, arguing that the promoters had the same fiduciary duties as other corporate officers and directors. The district court agreed that the condominium officers had the duties of corporate officers because the condominium association could have been formed as a corporation for profit. However, the court concluded that there was no breach of this duty,¹⁶⁹ and the supreme court affirmed without an opinion.¹⁷⁰ Justice Ervin, in a long and vigorous dissent, discussed the corporate fiduciary protection afforded stockholders and thought that the same principle should apply to what he regarded as an obvious breach of trust.¹⁷¹

Another condominium scheme was upheld in *Wechsler v. Goldman*.¹⁷² The individual owners of several condominiums leased the recreation area in their apartment building from the developers at exorbitant prices. The court held that the owners *could not cancel the lease and the association could not reform it by stating:*

It is not without some reluctance that we hold the plaintiff condominium associations do not have a cause for relief against the claimed exorbitant lease rental obligation imposed on them while both lessor and lessee were owned or controlled by the

167. See notes 22-24 *supra* and accompanying text.

168. 203 So.2d 657, *aff'd*, 214 So.2d 609 (Fla. 1968).

169. The court merely cited *Lake Mabel Devel. Corp. v. Bird*, 99 Fla. 253, 126 So. 356 (1930), to hold that this scheme did not breach a duty to subsequent stockholders.

170. 214 So.2d 609 (Fla. 1968).

171. *Id.* (dissenting opinion). The justice distinguished the *Lake Mabel* case by arguing that in that case no stock was ever shown to have been sold to the public. *Id.* at 611. The justice is right. In *Lake Mabel*, the corporation tried to avoid the sales by its organizer when the mortgagee sued the corporation. The court said that the rights of innocent stockholders had not arisen when the exorbitant sale was made. It does not discuss what these rights would be if the stock were later sold publicly.

172. 214 So.2d 741 (Fla. 3d Dist. 1968).

promoters. However, we affirm the decree on the authority of *Fountainview* [discussed above] . . . which, on review by the Supreme Court of Florida, recently was held to have been correctly decided What occurred in this instance and in the *Fountainview* case may indicate a need for legislative action¹⁷³

Cooperative apartments also may have their disappointed holders of castles in the sky. In *Hirlinger v. Stelzer*,¹⁷⁴ the developers leased cooperative apartments to the plaintiffs. The sales talk involved reference to a reproduction of the project called the "master plat." This plat showed a recreation area, but apparently none was provided for in the lease. The lease did make reference, however, to "appurtenances" and a "plat." The court held that, assuming the plat, the lessees had a cause of action for an implied easement; but it also indicated that the cooperators may have a problem of proof. The court said that the plat was necessary to support an action for an implied easement, but that the lessees had no cause of action as such which would enable them to compel production of the "master plat." The dilemma is apparent—without the plat there is no cause of action, and without a cause of action, no production of the plat can be compelled. It is somewhat reminiscent of the proverbial problem of the chicken and egg. In all probability, however, the decision simply means that the complaint was inartfully drawn and that there was no justification for a separate "count" seeking the production and maintenance of a master plat.¹⁷⁵

VII. EMINENT DOMAIN

A. Legislation

The provision in the new constitution encompassing the power of eminent domain is article ten, section six. The new provision is a combination of the eminent-domain and drainage provisions of the old constitution.¹⁷⁶ The language is somewhat different, and there is no special provision in the article itself for the right to jury trial as there was in article XVI, section 29 of the repealed constitution. Further, the use of a single constitutional provision eliminates any former ambiguity as to the difference, if any, between "full" and "just" compensation. The new provision uses the term "full compensation."

The Community Redevelopment Act,¹⁷⁷ discussed *infra*, provides

173. *Id.* at 744.

174. 222 So.2d 237 (Fla. 2d Dist. 1969).

175. See 222 So.2d 237 at 238, "On Petition for Rehearing."

176. FLA. CONST. Decl. of Rights § 12, art. 16, §§ 28, 29 (1885). Section 12 of the Declaration of Rights, apparently applying to governmental takings, used the term "just compensation" as did article XVI, section 28. Article XVI, section 29, applying to takings by corporations or individuals with the power of eminent domain, used the term "full compensation."

177. Fla. Laws 1969, ch. 69-305, § 10 at 1078.

for the use of eminent domain to redevelop slum or blighted areas.

