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FLORIDA LEGISLATIVE NOTES*

INSTALLMENT LAND SALES ACT

The natural attraction of Florida as a retirement haven has enabled promoters and developers to sell Florida real estate sight-unseen through the use of questionable selling techniques. An out-of-state buyer of Florida land might never see his property prior to the purchase, in which case he will have to rely upon the factual data available in the brochure and his installment land sales contract, and whatever representations are made by the salesman. The potential and actual abuses inherent in "long-distance" selling threatened the well-being of this substantial segment of the economy to the extent that in 1963, the Florida Legislature enacted a statute aimed at curbing the more blatant abuses.¹ The legislative solution is analogous to that of the Federal Securities Act, in that full disclosure of the subject matter is required to be made to the buying public.

The Florida statute establishes a five-member administrative board to police the installment land sales industry.² The act requires that all subdividers who meet two requirements file an application for registration.³ The two requirements are: (1) that he handle a minimum number of sales⁴ of improved and unimproved property⁵ by use of the installment land sales contract; and (2) that he sell subdivided land located in the state of Florida, or conduct any part of his business operation therein, including any advertising, promotion, or solicitation conducted within the

* This is a new section of the *University of Miami Law Review*, designed to present brief discussions of newly enacted Florida Statutes which may be of particular interest to the Florida practitioner. A more extensive treatment of recent Florida legislation appears elsewhere in this issue. Boyer & Shapo, *Florida's Marketable Title Act: Prospects and Problems*, 18 U. MIAMI L. REV. 103 (1963).

1. Florida Installment Land Sales Law, FLA. STAT. ch. 478 (1963). [Hereinafter cited by section number only.]

2. Section 478.031. The Governor appoints these members from resident citizens of the state. Three of the five members must have been directly related to Florida real estate and development for the past four years. The other two must not be directly related to real estate. The terms of the board members vary from one to three years, and a three-member quorum may transact business.

3. Section 478.121(1).

4. Section 478.021(7). Registration is required under § 478.121 of any subdivider who, acting personally, through a group or agent:

(a) makes or issues more than fifty (50) installment land contracts in any one (1) year; or, (b) offers for sale or lease by installment land sales contracts more than fifty (50) lots, parcels or units at any one time; or, (c) offers for sale or lease by installment land sales contracts twenty-five per cent (25%) or more of the lots, parcels, or units of a subdivision at any one time.

5. Section 478.021(5).

state.⁶ All salesmen for these subdividers are required to register independently of the subdivider.⁷

The registration application must include the address of the principal office, and all branch offices located in Florida. The application must also make full disclosure of all persons connected with the development, including a resume of their background and experience.⁸ The requirements of registration include a fee for the registrant and a fee for the sub-development, which vary according to the size of the development registered.⁹ The board must then rule on the plans within forty-five days.¹⁰ Silence on the part of the board after the time limit has expired, is considered approval, subject to the board's later review.¹¹

If the application is disapproved, the applicant may seek review through the Administrative Procedure Act.¹² However, on approval of the application, the board will issue a registration certificate which permits the subdivider to commence operations. The board, however, retains certain regulatory powers over the development. It has the power to investigate fraud and swindle,¹³ misleading characteristics in the description of the land,¹⁴ impossibility of performance by the vendor,¹⁵ or to examine any books or records that it deems necessary.¹⁶ Before a subdivider may publish promotional material for public distribution through any news media, he must first submit to the board for its approval, a copy of the installment land sales contract to be used, and a complete property description, including maps and artist's drawings.¹⁷ The board may conduct hearings,¹⁸ subpoena witnesses for depositions,¹⁹ and adopt reasonable rules and regulations.²⁰

The act also equips the board with powers to enforce these regulations. The board may secure an injunction from the courts and have a receiver appointed.²¹ Registration suspensions may be granted for the

6. Section 478.121.

7. Sections 478.021(4), 478.121(5). Registration fees charged subdividers are substantially greater than those charged salesmen. Section 478.121(4).

8. Section 478.121(2).

9. Sections 478.121(4), 478.131(3).

10. Section 478.141(3).

11. Section 478.141(5).

12. Section 478.041(9). FLA. STAT. ch. 120 (1963).

13. Section 478.141(2)(b).

14. Section 478.141(2)(a).

15. Section 478.141(2)(c).

16. Sections 478.151(1), 478.041(1).

17. Section 478.131(1). If no action is taken by the board within ten days, the person filing may cause such information to be published. Section 478.141(3). However, this is not conclusive, and the board may subsequently enter an order of disapproval of the information filed. Section 478.141(5).

