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Contracts for the Sale of Land: Subscribing Witnesses?

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COMMENTARIES

CONTRACTS FOR THE SALE OF LAND: SUBSCRIBING WITNESSES?

What the electorate chose not to prescribe, however, the bench has supplied — by a process as clever as it was gradual, and at least as dubious as devious.[1]

The Statute of Frauds requires that contracts for the sale of land be in writing and signed by the party to be charged.[2] When dealing with certain *written* contracts for the sale of land Florida courts have imposed the additional necessity of subscribing witnesses even though the Statute of Frauds contains no such requirement.

In determining whether subscribing witnesses are required, Florida courts have historically looked to the vendor's status or use of his property at the time he contracts to sell. Contracts involving the conveyance of homestead,[3] married women's separate property,[4] and the relinquishment of dower[5] are required to be executed in the presence of two subscribing witnesses. No subscribing witnesses, however, are required when a single man contracts to convey property.[6] The primary consequence attached to the absence of subscribing witnesses is a denial of specific performance.[7] While denying specific performance, Florida courts have generally held that the unwitnessed contract will support an action for damages following breach.[8] Recently, however, the Fourth District Court of Appeal concluded that an action for damages will not lie because such contracts are void *ab initio*.[9]

The enactment of the 1968 Florida constitution has raised serious doubts about the continuing validity of witness requirements as applied to married women's separate property and homestead. An authorative source on Florida

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1. Crosby & Miller, *Our Legal Chameleon, The Florida Homestead Exemption*, 2 U. FLA. L. REV. 12, 68 (1949).

2. FLA. STAT. §725.01 (1969). There are, however, exceptions to the statute's requirements.

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

4. Petersen v. Brotman, 100 So. 2d 821 (2d D.C.A. Fla. 1958).

5. Kyle v. Kyle, 128 So. 2d 427 (2d D.C.A. Fla. 1961).

6. Lente v. Clark, 22 Fla. 515, 519, 1 So. 149, 151 (1886) where the court stated the statute requiring that conveyances of land be executed in the presence of two subscribing witnesses was not applicable to contracts.

7. *E.g.*, Zimmerman v. Diedrich, 97 So. 2d 120 (Fla. 1957); Edgar v. Bacon, 97 Fla. 679, 122 So. 107 (1929); Wheeler v. Sullivan, 90 Fla. 711, 106 So. 876 (1925); Vance v. Jacksonville Realty & Mortgage Co., 69 Fla. 33, 67 So. 636 (1915); Shields v. Ensign, 68 Fla. 552, 67 So. 140 (1914); Kyle v. Kyle, 128 So. 2d 427 (2d D.C.A. Fla. 1961); Petersen v. Brotman, 100 So. 2d 821 (2d D.C.A. Fla. 1958).

8. Edgar v. Bacon, 97 Fla. 679, 122 So. 107 (1929); Wheeler v. Sullivan, 90 Fla. 711, 106 So. 876 (1925); Vance v. Jacksonville Realty & Mortgage Co., 69 Fla. 33, 67 So. 636 (1915); Shields v. Ensign, 68 Fla. 552, 67 So. 140 (1914).

9. Radabaugh v. Ware, 241 So. 2d 738 (4th D.C.A. Fla. 1970); *accord,* Kroner v. Esteves, 245 So. 2d 141 (3d D.C.A. Fla. 1971); Wexler v. Griffith, 107 So. 2d 147 (2d D.C.A. Fla. 1958). *Contra,* Jones v. Dobkin, 15 Fla. Supp. 70 (Cir. Ct. Rec. Dade County 1959). *But see* Sedwick v. Shaw, 188 So. 2d 29 (2d D.C.A. Fla. 1966).

real estate transactions has suggested that the new constitution confused the law concerning witness requirements,[10] and that certain decisions prior to the 1968 constitution need not be followed in order to insure that a valid, specifically enforceable contract exists.[11] This commentary will examine the evolution of subscribing witness requirements, the rationales supporting them, and their validity in light of public policy considerations.

Rules requiring that certain realty contracts be executed in the presence of two subscribing witnesses apparently developed through oversight and misinterpretation. This development when coupled with prohibitions in the new constitution suggests that these rules might be abandoned. In addition, the propriety of such requirements is doubtful since Florida is apparently the only state that requires subscribing witnesses for contracts involving the sale of land.