The legislature also gave the power of eminent domain to the boards of trustees of junior colleges whenever the State Board of Education finds it necessary.¹⁷⁸

Venue for causes of action with the State Road Department was statutorily laid in Leon County, or the county where the cause of action accrued.¹⁷⁹

B. *Interests That Are Protected*

1. MORTGAGEE'S INTEREST

Florida's lien theory of mortgage means that the mortgagee has no estate in land. The question is, then, does the mortgagee have standing to challenge an eminent-domain award given the mortgagor? The third district in *Washington Federal Savings and Loan Association v. Dade County* held that unless the award is so inadequate as to impair the mortgagee's security interest, he has no standing.¹⁸⁰

2. OPTION TO RENEW LEASE

A lessee who operated a drive-in theatre on his leasehold had an option of renewal for an additional 5-year term at reasonable rates. This option was held to be an interest in land such as to support a compensation award in an eminent-domain proceeding in *State Road Department v. Tampa Bay Theaters*.¹⁸¹ Damages should be awarded thereon only if the lessee would have exercised the option had the condemnation proceedings not been pending.¹⁸²

C. *Business Damages and Other Items of Recovery*

The second district considered two cases dealing with a taking resulting in a total destruction of a business, one of which was reversed by the supreme court. Florida Statutes section 73.071(3)(b) provides for business damages. The compensation takes into account,

Where less than the entire property is sought to be appropriated, any damages to the remainder caused by the taking, including when . . . the effect of the taking of the property involved may damage or destroy an established business of more than five years standing . . . located upon adjoining lands owned or held by such party [the one whose land is being taken], the probable damages to such business . . .¹⁸³

178. Fla. Laws 1969, ch. 69-123, adding FLA. STAT. § 230.0103(f) (1969).

179. Fla. Laws 1969, ch. 69-391.

180. 221 So.2d 790 (Fla. 3d Dist. 1969).

181. 208 So.2d 485 (Fla. 2d Dist. 1968).

182. *Id.* at 487.

183. FLA. STAT. § 73.071(3)(b) (1967).

In *Douglass v. Hillsborough County*,¹⁸⁴ the sublessee appealed a decision refusing to allow him any recovery for business damages when his entire leasehold property was condemned. The second district ruled that the sublessee was not entitled to business damage because the destroyed business was located on the property taken, not adjoining it. *Young v. Hillsborough County*,¹⁸⁵ decided by the second district at the same time as *Douglass*, involved a partial taking where the entire business was destroyed because land taken passed through the front portion of defendant's building. The court reasoned that since the entire business was destroyed and the value of the land taken was enhanced by the operation of the business thereon, there should be no distinction between a partial taking and a total taking when the business was destroyed.¹⁸⁶ Therefore, business damages would not be awarded. The supreme court disagreed, however, and held that the distinction was clearly made in the statute, and the owner of the business was entitled to business damages.¹⁸⁷

This same statutory provision presented another interesting question in *Glessner v. Duval County*.¹⁸⁸ The appellant had a perpetual easement over the land of another which was taken in an eminent-domain proceeding. This easement provided ingress and egress to the appellant's truck manufacturing business and was the only access over which semi-trailer trucks could pass, although the appellant did have other means of ingress and egress. The first district ruled that the appellant could recover business damages to the business on the land adjoining his perpetual easement. This is a liberal interpretation of the statute,¹⁸⁹ much different from the strict construction of the second district.¹⁹⁰ The court also held that the appellant was entitled to severance damages.¹⁹¹

*State Road Department v. Myers*¹⁹² held that a tenant on a month-to-month basis could not recover damages for moving personal property from the portion of the leasehold which was not actually taken in an eminent-domain proceeding. The court emphasized that since the personal property was not on the part of the land being taken, it was not absolutely necessary for the appellants to relocate their business.

184. 206 So.2d 402 (Fla. 2d Dist. 1968). *Accord*, *Glessner v. Duval County*, 203 So.2d 330 (Fla. 1st Dist. 1967).

185. 206 So.2d 405 (Fla. 2d Dist. 1968).

186. *Id.* at 401.

187. 215 So.2d 300 (Fla. 1968).

188. 203 So.2d 330 (Fla. 1st Dist. 1967).

189. Note that the statute provides for damages to the "party whose land is being taken," to a business located upon adjoining lands. FLA. STAT. § 73.077(3)(b) (1967) (emphasis supplied). The statute refers to the owner of lands, not property.

190. *See* notes 173-76 *supra* and accompanying text.

191. *Id.* at 334.