18. Section 478.041(2).

19. Section 478.041(6).

20. Section 478.044(4).

21. Section 478.171.

violation of board orders²² or chapter provisions,²³ for intentional deception in advertising, sales or promotion,²⁴ for any substantial change in the approved plan of sale,²⁵ or for selling without initially filing the required application.²⁶ Finally, the board may revoke the registration for persistent violations,²⁷ for conviction of a subdivider or officer of a criminal offense concerning realty,²⁸ for conversion or concealment of funds,²⁹ for breach of agreement with the board,³⁰ or for obtaining a registration certificate by fraud.³¹ To prevent the board from taking arbitrary action without proper notice to the developers, certain procedural safeguards are provided by the act.³²

The board has been given jurisdiction over false and misleading advertising by subdividers,³³ an area previously regulated by the Florida Real Estate Commission.³⁴ Although the Commission was divested of this power, the rules of the Commission³⁵ were not abridged by the statute. The Commission's rules remain "the rules of regulation of the board until . . . amended, repealed or revised by the board."³⁶ This means that the developer may rely on the former rules of the Real Estate Commission in the area of false and misleading advertising, until notice to the contrary is given.

One injured by his reliance on false or misleading advertising has alternative civil remedies available under the act. He is entitled to an action for rescission in equity, or he may recover damages at law from the person to whom payment was made.³⁷ In addition, developers convicted of publishing false advertisements shall be subject to a prison sentence not exceeding six months, or a fine of 5,000 dollars, or both.³⁸ Further, the existing Florida legislation covering the general areas of

22. Section 478.161(1)(a).

23. Section 478.161(1)(e).

24. Section 478.161(1)(b).

25. Section 478.161(1)(c).

26. Section 478.161(1)(d). Registration of a salesman is automatically suspended or revoked accordingly, when the registration of his subdivider is suspended or revoked. Section 478.161(3).

27. Section 478.161(2)(a).

28. Section 478.161(2)(b).

29. Section 478.161(2)(c).

30. Section 478.161(2)(d).

31. Section 478.161(2)(e).

32. Sections 478.041(9), 478.051, 478.161(1), 478.161(2).

33. Section 478.041(4). Fla. Laws, 1963, ch. 63-129 repealed the following: FLA. STAT. §§ 475.42(1)(e), 475.50-475.52, 475.521, 475.53-475.55 (1963). Section 478.201 provides for substitution of the board for the Florida Real Estate Commission in actions brought under this act.

34. FLA. STAT. §§ 475.47-475.55 (1963), parts repealed, see note 33 *supra*. See also FLORIDA REAL ESTATE HANDBOOK §§ 18.01-18.09 (4th ed. 1958).

35. *Ibid.*

36. Section 478.041(4).

37. Section 478.191.

38. Section 478.211.

misleading,³⁹ and intentionally false advertising,⁴⁰ has not been changed.

Foresight is exhibited by the disclosure provisions established by the act. The stringent restrictions imposed are broad enough, if properly exercised, to encompass any previous loopholes permitting fraudulent promotional practices. However, the statute fails to correct any substantive contractual abuses. The Florida Law still permits strict forfeiture in installment land contracts, whereby the vendor, in the absence of fraud, mistake or undue influence, may elect to keep all payments received on default of the purchaser.⁴¹ The only exceptions which allow the purchaser to recover his payments, exist when the vendor is guilty of fraud; when the vendee's failure of performance is due to circumstances beyond his control, thereby giving the vendor the benefit;⁴² when forfeiture would be shocking to the conscience of the court;⁴³ and in cases of mutual rescission.⁴⁴

The harsh treatment afforded defaulting vendees seems inequitable, in that the vendor need not return any payments made even though only one payment remained unpaid. One solution might be to adopt legislation similar to that used in conditional sales contracts.