Specific Performance

Development of the Florida Rule

Between 1892 and 1947 executional requirements enabling specific performance of contracts conveying married women's separate property and relinquishing inchoate dower[12] were controlled by statutory provision requiring that in order to be specifically enforceable such contracts must be executed and acknowledged in the form prescribed for the conveyance of married women's realty and the relinquishment of dower.[13] In effect, two subscribing witnesses were required for either type of contract.[14] Other requirements, such as the necessity of the husband's joinder and the wife's separate acknowledgment, were incorporated by reference through the statutory phrase "in the form prescribed for conveyances of her real property and for relinquishment of dower."[15] Cumulatively, these requirements

10. Lawyers' Title Guaranty Fund, 3 Fund Notes, Feb. 1971, at 5.

11. *Id.* Lawyers' Title Guaranty Fund suggests that since the 1968 Florida constitution eliminated art. XI, §1, pertaining to married women's separate property, contracts involving such property need not be executed in the presence of two subscribing witnesses.

12. For a historical discussion of the executional requirements necessary to obtain specific performance of a contract to convey married women's separate property or relinquish inchoate dower see Frederick & Logan, *Specific Performance Against Married Women*, 16 U. Fla. L. Rev. 383 (1963).

13. Fla. Stat. §708.07 (1941) provided: "Coverture shall not prevent a decree against husband and wife to specifically perform their written agreement to sell or convey the separate property of the wife, or to relinquish her right of dower in the property of the husband, but no agreement for the sale or conveyance of her real property or for the relinquishment of dower, shall be specifically enforced unless it be executed in the form prescribed for conveyances of her real property and for relinquishment of dower."

14. By requiring that the contract be "executed in the form prescribed for conveyances of her real property," §708.07 incorporated §689.01 by reference. Fla. Stat. §689.01 (1969) provides that the form of a conveyance shall be an "instrument in writing signed in the presence of two subscribing witnesses."

15. Fla. Stat. 708.07 (1941). Relinquishment of dower was controlled by Fla. Laws 1877, ch. 3011, §1, *codified as* Fla. Stat. §§693.02 .03 (1941), *repealed by* Fla. Laws 1970,

greatly impeded actions for specific performance of a married woman's contract.

In 1947, section 708.07 was amended to allow a decree of specific performance, against either husband or wife, on a contract to convey the wife's separate property or to relinquish dower regardless of whether the contract was acknowledged.[16] Significantly, the prior requirement that the contract be "executed and acknowledged in the form prescribed for conveyances of her real property and for relinquishment of dower" does not appear in the statute's amended version.[17] Since the original authority for the witness requirement came from these precise words, this deletion implied that two witnesses were no longer required to obtain specific performance of a married woman's contract.[18]

The Florida supreme court, however, ignored the obvious implications of the 1947 amendment. *Abercrombie v. Eidschun*,[19] the first Florida supreme court decision to consider the effect of section 708.07, as amended, dealt with a bill for specific performance against vendors, husband and wife, of a contract conveying homestead property. Although there had been no prior judicial determination of whether a contract to convey homestead property required the presence of two subscribing witnesses, the vendors defended on the basis that the contract was not executed with this formality. Relying solely on *Scott v. Hotel Martinique*[20] the court ruled that the amendment

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ch. 70-4, §4. Section 693.02 indicated that a married woman could relinquish her dower rights either by joining in the conveyance with the husband or by separate instrument executed in the same manner as other conveyances. Thus, §693.02 merely reiterated the requirement in §708.07 that the contract be executed in the same manner as her conveyances. Until its amendment in 1943, §693.03 required the wife to separately acknowledge an instrument wherein she relinquished dower rights. Conveyances of married women's property were controlled by FLA. STAT. §689.01 (1969) and Fla. Laws 1927, ch. 12255, §1, *codified as* Fla. Stat. §708.04 (1941), *repealed by* Fla. Laws 1970, ch. 70-4, §4. Section 689.01 provides that the form of the conveyance shall be an "instrument in writing signed in the presence of two subscribing witnesses . . . ." Section 708.04 required that the husband and wife join in all conveyances by the wife.