192. 211 So.2d 33 (Fla. 1st Dist. 1968).

D. *Public Use and Necessities of Taking*

In *City of Palm Bay v. General Development Utilities, Inc.*,¹⁹³ the city sought to exercise its eminent domain power in order to acquire the defendant utility's water and sewer system, all of which was located within the city limits. The appellate court rejected the defendant's argument that the eminent-domain statutes¹⁹⁴ did not provide for the taking of an existing utility, but only land upon which to build a utility. The court then proceeded to discuss the primary argument: the doctrine of prior public use prohibits the taking of an existing privately owned utility already dedicated to public use without clear and specific statutory authority. The court stated that although the taking of the property was for the same public use, the larger public use and more general public benefit resulting from the operation of a public utility by a municipality warranted such a taking.¹⁹⁵

Land taken for the expansion of the University of Miami Medical School was the subject of an eminent-domain dispute in *Wright v. Dade County*.¹⁹⁶ The lands taken were planned for the construction of clinical research and teaching facilities, but plans for construction had not been prepared nor was the exact use of the appellant owner's land stated. The court held that the necessity of taking and the amount of land reasonably needed for anticipated expansion were matters for the discretion of county officials. In these circumstances, it was not necessary for the officials to make immediate use of the property, or to have plans and specifications prepared.¹⁹⁷

E. *Inverse Condemnation*

The "taking" of property by the noisy use of the airways through inverse condemnation was established in Florida by the case of *City of Jacksonville v. Schumann*.¹⁹⁸ The more recent case of *Northcutt v. State Road Department*¹⁹⁹ refused to extend inverse condemnation to property damages by noise from the highways. The court stated that there was a substantial difference in the noise, safety, and use of actors of highways vis-a-vis airways. To sustain the cause of action, the court reasoned,

193. 201 So.2d 912 (Fla. 4th Dist. 1967).

194. FLA. STAT. §§ 180.06, .22 (1967).

195. 201 So.2d at 916 citing 29A C.J.S. *Eminent Domain* § 75 (1965).

196. 216 So.2d 494 (Fla. 3d Dist. 1968), *cert. denied*, 225 So.2d 527 (Fla. 1969), *cert. denied*, 396 U.S. 1008 (1969).

197. *Id.* at 496-97.

198. 167 So.2d 95 (Fla. 1st Dist. 1964), *cert. denied*, 172 So.2d 597 (1965), *cert. denied* 390 U.S. 981 (1968). This first appeal was an interlocutory one. The cases were up on appeal again after trial. After a discussion of the trial judge's evaluation of the evidence, the case was affirmed. 199 So.2d 727 (Fla. 1st Dist. 1967).

199. 209 So.2d 710 (Fla. 2d Dist. 1968).

"would bring to an effective halt the construction, operation and maintenance of access roads and highways within the State of Florida."²⁰⁰

*Hillsborough County Aviation Authority v. Benitez*²⁰¹ resolved several issues in a cause of action for an aviatational easement. The plaintiffs lived near the airport and were directly in line with the take-off of the airplanes. Noise from the airplanes had affected them adversely in several ways (interruption of sleep and conversation, nervousness). The court held that the character of the invasion deprived the plaintiffs of enjoyment and use of their property and damage was substantial; therefore, there was a taking.²⁰² There was no prescriptive right to an easement on the part of the airport authority. The period for prescription of an aviatational easement begins to run from the time that there first is a substantial interference with the owner's use and enjoyment of his land.²⁰³

*Kendry v. State Road Department*²⁰⁴ was a rather unusual case on its facts. Plaintiffs were the owners of land over which the defendant road department had taken a perpetual easement by eminent domain. The easement, however, contained a restriction: that the new fill and roadbed would not be any higher than the present highway. The widening of the highway, however, resulted in an elevation and drainage on the plaintiff's land which caused damage and made the property useless for residential purposes. The defendant also filled in bottom land in a stream adjacent to the plaintiff's land. The court held: 1) the additional burden imposed on the servient estate by violation of the easement restriction was a taking; 2) the drainage damage to the land was a taking if the flooding damage was permanent; and 3) the filled-in land in streams adjacent to the plaintiff's land belonged to the plaintiff and the defendant's use of them constituted a taking.²⁰⁵ There was a strong and vigorous dissent arguing that damages from the elevation of a highway were not compensable and this was a technical violation of a restriction in the easement which is not a taking.²⁰⁶

F. Procedure

The State Road Department appealed a judgment awarding damages by the eminent-domain taking of a leasehold *only* as to the award to one tenant, paying the cotenant and fee owner. The case, *State Road Department v. Hartsfield*,²⁰⁷ held that since the appellant accepted the benefits of the judgment (by two of the parties), he could not appeal

200. *Id.* at 711.