A factor common to the conditional sales and the installment land contracts is that title is retained in the vendor until the final payment is made. In Florida, relief is granted to the vendee in the restricted area of conditional sales contracts on automobiles.⁴⁵ When the vendor repossesses the property and re-sells it, on the subsequent re-sale he is required to return to the conditional purchaser any sum realized in excess

39. FLA. STAT. § 817.41 (1963).

40. FLA. STAT. § 817.44 (1963).

41. *Beatty v. Flannery*, 49 So.2d 81 (Fla. 1950). When the purchaser sued the vendor to recover earnest money paid on default, the court said, "even in the absence of . . . a forfeiture provision, a vendee in default is not entitled to recover from the vendor money paid in part performance on an executory contract." *Id.* at 82. In the recent case of *Huguley v. Hall*, 141 So.2d 595 (Fla. 1st Dist. 1962), strict foreclosure of the defaulting vendee was apparently assumed. The majority and dissenting justices were merely arguing whether equity has the power to render a summary judgment for the vendor against the purchaser for cancellation of the agreement, rather than permit an action in ejectment at law. *But see* the Florida Supreme Court's decision on the same case, 157 So.2d 417 (Fla. 1963), which casts some doubt on the presumption taken by the district court. See also *Watkins v. Wells*, 303 Ky. 728, 198 S.W.2d 662 (1946), regarding strict foreclosure. *But see Pembroke v. Caudhill*, 160 Fla. 948, 37 So.2d 538 (1948). The court stated that any clause providing for the forfeiture of the earnest money on default is a penalty clause, even though labeled a liquidated damage clause by both parties. Thus, the penalty clause was held to be unenforceable. This case is distinguishable from *Beatty v. Flannery*, *supra*, in that in *Pembroke*, the vendor could not recover in an action against the purchaser for the earnest money, since the vendor's damages were readily ascertainable, being the difference between the agreed price and the lesser value of the property.

42. *Beatty v. Flannery*, *supra* note 41, at 82.

43. *Haas v. Crisp Realty Co.*, 65 So.2d 765 (Fla. 1953). See also *Huguley v. Hall*, 157 So.2d 417 (Fla. 1963).

44. *Beatty v. Flannery*, *supra* note 41, at 82.

45. FLA. STAT. § 520.11 (1963).

of the remainder due on the original conditional sales contract. A similar provision applied to installment land sales contracts would effectuate a more equitable result on re-sale.⁴⁶

It is submitted that until additional legislative steps are taken to lessen the injustices of strict forfeiture under the installment land sales contract, the statute will be somewhat ineffective to protect the interest of installment purchasers of Florida realty, both long-distance and local.

Absent this one basic defect, the Installment Land Sales Act seems well equipped to control the practices of sub-developers of Florida land. It is difficult, however, to evaluate its impact, for the act will only be as effective as its enforcement by the board.

REPLEVIN—CONCEALED AND SECRETED PROPERTY

When a person improperly retains possession of the personal property of another, the proper action at law for its return is an action for replevin. The recent replevin statute¹ gives a new remedy to the plaintiff when the defendant secretes or conceals the property from the sheriff, on service of the writ of replevin.

The action of replevin is brought to recover possession² of personal property to which the plaintiff is entitled, but which is being wrongfully withheld by the defendant.³ A replevin action (as other actions at law) is commenced by the filing of a complaint; however, a further requirement is that a bond be filed before a writ will be issued.⁴ Upon execution of the writ by the sheriff, the property is delivered to the plaintiff.⁵ If the de-

46. Another solution is the approach taken by the Maryland legislature. MD. CODE ANN. art. 21, § 120(7) (1951). When 40% or more of the original cash price of the property has been paid, the vendee then has the right to demand a conveyance of the premises on the condition that he execute a purchase money mortgage to the vendor, or to a mortgagee procured by the vendee. But as a prerequisite to any recovery by the defaulting vendee, the property must either be property or improved chattels real, occupied or to be occupied by the vendee as a dwelling, and the purchase price must not exceed \$15,000. MD. CODE ANN. art. 21, § 118(3) (1951). The vendor must give the vendee thirty days notice of the vendor's proposed action, "as a condition to the exercise of his remedy." MD. CODE ANN. art. 21, § 121(1) (1951). For legislative action in other states granting relief to defaulting vendees, see, *Installment Land Contract: Legislative Protection of Defaulting Purchasers*, 52 HARV. L. REV. 129 (1938).