16. Fla. Stat. §708.07 (1941), *as amended by* Fla. Laws 1947, ch. 23820, §1, which provided: "Coverture shall not prevent a decree against husband and wife or either of them to specifically perform their written agreement to sell or convey the separate property of the wife, regardless of whether the same shall be acknowledged or not." Curiously, the amendment removing the requirement that the contract be acknowledged added nothing to existing law since a 1943 amendment to §693.03 had previously removed this requirement. Because §693.03 was incorporated by reference into 708.07 (*see* note 15 *supra* and accompanying text) it follows that any amendment to the prior section would impliedly be reflected in §708.07.

17. Fla. Stat. §708.07 (1941), *as amended by* Fla. Laws 1947, ch. 23820, §1.

18. *E.g.*, Berlin v. Jacobs, 24 So. 2d 717 (Fla. 1945), held that a married woman's contract to convey land must be executed and acknowledged in accordance with §708.07. "Except for this statute [§708.07] it is quite evident that in equity and good conscience, Mrs. Gertrude Berlin should be required to perform the contract." *Id.* at 718.

19. 66 So. 2d 875 (Fla. 1953). Section 708.07, as amended, had been discussed but not in regard to witness requirements. *See* Scott v. Hotel Martinique, 48 So. 2d 160, 161 (Fla. 1950); Dixon v. Clayton, 44 So. 2d 76, 78 (Fla. 1949).

20. 48 So. 2d 160 (Fla. 1950).

to section 708.07 "did not dispense with the requirement of two subscribing witnesses but only with the formal requirement of acknowledgment."[21]

Scott was an action for specific performance brought on a contract conveying homestead property owned by a husband and wife as an estate by the entirety.[22] Although the contract had been executed in the presence of two subscribing witnesses, it had not been acknowledged. Based on its interpretation of section 708.07 and sections 1 and 4 of article X of the 1885 Florida constitution, the court held that the contract need not be acknowledged to be specifically enforced.[23] In restating the facts of the case, however, the court noted:[24]

> [A] contract for the sale of homestead property may be specifically enforced if the contract has been jointly executed by the husband and wife *in the presence of two subscribing witnesses,* even though such contract was not acknowledged by the wife.

Thus, although *Scott* did not hold that witneseses were required to specifically enforce a contract for the sale of homestead, the *Abercrombie* court apparently accepted the dictum of *Scott* as controlling.[25]

Although contrary to the legislative history of section 708.07,[26] the holding in *Abercrombie* respresents a landmark decision because subsequent cases have accepted *Abercrombie's* unqualified pronouncements that the statute's amendment did not eliminate the witness requirement for a married woman's separate property contract[27] and that the witness requirement ex-

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21. Abercrombie v. Eidschun, 66 So. 2d 875, 876 (Fla. 1953).

22. Scott v. Hotel Martinique, 48 So. 2d 160 (Fla. 1950).

23. *Id.* at 161. In determining whether the contract must be acknowledged, the supreme court considered the property as being both a homestead and that of a married woman. The dual analysis was apparently prompted by the fact that the real estate was owned by the entirety and thus could be considered as property owned by a married woman. *See generally* Starling, *The Tenancy by the Entirety in Florida,* 14 U. FLA. L. REV. 111 (1961). The court, in examining the contract as one involving homestead, concluded that the only limitation placed on the alienation of homestead by the 1885 Florida constitution was that the *deed* must be "duly executed" by both husband and wife. In examining the contract as one involving property owned by a married woman the court considered §§693.03 and 708.07 and concluded that no acknowledgment was required on such a contract after the statutes had been amended.

24. Scott v. Hotel Martinique, 48 So. 2d 160, 161 (Fla. 1950) (emphasis added).

25. The soundness of the *Abercrombie* decision is also questionable on grounds that §708.07, both before and after amendment, has never been directly applicable to contracts for the sale of homestead property. Rather, it was applicable only to contracts for the sale of married women's separate property and the relinquishment of dower. Before amendment, the statute only affected contracts to convey homesteads owned by the entireties. Since the wife owned an interest, such interest could be viewed as her separate property.