201. 200 So.2d 194 (Fla. 2d Dist. 1967).

202. *Id.* at 199.

203. *Id.* at 200.

204. 213 So.2d 23 (Fla. 4th Dist. 1968), *cert. denied*, 222 So.2d 752 (Fla. 1969).

205. *Id.* at 26-28.

206. *Id.* at 28 (Cross, J. dissenting).

207. 216 So.2d 61 (Fla. 1st Dist. 1968).

it. The court pointed out that in the eminent-domain action the jury renders a verdict fixing a compensation to be paid for the entire parcel,²⁰⁸ and the judge determines the rights of the parties involved in the apportionment of the award.²⁰⁹ Therefore, although the judgment looks separate and divisible, it really is not. Retrial as to one party would require retrial as to all.

G. Miscellaneous

In *Di Virgilio v. State Road Department*,²¹⁰ the defendant owner's land lay on both sides of an already existing highway. The property was condemned as one parcel, and the defendant did not object to such treatment until the motion for new trial was made. The appellate court held that the defendant could not now complain of single-parcel treatment of his land. Contiguity of parcels is not the only test for one parcel. Three facts are important: unity of ownership, unity of use, and physical contiguity. If lands are only nominally divided, they will be treated as a single unit.²¹¹

VIII. ZONING AND URBAN RENEWAL

A. Legislation

Two major legislative enactments, one aimed at correction of existing problems in land usage, the Community Redevelopment Act,²¹² the other aimed at enabling the municipalities to more carefully plan their future development,²¹³ were passed by the 1969 legislature.

The act providing for the future development of municipalities is a far more comprehensive piece of enabling legislation for zoning purposes than chapter 176 of the Florida Statutes. The act is supplementary to already existing zoning provisions. It establishes a commission for development which is to adopt a comprehensive plan, after a public hearing, effective upon adoption by the governing body.²¹⁴ At least once a year, the plan is to be reviewed by the planning commission to determine if any changes or additions are necessary.²¹⁵ The plans must be for the purpose of "guiding and accomplishing coordinated, adjusted and harmonious development in accordance with existing and future needs, and in order to protect, promote and improve public health, safety, comfort, order, appearance, convenience, morals, and general welfare."²¹⁶ Detailed

208. FLA. STAT. § 73.081 (1967).

209. FLA. STAT. § 73.101 (1967).

210. 205 So.2d 317 (Fla. 4th Dist. 1967), *cert. discharged*, 211 So.2d 556 (Fla. 1968).

211. *Id.*

212. Fla. Laws 1969, ch. 69-305.

213. Fla. Laws 1969, ch. 69-139.

214. *Id.* at §§ 5-7.

215. *Id.* at § 9.

216. *Id.* at § 10.

provisions may be made for such items as height, stones, bulk, location, erection, repair, and density of population.²¹⁷ Proposed changes in the regulation may be suggested by the commission, governing body,²¹⁸ or 51 percent or more of the area involved in the change. The board of adjustment shall be created by the governing body,²¹⁹ to handle appeals, to decide such exceptions as authorized under the zoning ordinance, and to grant variances.²²⁰ Persons aggrieved after the decision of the board of adjustment may then apply to the circuit court for trial de novo or review by certiorari.²²¹ A violation of the act or a zoning ordinance is a misdemeanor.²²² The municipalities are authorized to regulate the subdivision of lands²²³ and in areas where a commission is established, the governing body may designate the commission as an accredited representative for approving subdivisions, plans, and plats under chapter 177 of the Florida Statutes.²²⁴ The general act may be summed up as a piece of homerule enabling legislation.²²⁵

The Community Redevelopment Act was passed for the purposes of clearing slums and blighted areas, renewal that may be urban, suburban, or rural. Under the power of eminent domain, discussed *supra*, the agency may acquire slums or any blighted portion thereof, real property to be repaired or rehabilitated, or any property to eliminate unsanitary conditions.

It is hoped that the spirit of these two acts, to provide and preserve clean, aesthetic, healthful, and sanitary communities for Florida living,²²⁶ will be carried out to preserve Florida from the afflictions of northern communities.