1. FLA. STAT. § 78.071 (1963).
 2. *Richbourg v. Rose*, 53 Fla. 173, 44 So. 69 (1907).
 3. FLA. STAT. § 78.01 (1963); *Parramore v. Smith*, 158 Fla. 85, 27 So.2d 670 (1946).
 4. FLA. STAT. § 78.05 (1963). For bond requirements, see FLA. STAT. § 78.07 (1963). No bond or writ is required where the plaintiff would only seize property after judgment, or if the defendant had retaken the property by the filing of a forthcoming bond. FLA. STAT. § 78.01 (1963). This is the remains of the common law action of detinue. 3 BLACKSTONE, COMMENTARIES *144 (10th ed. 1787).
 5. FLA. STAT. §§ 78.01, 78.13 (1963).

defendant wishes to regain possession of the property during the action, he must file a forthcoming bond within three days from the time the property was taken,⁶ in order to protect whatever interests the plaintiff may have in the property.

Traditionally, if possession could not be obtained because the defendant concealed the property, or because the defendant refused to surrender the property upon service of the writ, the plaintiff's only available remedy at law was one for damages.⁷ Even intentional concealment by the defendant did not give the plaintiff any greater rights. Only if the property were unique could the plaintiff bring an action in equity. A contumacious defendant who refused to surrender the property upon service of the writ in equity could then be held in contempt of court. This relief was available for any act calculated to hinder, embarrass, or obstruct the court's authority, or for any act, with a "tendency to directly affect the administration of justice."⁸

The new replevin statute now affords a remedy to the plaintiff whenever the defendant secretly withholds the property. When the plaintiff or his attorney has good cause to believe that the defendant is secreting or concealing property sought to be replevied, upon sworn motion by the plaintiff, accompanied by the necessary supporting affidavits, the court may order the defendant to deliver the property to the sheriff or be held in contempt of court.⁹

This contempt provision is an additional statutory measure designed to curb acts in defiance of court orders. Since 1845, the Florida legislature has conferred upon the sheriff certain powers in executing on personal property secreted or concealed within a building. Upon making public demand for the delivery of the property and subsequent refusal by the defendant, the sheriff has the power to "cause such . . . building . . . to be broken open, and . . . make replevin according to the writ, and if necessary . . . take to his assistance the power of the county."¹⁰ For the sheriff to force entry into a building, he must have actual knowledge that the property is located inside.¹¹

However, under the new act, to hold the defendant in contempt

6. FLA. STAT. § 78.13 (1963).

7. *Bringley v. C.I.T. Corp.*, 119 Fla. 529, 160 So. 680 (1935).

8. *Ex parte Crews*, 127 Fla. 381, 389, 173 So. 275, 279 (1937). See also *Baumgartner v. Joughin*, 105 Fla. 335, 141 So. 185 (1932).

9. FLA. STAT. § 78.071 (1963).

10. FLA. STAT. § 78.10 (1963). The sheriff, however, is not authorized to force entry into a private residence to levy on personalty in satisfaction of a civil writ of attachment, execution or distress for rent. [1959-1960] FLA. ATT'Y GEN. BIENNIAL REP. 16. Without the permission of the occupant of a business establishment, the sheriff does not have the authority to close and lock the doors of the establishment for the purpose of securing attached property located inside until transportation is available to remove the property. [1959-1960] FLA. ATT'Y GEN. BIENNIAL REP. 16.

11. See FLA. STAT. § 78.10 (1963).

of court, the plaintiff need only have "good cause" to believe that the defendant is secreting the property.¹² An unanswered question remains in the new statute as to what constitutes "good cause" in the affidavit. Perhaps to establish "good cause," the courts will adopt the "probable cause" test necessary for obtaining a search warrant in Florida.

Probable cause exists, where the facts and circumstances within their [the officers'] knowledge, and of which they had reasonably trustworthy information . . . [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.¹³

Unfounded claims and rumors would be insufficient to establish "probable cause." it would seem advisable that the test for "good cause" should at least meet the minimum standard required for "probable cause" so that the court could hold the defendant in contempt without running afoul of the Florida and Federal constitutional limitations.

Thus, the recent replevin statute cloaks the law side of the court with powers of contempt in limited areas. The statute would be particularly effective where the plaintiff anticipates a contumacious defendant, prior to the sheriff's unsuccessful return. If the plaintiff has "good cause" to believe the defendant is concealing the property, and will continue to do so on service of the writ, he could file a motion accordingly, together with the original complaint and necessary bond. Upon service of the writ the sheriff could then proceed to seize the property peacefully or by force, if the property can be located,¹⁴ or serve upon the recalcitrant defendant an order to appear for contempt proceedings,¹⁵ all in one motion.