26. *See* text accompanying notes 16-18 *supra.*

27. In Petersen v. Brotman, 100 So. 2d 821 (2d D.C.A. Fla. 1958), the Second District Court of Appeal relied on *Abercrombie* to deny specific performance. The court found that a contract to convey a tenancy by the entirety was in essence a contract involving the conveyance of a married woman's separate property; the rule set forth in *Abercrombie* was therefore deemed applicable.

tended to homestead property.[28]

In *Zimmerman v. Diedrich*[29] the Florida supreme court was again faced with the issue of whether a contract for the sale of homestead property must be executed in the presence of two subscribing witnesses. The court attempted to reconcile its prior decisions by tracing the history of witness requirements.[30] Relying primarily on *Scott* the court restated that holding: "[A] contract for the sale of homestead property could be specifically enforced if executed by the husband and wife in the presence of two witnesses."[31] The court noted that *Scott* was based on sections 1 and 4 of article X of the 1885 Florida constitution, which required that a deed or mortgage[32] of homestead be "duly executed" by both husband and wife.[33] The *Zimmerman* court reasoned that prior decisions had interpreted "due execution" as meaning "signed in the presence of two subscribing witnesses," and that a contract for the sale of homestead should be executed with as much formality as a deed.[34] In eliminating any distinction between the witness requirements for a deed and a contract for the sale of homestead, the court stated:[35]

> We apprehend that the writers of opinions had in mind that if the execution of contracts to sell homesteads were not so formalized, the transfer of homestead property, sacrosanct as it is, could be eventually effected by decree of specific performance, although the contract forming the basis of such a transfer would have small resemblance to the formality with which it was intended that conveyances of homestead[s] should be accomplished.

The efficacy of the court's statement rests on the functional justification for witness requirements. If the purpose of such requirements is to establish only the validity of parties' signatures, there is little need for subscribing witnesses on a contract since its validity can be established when an action for specific performance is brought. If the objective of witness requirements is to prevent fraud and undue influence at execution, then there may be some

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

29. *Id.*

30. The court began its historical analysis by discussing early decisions dealing with contracts composed of letters and telegrams. Notwithstanding the fact that these cases dealt with unwitnessed contracts the courts refused to follow their holdings because the witness question had not been litigated. *Id.* at 123.

31. *Id.* at 122.

32. For a discussion of the executional requirements of mortgages *see, e.g.*, Perry v. Beckman, 97 So. 2d 860 (Fla. 1957); Oates v. New York Life Ins. Co., 144 Fla. 744, 198 So. 681 (1940), *cert. denied*, 314 U.S. 614 (1941); Heath v. First Nat'l Bank, 213 So. 2d 883 (1st D.C.A. Fla. 1969); Lieberman v. Barley, 100 So. 2d 88 (2d D.C.A. Fla. 1958).

33. Zimmerman v. Diedrich, 97 So. 2d 120, 123 (Fla. 1957).

34. *Id.* at 123-24. The *Zimmerman* reasoning is similar to that used by Florida courts in other analogous situations. *E.g.*, Jackson v. Jackson, 90 Fla. 563, 107 So. 255 (1925); Norton v. Baya, 88 Fla. 1, 102 So. 361 (1924); Hill v. First Nat'l Bank, 79 Fla. 391, 84 So. 190 (1920); Palmer v. Palmer, 47 Fla. 200, 35 So. 983 (1904).

35. Zimmerman v. Diedrich, 97 So. 2d 120, 123-24 (Fla. 1957).

justification for requiring that contracts, like deeds, be executed in the presence of two subscribing witnesses since the presence of these elements may not be readily shown without such testimony.

Zimmerman also dismissed any idea that the witness requirements of section 689.01, concerning the executional requirements of a deed, were applicable to all land-sale contracts.[36] Such a ruling would have been inconsistent with prior holdings that a contract for the sale of land could be formed by correspondence.[37] Memoranda sufficient to constitute such a contract are seldom witnessed; however, Florida courts recognize the validity of correspondence agreements.[38] Thus, *Zimmerman* today stands for the proposition that contracts for the sale of homestead and married women's separate property or relinquishment of dower must be executed in the presence of two subscribing witnesses.[39]

The Florida Constitution of 1968

Although *Zimmerman* appeared to put an end to the confusion surrounding witness requirements, it did so only temporarily. Provisions of the 1968 constitution cast serious doubt on these requirements in regard to both married women's separate property and homestead.