Chapter 69-119 of the Florida Laws of 1969 provides for minimum standards of notice for zoning changes. It must be mailed to the owner's current address no later than 10 days before the hearing.

B. *Scope of The Power*

1. THE FAIRLY DEBATABLE RULE

The very debatable "fairly debatable rule" was more than viable this biennium,²²⁷ it was alive and kicking.²²⁸ The efficacy of the rule in

217. *Id.*

218. *Id.* at § 12.

219. *Id.* at § 13.

220. *Id.* at § 14.

221. *Id.* at § 19.

222. *Id.* at § 20.

223. *Id.* at § 21.

224. *Id.* at § 22.

225. Fla. Laws 1969, ch. 69-305.

226. Fla. Laws 1969, ch. 69-305 § 9.

227. See Boyer, *Real Property Law*, 22 MIAMI L. REV. 278, 313 (1967) (Florida survey).

228. The following cases applied the fairly debatable rule: *City of St. Petersburg v. Aikin*, 217 So.2d 315 (Fla. 1968); *Metropolitan Dade County v. Greenlee*, 224 So.2d 781 (Fla. 3d Dist. 1969); *Watson v. Mayflower Property, Inc.*, 223 So.2d 368 (Fla. 4th Dist.

upholding zoning ordinances was strengthened by the supreme court decision of *City of St. Petersburg v. Aiken*.²²⁹

In the two previous surveys of real property law, it was pointed out that the effect of the case of *Burritt v. Harris*²³⁰ was probably exaggerated by the second district decision of *Lawley v. Town of Golfview*²³¹ which read *Burritt* as casting the burden on the zoning authorities of establishing that an ordinance bears substantially on the public health, morals, safety, or welfare of the community.²³² This conclusion was borne out by the supreme court case of *City of St. Petersburg v. Aiken*,²³³ which resolved the question. The court held that the burden of proof was on the person attacking the ordinance. "[T]he fairly debatable doctrine is now restored. . . ."²³⁴

Two cases dealing with the requirement that gasoline stations be separated by certain minimum distances came to opposite results under the fairly debatable rule, perhaps due to the fact that both decisions upheld the decision of the chancellor. In *City of Boca Raton v. Tradewind Hills, Inc.*,²³⁵ the court upheld the spacing ordinance. *City of Miami v. Wyson*²³⁶ held that the ordinance was invalid. The plaintiff supported the burden of proof of the ordinance's invalidity because the defendant city introduced no testimony as to what distance was a safe one while the plaintiff showed that there was no reasonable necessity for the distance insofar as their property was concerned.²³⁷

2. IS IT ARBITRARY AND CONFISCATORY?

A zoning regulation for business edifices (which had the effect of preventing the erection of a Farm Store which was below the minimum height) was held invalid in *City of North Miami v. Newsome*.²³⁸ "Zoning

1969); *County of Brevard v. Woodham*, 223 So.2d 344 (Fla. 4th Dist. 1969); *Town of N. Redington Beach v. Williams*, 220 So.2d 22 (Fla. 2d Dist. 1969); *City of Miami v. Wyson*, 217 So.2d 603 (Fla. 3d Dist. 1969) (gas station distance requirement not fairly debatable since no evidence was presented on this point); *City of Boca Raton v. Tradewind Hills, Inc.*, 216 So.2d 460 (Fla. 4th Dist. 1968); *McCormick v. City of Pensacola*, 216 So.2d 785 (Fla. 1st Dist. 1968); *Donach v. City of Miami*, 214 So.2d 503 (Fla. 3d Dist. 1968); *Smith v. City of Miami Beach*, 213 So.2d 281 (Fla. 3d Dist. 1968); *Pepper v. Dade County*, 209 So.2d 684 (Fla. 3d Dist. 1968); *Metropolitan Dade County v. Kanter*, 200 So.2d 624 (Fla. 3d Dist. 1967).

229. 217 So.2d 315 (Fla. 1968), *rev'g*, 208 So.2d 268 (Fla. 2d Dist. 1968).

230. 172 So.2d 820 (Fla. 1965).

231. 174 So.2d 767 (Fla. 2d Dist. 1965).

232. Boyer, *Real Property Law*, 22 U. MIAMI L. REV. 278, 313 (1967) (Florida survey); Boyer, *Real Property Law*, 20 U. MIAMI L. REV. 313, 339-41 (1965) (Florida survey).