Because of the wording of this amendment and its location within the chapter, courts may hold that it merely empowers a law court to use the contempt process in order to facilitate the initial seizure of the property at the commencement of the suit, but that it cannot be utilized by the plaintiff after final judgment in order to regain property which is in the possession of a defendant pursuant to a forthcoming bond. If this interpretation prevails, this amendment may be of little practical effect if the defendant proves to be contumacious. If this amendment had been incorporated into the existing section 78.19, rather than as an addition following section 78.07, which deals with the requisites of the replevin bond, then the intent of the amendment would have been clear.

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12. FLA. STAT. § 78.071 (1963).

13. *Brinegar v. United States*, 338 U.S. 160, 175 (1948), citing *Carroll v. United States*, 267 U.S. 132, 162 (1924).

14. See note 10 *supra*.

15. FLA. STAT. § 78.071 (1963).

LAND TRUST ACT¹

The 1963 Florida Legislature, in an effort to stimulate the development of Florida real estate, passed a statute validating the land trust.² This intriguing trust device, often referred to as a "hybrid,"³ was pioneered in Illinois⁴ as an outgrowth of the Massachusetts business trust.⁵ Its primary purpose is to facilitate the transfer of title to, and financing of, large real estate holdings and developments.⁶ By designating the beneficial interest in the trust as personalty, represented by trust certificates, title may be conveyed by the trustee without the joinder of the beneficiaries. In addition, the trust certificates may be pledged or assigned as collateral security in the same manner and facility as certificates of corporate ownership.⁷

A land trust consists of two basic instruments:⁸ the first is a recorded deed in trust, in which the trustee is given full powers of ownership, and the second is a trust agreement between the settlors and the trustee which is not recorded and in which the powers of the trustee are practically eliminated.⁹ This results in the trustee's being given both the legal and equitable title to the trust property, subject to full power of direction and control by the beneficiaries.

There are numerous inducements to investors to employ this device, in addition to its primary functions. For example, because the beneficial interest is considered to be personalty,¹⁰ the realty may be conveyed free from dower and curtesy interests.¹¹ Another factor is that the trust

1. FLA. STAT. § 689.071 (1963).

2. *Ibid.*

3. In an orthodox common-law realty trust, legal title is vested in the trustee and equitable title in the beneficiaries. In a land trust, the complete title is vested in the trustee. The beneficial interest is personalty and full power of management and control is retained by the beneficiaries.

4. *Kerr v. Kotz*, 299 Ill. 465, 132 N.E. 625 (1921). For a general discussion of the land trust in Illinois, see Garrett, *Land Trusts*, U. ILL.L.F. 655 (1955); Turner, *Some Legal Aspects of Beneficial Interests Under Illinois Land Trusts*, 39 ILL. L. REV. 216 (1945).

5. In the business trust the investors agree to the creation of a group of governing trustees, vest the title of the property in them and also grant them control and management of the trust business. The interests of the beneficiaries is evidenced by transferable trust certificates. For a detailed and complete analysis, see Annot., 156 A.L.R. 22 (1942).

6. Carlock, *Sub-division Trust—A Useful Device in Real Estate Transaction*, 5 ARIZ. L. REV. 1 (1963); Schwind, *Land Trusts; A Real Estate Syndication Device*, 101 TRUSTS & ESTATES 650 (1962).

7. Seltzer, *The Use of the Land Trust as Collateral Security for Commercial Loans* (1959). This paper was written as a thesis for the Graduate School of Banking at the University of Wisconsin. Copies are available only at the Mercantile National Bank of Miami Beach, Florida, of which the author, Mr. Seltzer, is the president.

8. For an example of a standard land trust agreement, deed, mortgage and note, see CAPLAN LAND TRUSTS 22-30 (2d ed. 1958).

9. *Ibid.*

10. E.g., *Breen v. Breen*, 411 Ill. 206, 103 N.E. 2d 625 (1952); *Aronson v. Olsen*, 348 Ill. 26, 180 N.E. 565 (1932); *Chicago N.S. & M.R.R. v. Chicago Title & Trust Co.*, 328 Ill. 610, 160 N.E. 226 (1928); *Duncanson v. Lill*, 322 Ill. 528, 153 N.E. 618 (1926).