The most significant constitutional change involves married women's separate property. Article XI of the 1885 Florida constitution, which dealt with this subject, has been omitted from the 1968 constitution. Moreover, the new constitution prohibits any distinction between married women and married men in the disposition of property.[40] This provision would appear to bar the imposition of executional formalities upon married women when such requirements are not demanded of married men. Rather than removing the witness requirement from married women's contracts, this section could be interpreted to mean that a contract for the sale of a married man's property may now require two subscribing witnesses. Such an interpretation seems unlikely in light of the absence of married women's separate property provisions in the new constitution and the post-1968 repeal of statutes governing married women's separate property.[41] The purpose of both these

36. *Id.* at 124. *See* notes 15 *supra*, 47 *infra*.

37. *E.g.*, Ryan v. United States, 136 U.S. 68 (1890).

38. Mehle v. Huston, 57 So. 2d 836 (Fla. 1952); Simon v. Tobin, 89 Fla. 321, 104 So. 583 (1925); Gautier v. Brodway, 87 Fla. 193, 99 So. 879 (1924); Tucker v. Gray, 82 Fla. 351, 90 So. 158 (1921); Kalil v. Florida Nat'l Bank, 81 Fla. 543, 88 So. 383 (1921); Meek v. Briggs, 80 Fla. 487, 86 So. 271 (1920).

39. *Zimmerman* has been continually cited for this proposition. Perry v. Beckerman, 97 So. 2d 860 (Fla. 1957); Radabaugh v. Ware, 241 So. 2d 738 (4th D.C.A. Fla. 1970); Kyle v. Kyle, 128 So. 2d 427 (2d D.C.A. Fla. 1961); Williams v. Noel, 105 So. 2d 901 (3d D.C.A. Fla. 1958); Lindgren v. Van Fleet, 101 So. 2d 155 (3d D.C.A. Fla. 1958), *rev'd on other grounds*, 107 So. 2d 381 (Fla. 1958); Petersen v. Brotman, 100 So. 2d 821 (2d D.C.A. Fla.), *cert. denied*, 104 So. 2d 594 (Fla. 1958).

40. FLA. CONST. art. X, §5 provides: "There shall be no distinction between married women and married men in the holding, control, disposition, or encumbering of their property, both real and personal; except that dower or curtesy may be established and regulated by law."

41. Fla. Laws 1970, ch. 70-4, §4 *repealing* Fla. Stat. §§693.01, .03, .13, .14, 708.02, .03,

actions appears to be the removal of impediments on the alienation of married women's separate property, not an increase in restrictions upon the conveyance of married men's property.

In addition, section 708.07 has recently been repealed.[42] Notwithstanding previous misinterpretations of this section, the executional requirements for a married woman's contract to convey or relinquish dower are now the same as those of a man's contract, namely: compliance with the Statute of Frauds.[43]

Although the 1968 constitution retained the requirement that both husband and wife join in the conveyance of homestead property, the requirement that homestead deeds be "duly executed" was deleted.[44] Thus, if *Zimmerman* is correct in asserting that the witness requirement for contracts to convey homestead is based on the constitutional mandate that such deeds be "duly executed," then the absence of these words in the new constitution would appear to abrogate the witness requirement.

Although the issue of the 1968 constitution's effect has not yet reached the Florida supreme court, a recent Fourth District decision, *Radabaugh v. Ware*,[45] appears to extend the *Zimmerman* holding to all land-sale contracts. However, since *Radabaugh* dealt with a contract for the sale of homestead property owned by the entireties, this extension is merely dictum.[46] Moreover, this dictum is contrary to the *Zimmerman* statement that section 689.01 is not applicable to all contracts[47] and has been rejected by the Third District Court of Appeal in *Kroner v. Esteves*.[48] Since neither the opinion nor the *Radabaugh* briefs mention the 1968 constitution, its effect is still unclear.[49] Nevertheless, it appears that the witness requirement for instruments releasing dower was abolished by the repeal of section 708.07.[50] Due to the repeal of this section and the enactment of article X, section 5, of the new constitution a conveyance of married women's separate property should no longer require two subscribing witnesses. Futhermore, an instrument transferring homestead property apparently no longer needs to be executed in the presence of two subscribing witnesses because no statute requires this formality, and the words in the 1885 constitution implying such a requirement do not appear in the new constitution.[51]

.04, .07 (1969).