233. 217 So.2d 315 (Fla. 1968), *rev'g*, 208 So.2d 268 (Fla. 2d Dist. 1968).

234. *McCormick v. City of Pensacola*, 216 So.2d 785, 789 (Fla. 1st Dist. 1968) (commenting on the *St. Petersburg* case). See this case for a development of the circuitous path which this doctrine took during the last 4 years.

235. 216 So.2d 460 (Fla. 4th Dist. 1968).

236. 217 So.2d 603 (Fla. 3d Dist. 1969).

237. *Id.* at 605. *Tradewind Hills* indicated a conflict of testimony on the need for the ordinance. 216 So.2d at 461.

238. 203 So.2d 634 (Fla. 3d Dist. 1967).

requirements specifying a minimum height for business buildings have uniformly been held invalid, as arbitrary, unreasonable and having no relation to public health safety and welfare."²³⁹

Ordinances requiring the screening of junk yards are valid according to the court in *Rotenberg v. City of Fort Pierce*.²⁴⁰ The court reaffirmed the principle that the regulation of occupations injurious to the "public health, morals, comfort, prosperity or convenience or otherwise detrimental to the general welfare" is a proper exercise of the power, and aesthetics is a valid basis for regulation.²⁴¹

3. EFFECT OF A CHANGE IN CIRCUMSTANCES

In *Smith v. City of Miami Beach*,²⁴² the trial judge refused to relax a zoning ordinance with the exception of one piece of property. The owner of this property had alleged a change in circumstances because a parking lot had been erected across the street and immediately south of his property. The appellate court pointed out that if a change to multiple family zoning were allowed as to this one piece of property, it would have a domino effect, toppling the residential district. The court reversed the relief as to the one plaintiff, denying a change in zoning to all plaintiffs.

A zoning ordinance, zoning a residential area, was struck down as unreasonable due to a change in circumstances in *Kugel v. City of Miami Beach*.²⁴³ The City of Miami Beach Convention Hall had been built across the street from the plaintiff's property and the street had become a major thoroughfare.

C. Enabling Acts

The City of Palm Beach and the zoning commission brought an action against a trailer park for failure to comply with the county's building, plumbing, and electrical code. Defendant attacked the codes as not being authorized by the enabling legislation. The special act²⁴⁴ gave Palm Beach the authority to zone lands in the unincorporated areas of the county and to adopt building, plumbing, and electrical codes. The appellant argued that no guidelines for the codes were prescribed and the provision for codes was a mere afterthought. The supreme court held in that case, *Demko's Gold Coast Trailer Park v. Palm Beach County*,²⁴⁵ that the enabling act authorized the codes. The land-use

239. *Id.* at 636.

240. 202 So.2d 782 (Fla. 4th Dist. 1967).

241. *Id.* at 785.

242. 213 So.2d 281 (Fla. 3d Dist. 1968).

243. 206 So.2d 282 (Fla. 3d Dist. 1968), *cert. denied*, 212 So.2d 877 (Fla. 1968), *cert. denied*, 393 U.S. 1021 (1969), *followed by* *Manilow v. City of Miami Beach*, 213 So.2d 589 (Fla. 3d Dist. 1968), *aff'd*, 226 So.2d 805 (Fla. 1969) (similar facts).

244. Fla. Laws 1957, ch 57-1691.

245. 218 So.2d 745 (Fla. 1969).

zoning authority was related sufficiently to building construction to warrant inclusion in the same act.

D. Procedure

1. MANDAMUS

A person filing suit for mandamus to compel the issuance of a zoning permit is governed by the law (ordinances) in effect at the time that the suit is filed, not at the time that the application is filed.²⁴⁶ The same case held that when suit was filed 10 days after the hearing, not giving the commission sufficient time to consider its decision before being compelled by judicial fiat to act, there was a failure to exhaust administrative remedies.²⁴⁷

It is error for a trial judge to direct rezoning in a certain fashion.²⁴⁸ A trial judge who invalidates a zoning classification as too restrictive should order a less restrictive classification, not reclassify the property.²⁴⁹

2. INJUNCTIVE RELIEF

In the case of *Ryals v. Rich*,²⁵⁰ the fourth district invalidated the Orange County zoning provision, amended by chapter 63-1716 of Florida Session Laws of 1963, as unconstitutional. The provision said that upon violation "the court shall . . . have the duty to forthwith issue such temporary and permanent injunctions as are necessary to prevent violation" ²⁵¹ The court held that the provision was an unconstitutional usurpation of judicial power. The supreme court reversed, construing "shall" to mean "may" in the interest of preserving the constitutionality of the statute.²⁵²

In *Pinellas County v. Hooker*,²⁵³ the Second District Court of Appeal held that the county could sue in equity for an injunction restraining the violation of a zoning ordinance without proving a public nuisance. The court rejected the defendant's argument that the county should be restricted solely to the criminal actions. (Violations were declared a misdemeanor in the enabling legislation.²⁵⁴)

The special enabling legislation of Orange County provides for an injunction against "any person" violating zoning ordinances (typical of enabling legislation), thus providing an action in personam. Therefore,

246. *City of Coral Gables v. Sakolsky*, 215 So.2d 329 (Fla. 3d Dist. 1968).

247. *Id.* at 334.

248. *City of Miami Beach v. Weiss*, 217 So.2d 836 (Fla. 1969), followed by *City of So. Miami v. Martin Bros., Inc.*, 222 So.2d 775 (Fla. 3d Dist. 1969).

249. *Prestige Homes of Tampa, Inc. v. County of Hillsborough*, 220 So.2d 427 (Fla. 2d Dist. 1969).

250. 202 So.2d 779. (Fla. 4th Dist. 1967).

251. Fla. Laws 1963, ch. 63-1716, § 19.

252. *Rich v. Ryals*, 212 So.2d 641 (Fla. 1968).

253. 200 So.2d 560 (Fla. 2d Dist. 1967).

254. Fla. Laws 1965, ch 65-2102 § 3.

the court in *Cooper v. Gibson*²⁵⁵ held that injunctive relief could not be granted on constructive services of process.

3. CERTIORARI

A variance was granted by the Zoning Board of Appeals of West Palm Beach County. Petitioners opposed the variance and filed a writ of certiorari to the circuit court. The zoning board, but not the city, was named as respondent in the petition. Service of process was made on the chairman of the zoning board. The Fourth District Court of Appeal held that the city was not required to be named as a respondent and had no standing to file a motion to dismiss. The court also held that service of process on the chairman of the zoning board was sufficient.²⁵⁶ Justice Cross dissented, arguing that in view of the nature and scope of zoning, a police power which can be delegated by the municipality to the zoning board for administration, the city was a necessary and proper party.²⁵⁷

IX. VENDOR AND PURCHASER

A. *Fraud and Misrepresentation—Acquiescence*

The vendee who has been defrauded should assert his rights without delay, otherwise he waives his right to rescind. Thus, where the purchaser became aware of the vendor's fraudulent representations as to the sale of orange groves but thereafter demanded the deed and executed a note and mortgage for an additional tract of ground, the purchasers acquiesced in the fraud and could not assert it as a defense.²⁵⁸

B. *Marketable Record Title Act*

*Marshall v. Hollywood, Inc.*²⁵⁹ held that the Marketable Title Act operated to give good title to one whose root of title had been derived from a void deed. The court made it clear that the exemption from the Marketable Title Act of "Estates or interests, easements and use restrictions disclosed by and defects inherent in the muniments of title on which such estate is based beginning with the root of title. . . ."²⁶⁰ [applied only to links subsequent to and including the root of title itself.]²⁶¹ The title in

255. 208 So.2d 117 (Fla. 4th Dist. 1968).

256. *Weber v. Zoning Board of Appeals*, 206 So.2d 258 (Fla. 4th Dist. 1968).

257. *Id.* at 262 (dissenting opinion).

258. *Tonkovich v. South Florida Citrus Industries, Inc.*, 202 So.2d 579 (Fla. 2d Dist. 1967). The case had previously been decided on the issue of whether there was fraud in 185 So.2d 710 (Fla. 2d Dist. 1966) and certiorari was granted by the supreme court, which remanded the cause for a consideration of waiver, 196 So.2d 438 (Fla. 1967). See *Boyer, Real Property Law*, 22 *MIAMI L. REV.* 278, 282 (1967) (Florida survey).

259. 224 So.2d 743 (Fla. 4th Dist. 1969). The decision was to be certified to the Supreme Court of Florida as a matter of great public interest.

260. *FLA. STAT.* § 712.03(1) (1967) as quoted in 224 So.2d at 751 (emphasis supplied).