42. Fla. Stat. §708.07 (1969), *repealed by* Fla. Laws 1970, ch. 70-4, §4. *See* text accompanying notes 12-25 *supra*.

43. FLA. STAT. §725.01 (1969). *See* text accompanying note 2 *supra*.

44. FLA. CONST. art. X, §4 (c).

45. 241 So. 2d 738 (4th D.C.A. Fla. 1970).

46. Brief for Appellee at 7, Radabaugh v. Ware, 241 So. 2d 738 (4th D.C.A. Fla. 1970).

47. The Florida supreme court in *Zimmerman* clarified a misstatement in Cox v. La Pota, 76 So. 2d 662 (Fla. 1955), that §689.01 applied directly to all contracts for the sale of land. *See* text accompanying note 36 *supra*.

48. 245 So. 2d 141 (3d D.C.A. Fla. 1971).

49. *See* Brief for Appellant, Brief for Appellee, Radabaugh v. Ware, 241 So. 2d 738 (4th D.C.A. Fla. 1970).

50. *See* Fla. Stat. §708.07 (1969), *repealed by* Fla. Laws 1970, ch. 70-4, §4.

51. *See* FLA. CONST. art. X, §4 (c).

DAMAGES

Early Florida decisons dealing with the validity of a contract not specifically enforceable, because it did not comply with the executional formalities of section 708.07, were unanimous in holding that such a contract was not void and generally allowed an action for damages on the contract.[52] In *Shields v. Ensign*[53] a married woman signed a conveyancing agreement that was neither witnessed nor acknowledged. The vendee sought a return of her 1,000-dollar partial payment claiming the contract was void because it lacked the required formalities. The court rejected this contention stating that the statute did not make the contract void but only unenforceable by specific performance.[54] Recent cases, however, although not entirely consistent, tend to treat such contracts as void for all purposes.[55]

In *Wexler v. Griffith*[56] vendors, husband and wife, sought to expunge from the public record a contract that had not been executed in the presence of two subscribing witnesses. The court, relying on *Petersen v. Brotman*,[57] ruled that witnesses were essential to the validity of the contract and ordered the contract expunged.[58] *Petersen,* however, dealt with an action for specific performance, not an action on the validity of the contract.[59] The case does not appear to stand for the proposition that such a contract is void. A lower court decision refuted *Wexler's* interpretation of *Petersen* by stating that *Petersen* represents the rule that a contract executed without the requisite formalities may not be specifically enforced, but may support an action for money damages.[60] Significantly, the Second District Court of Appeal appears to have subsequently reversed itself by dismissing an appeal from a judgment granting damages for breach of a contract for the sale of homestead not executed in the presence of two subscribing witnesses.[61]

A recent decision in which the validity question arose is *Radabaugh v. Ware*.[62] In that case an action for damages was brought against vendors, husband and wife, for breach of a contract to convey homestead property

52. Edgar v. Bacon, 97 Fla. 679, 122 So. 107 (1929); Wheeler v. Sullivan, 90 Fla. 711, 106 So. 876 (1925); Vance v. Jacksonville Realty & Mortgage Co., 69 Fla. 33, 67 So. 636 (1915); Shields v. Ensign, 68 Fla. 522, 67 So. 140 (1914).

53. 68 Fla. 522, 67 So. 140 (1914).

54. *Id.* at 524, 67 So. at 141.

55. Kroner v. Esteves, 245 So. 2d 141 (3d D.C.A. Fla. 1971); Radabaugh v. Ware, 241 So. 2d 738 (4th D.C.A. Fla. 1970); Wexler v. Griffith, 107 So. 2d 147 (2d D.C.A. Fla. 1958).

56. 107 So. 2d 147 (2d D.C.A. Fla. 1958).

57. 100 So. 2d 821 (2d D.C.A. Fla. 1958).

58. Wexler v. Griffith, 107 So. 2d 147 (2d D.C.A. Fla. 1958).

59. Petersen v. Brotman, 100 So. 2d 821 (2d D.C.A. Fla. 1958).

60. Jones v. Dobkin, 15 Fla. Supp. 70 (Cir. Ct. Rec. Dade County 1959).

61. Sedwick v. Shaw, 188 So. 2d 29 (2d D.C.A. Fla. 1966). The vendee's appeal was dismissed because he had received and accepted the damages awarded under the final decree of the lower court. In the last paragraph of the opinion the court notes that the lower court decree "would necessarily have been affirmed, under authority of *Petersen v. Brotman* . . . ." *Id.* at 32.

62. 241 So. 2d 738 (4th D.C.A. Fla. 1970).

owned by the entireties. The court rejected appellants' contention that the contract, although not specifically enforceable because it lacked the required witnesses, was valid for all other purposes. Affirming the lower court decree,[63] which denied relief, the court stated:[64]

> The authorities cited above [*Petersen* and *Zimmerman*] make it amply clear that an *obligation* does not arise unless and until the contract has been executed with the formalities required by F.S. Section 689.01, F.S.A.

It is difficult to determine what the court means by the word "obligation." The cases cited make it clear that the vendor cannot be specifically compelled to convey the property when the contract has been executed without the requisite formalities.[65] *Petersen* and *Zimmerman,* however, do not hold that the vendor has no legal obligation to refrain from breaching the contract. Moreover, the Florida supreme court has never allowed parties to such a contract to ignore the agreement or treat it as void.[66]

The Third District Court of Appeal recently acknowledged the *Radabaugh* holding in *Kroner v. Esteves.*[67] In *Kroner* vendees brought an action for damages resulting from a breach of contract to convey land. Because the contract had not been executed in the presence of witnesses the lower court granted a summary judgment in favor of the vendors. The appellate court reversed because the vendee's complaint did not state facts sufficient to indicate that the property was homestead.[68] While accepting the *Radabaugh* holding that a contract lacking the requisite number of witnesses is void *ab initio* and thus not capable of supporting an action for damages, the court rejected the *Radabaugh* dictum that section 689.01 applies to all contracts for the sale of land.[69]

Both *Radabaugh* and *Kroner* ignore a critical step in the *Zimmerman* rationale. To specifically enforce contracts executed without the formalities required for a deed would permit parties to form the legal basis for a conveyance even though the instrument was not executed in the presence of two subscribing witnesses. This, in effect, allows contracting parties to do indirectly what they could not do directly. This argument, however, fails when dealing with a bill for specific performance rather than an action for damages. An action for damages effects no conveyance, and thus there is no circumvention of the formalities required of a deed. Not only are *Rada-*

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63. Brief for Appellant at 2, Radabaugh v. Ware, 241 So. 2d 738 (4th D.C.A. Fla. 1970), states the lower court's decision was based on Wexler v. Griffith, 107 So. 2d 147 (2d D.C.A. Fla. 1958), *cert. denied,* 109 So. 2d 573 (Fla. 1959), wherein the court held such a contract was invalid.

64. Radabaugh v. Ware, 241 So. 2d 738, 739 (4th D.C.A. Fla. 1970) (emphasis added).

65. Zimmerman v. Diedrich, 97 So. 2d 120 (Fla. 1957); Petersen v. Brotman, 100 So. 2d 821 (2d D.C.A. Fla. 1958).

66. *See* note 52 *supra* and accompanying text.

67. 245 So. 2d 141 (3d D.C.A. Fla. 1971).

68. *Id.* at 142.

69. *Id.* at 141.

baugh and *Kroner* contrary to decisions of both the Florida supreme court and the Second District Court of Appeal, but their results also appear undesirable. The law has never favored willful breach of contract. Allowing the use of witness requirements as a defense to such conduct would appear to be an abuse of judicial process.

Public Policy Considerations

Whether the courts were erroneous in developing existing attestation rules is today only of academic significance. The critical issue, however, is whether the continued existence of such rules can be justified on the basis of public policy.

The Florida supreme court has stated that the object of attestation is to prove the absence of fraud, duress, or compulsion, and the authenticity of the signature appearing on the instrument.[70] This policy is not as persuasive today as it was when enacted in 1847.[71] Moreover, the contention that witness requirements prevent fraud and duress fails to consider that a person desiring to forge or compel another to sign an instrument can very likely induce or compel two others to affix their signatures as witnesses.[72] An examination of cases enforcing such executional formalities reveals no decisions concerning compulsion or duress.[73] Since a decree of specific performance is within the sound discretion of a court,[74] utilization of judicial discretion might prove more effective than witness requirements in protecting against fraud and duress.

Witness requirements are often a trap for the unwary because they are most frequently used as a contractual escape valve. Since the burden of showing that the contract was executed with knowledge of witness requirements is on the party seeking to assert estoppel,[75] this device is seldom available to prevent a party from invoking the witness requirement.[76] Therefore, prohibiting actions for breach of contract only encourages the utilization of witness requirements as a means to escape contractual obligations.