261. 224 So.2d at 751. The court accepted the statement to that effect by Professor Barnett that Florida and Indiana made this point clear. See Barnett, *Marketable Title Acts—Panacea or Pandemonium*, 53 *CORNELL L.Q.* 45, 67 (1967).

this case was derived from a fraudulent conveyance in 1924 by one purporting to be the president of the grantor corporation, after the testator (actual president of the corporation and majority stockholder) had died. The testator's administrator did not discover the fraud until 1966 when he brought suit. The plaintiff may have had the equities on his side, but not the law. The court dismissed the argument that the Marketable Title Act applied only to actually vested interests, not to apparently vested interests.²⁶² The language of the statutes' exceptions, unlike statutes in other states, was a clear indication that it did not apply to defects prior to the root of title.²⁶³

The first district applied the Marketable Title Act in a similar fashion in *Whaley v. Wotring*.²⁶⁴ Unlike the statute of limitations which does not protect the rights of those claiming under a void deed, the Marketable Title Act bars any claims after 30 years from the root of title against those claiming under the root, irrespective of what the prior transactions were.²⁶⁵

In the *Whaley* case, although one claimant may have had a better paper title than the other claimant in possession, he was barred from asserting the claim because the possessor had a record title whose chain traced back over 30 years.

In 1961 and 1962, Whaley obtained quitclaim deeds to the property in question from the heirs of the record holder of title under a 1908 deed. The 1908 deed referred to a previous deed giving Whaley a chain of title from 1863 to date. Wotring was claiming title on the basis of quitclaim deeds from the heirs of one who received an 1897 government patent, based on a certificate issued in 1851. Wotring filed the quitclaim deeds of the patentee's heirs in 1966. The jury found that Wotring held the better paper title. The appellate court, however, held for Whaley, saying that the 1908 deed had been of record for more than 30 years and the patentee's heirs had until July 1, 1965 to file a notice which would have protected their claim for another 30 years. In the absence of that notice, the filing of the quitclaim deeds by Wotring in 1966 came too late to assert the interest of the patentee's heirs. Thus, in this case, the older competing chain of title prevailed when the most recent instrument of the junior chain was recorded more than 30 years after the previous link in that chain while the senior chain had links filed in 1961 and 1962.

Wilson v. Kelly,²⁶⁶ held that a quitclaim deed (in this case of an undivided one-half interest) could not be a root of title since it did not purport to convey any particular estate. The court in dictum construed the act liberally, gave it full effect, and asserted that a wild deed could be a root of title.

262. The argument, of course, would render the act a nullity in some respects.

263. See note 261 *supra*.

264. 225 So.2d 177 (Fla. 1st Dist. 1969).

265. *Id.* at 181-82.

266. 226 So.2d 123 (Fla. 2d Dist. 1969).

C. *Specific Performance*

The fact that the terms of a contract to transfer an interest in real property are complex will not preclude specific performance.²⁶⁷ The provisions of the contract, however,

as to the time for performance, the method of making and securing deferred payments and the nature and extent of subordination thereof when provided for, as well as the obligations of the parties with respect to conditions of the contract and actions to be taken by the parties should be clear, definite and certain. . . .²⁶⁸

Thus, in *Lasseter v. Dauer*,²⁶⁹ the court denied specific performance when there was a contradiction as to the time of closing; there was no direct, but only an indirect reference to a mortgage by stating it would be subordinated to additional financing without more clarification; and there was no provision as to who had to obtain the requisite zoning change.

D. *Merger of Contract Into Deed: Exception*

The seller and the buyer entered into a deposit-receipt agreement whereby the consideration for the agreement was to be two mortgages and the remainder of the purchase price of the property in shares of stock. After the closing, the buyer refused to deliver the stock and the seller sued on the deposit-receipt agreement.

The issue before the appellate court was whether the deposit-receipt agreement was merged into the deed. The court held no; merger does not apply to those provisions of the antecedent contract which the parties did not intend to be incorporated into the deed or which are not necessarily performed and satisfied by the execution and delivery of the stipulated conveyance. Contractual provisions as to considerations to be paid by the purchaser are ordinarily not merged into the deed.²⁷⁰

267. *Sorrell v. Stacy*, 225 So.2d 922 (Fla. 1st Dist. 1969).

268. *Lasseter v. Dauer*, 211 So.2d 584, 585 (Fla. 3d Dist. 1968).

269. *Id.*

270. *Milu, Inc. v. Duke*, 204 So.2d 31 (Fla. 3d Dist. 1967).