The statutory witness requirements of other states indicate that no state other than Florida requires witnesses for land-sale contracts, and only two jurisdictions require that contracts for the sale of homestead be acknow-

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70. *See, e.g.*, Richbourg v. Rose, 53 Fla. 173, 183, 44 So. 69, 72 (1907).

71. Identification problems appear less relevant today in light of technological advancements in handwriting analysis. O. Hilton, Scientific Examination of Questioned Documents (1956); Mather, *Expert Examination of Signatures*, 52 J. Crim. L.C. & P.S. 122 (1961).

72. *See, e.g.*, Marshall v. Hollywood, Inc., 224 So. 2d 743 (4th D.C.A. Fla. 1969), *aff'd*, 236 So. 2d 114 (Fla. 1970).

73. *E.g.*, Zimmerman v. Diedrich, 97 So. 2d 120 (Fla. 1957); Abercrombie v. Eidschun, 66 So. 2d 875 (Fla. 1953); Radabaugh v. Ware, 341 So. 2d 738 (4th D.C.A. Fla. 1970); Petersen v. Brotman, 100 So. 2d 821 (2d D.C.A. Fla. 1957).

74. *E.g.*, Topper v. Alcazan Operating Co., 160 Fla. 421, 35 So. 2d 392 (1948).

75. First Nat'l Bank v. Savarese, 101 Fla. 480, 134 So. 501 (1931).

76. Cox v. La Pota, 76 So. 2d 662 (Fla. 1954). *Cf.* Medina v. Orange County, 147 So. 2d 556 (2d D.C.A. Fla. 1962).

ledged.[77] Most states do not even require subscribing witnesses for the execution of a deed,[78] and a majority of those states with such a requirement make attestation a prerequisite only for recording, leaving intact the common law rule that a deed without witness is good as between the parties thereto.[79]

Another argument opposing the imposition of witness requirements is that they hamper the ability to form a land-sale contract by correspondence.[80] A party making or accepting an offer by letter or telegram would seldom consider the necessity of subscribing witnesses, yet if the contract involves the sale of homestead, married women's separate property, or the relinquishment of dower, witnesses are necessary. Florida has consistently allowed letters to constitute a sufficient "writing" to comply with the Statute of Frauds.[81] The arguable utility of witness requirements does not appear to outweigh the desirability of allowing the formation of correspondence contracts.

CONCLUSION

It is ironic that, due to the survival of feudalistic attitudes toward land, a contract to convey Blackacre must be executed in the presence of two subscribing witnesses, yet the transfer of securities valued at $1 million may be consummated by telephone. This anomalous situation should be corrected. Florida courts have long recognized the inequities imposed by existing witness requirements;[82] a strict application of new statutory and constitutional provisions therefore seems warranted. If the confusion created by the quagmire of judicial decisions in this area is to be dispelled, however, the final solution must be provided by the legislature.

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77. Musser v. Zurcher, 180 Neb. 882, 146 N.W.2d 559 (1966); Watson v. Kresse, 130 N.W.2d 602 (N.D. 1964). In North Dakota only contracts for the sale of homestead owned by a married man need be acknowledged.

78. C. PATTON & R. PATTON, TITLES §362 (2d ed. 1957). Only nineteen states require subscribing witnesses to deeds.

79. *Id.*

80. *See* text accompanying notes 36-39 *supra.*

81. *See* note 38 *supra* and accompanying text.

82. The court in Berlin v. Jacobs, 156 Fla. 773, 24 So. 2d 717 (Fla. 1945), apologized to the plaintiff for disallowing an action for specific performance on the ground the defendant did not comply with §708.07 by saying: "Except for [§708.07] it is quite evident that in equity and good conscience [the wife] should be required to perform the contract . . . ." Similarly, in Dixon v. Clayton, 44 So. 2d 76 (Fla. 1949), where the vendor, a married man, had received part of the purchase price and placed the vendee in possession, the court recognized the inequities of the situation by noting: "It may well be that from a standpoint of ethics she should not escape any easier the obligations of the agreement than would her husband . . . ." Notwithstanding these equities, the court refused specific performance inasmuch as the vendor had not complied with §708.07.