11. FLA. STAT. § 689.071(3) (1963) provides that a purchaser from the trustee shall

res is not subject to the personal debts of the beneficiaries,¹² nor can an action for partition be maintained by one or more of the beneficiaries.¹³ In addition, corporate taxes may be avoided,¹⁴ and the identity of the beneficiaries may remain undisclosed since only the deed in trust is recorded.¹⁵

One of the major obstacles to the use of the land trust in Florida has been the Statute of Uses.¹⁶ The typical land trust agreement severely limits the powers of the trustee which were conferred by the recorded trust deed, and specifies the trustee's duties. The trustee will generally be required to sell the trust property remaining at the end of twenty years and will be able to convey title only upon direction of the beneficiaries. All remaining property rights are generally expressly reserved to the beneficiaries. The effect of the Statute of Uses upon a passive trust is to vest the legal title in the holder of the beneficial interest. Thus, one of the issues raised whenever a land trust is utilized is whether the duties of the trustee are sufficiently active to prevent the operation of the Statute of Uses.

In an effort to strengthen the active nature of the land trust, additional administrative duties are often imposed upon the trustee.¹⁷ There are conflicting views as to whether the duties to sell and convey are sufficient to render the trust active, and as far as the additional administrative duties are concerned, their active nature will normally depend upon the requirement that the trustee must retain the legal title in order to perform these duties.

The Illinois courts, displaying a liberal attitude, have held in the majority of cases that either the duty to convey upon direction of the beneficiaries,¹⁸ or the duty to sell at the end of twenty years,¹⁹ or both,

take the property free of any claim arising out of any dower or curtesy interest of the spouse of any beneficiary.

12. *Chicago Title & Trust Co. v. Mercantile Trust & Sav. Bank*, 300 Ill. App. 329, 20 N.E.2d 992 (1939); *Kerr v. Kotz*, 218 Ill. App. 654 (1920).

13. *Aronson v. Olsen*, 348 Ill. 26, 180 N.E. 565 (1932).

14. For a full discussion of the taxable character of a land trust, see Taubman, *The Land Trust Taxable as Association*, 8 TAX L. REV. 103 (1952). For recent developments on the taxation aspect, see 1963 INT. REV. BULL. No. 21 at 42. For the effect of the business test on a real estate trust, where the purpose is to hold property and collect the income, and no association is recognized, see *Crocker v. Malley*, 249 U.S. 223 (1919); *Cleveland Trust Co. v. Commissioner*, 115 F.2d 481 (6th Cir. 1940); *Myers v. Commissioner*, 89 F.2d 86 (7th Cir. 1937).

15. Under the act it is not necessary to set forth the names of the beneficiaries in the recorded trust instrument.

16. FLA. STAT. § 689.09 (1963).

17. Generally these duties are to prepare fiduciary reports, maintain records, pay income to the beneficiaries, and furnish information concerning taxes and assessments.

18. *Crow v. Crow*, 348 Ill. 241, 180 N.E. 877 (1932) (reconveyance by trustee of prescribed technical nature, was an active obligation); *Emery v. Emery*, 325 Ill. 212, 156 N.E. 364 (1927) (trustee required to convey to the designated beneficiaries of a testamentary trust); *Masters v. Mayes*, 246 Ill. 506, 92 N.E. 945 (1910) (duty to convey sufficient);

are sufficient to constitute an active trust. A Wisconsin court, on the other hand, held in the case of *Janura v. Fence*,²⁰ that a trust in which realty was held for the ultimate use of the beneficiaries and in which the power of management was vested solely in the beneficiaries was a passive trust and legal title vested in the beneficiaries under the Statute of Uses. The Florida Supreme Court has held that when the sole duty of a trustee is to convey the trust property according to the directions of the beneficiaries, the trust will be treated as a passive one and the Statute of Uses will vest the entire title in the beneficiaries.²¹ The Florida statute, enacted for the sole purpose of validating land trusts, does not deal with this problem. Thus, a question left unanswered by the act is whether the duty to sell plus the duty to convey, together with additional administrative duties, will be sufficient to constitute an active trust.

It should be noted that the above characterization as an active or passive trust loses its significance with respect to the validity of the land trust, if two legal principles are concurrently in force in a given jurisdiction. First, the beneficial interest in the trust must be characterized for the purposes of property law as an interest in personalty. Second, the Statute of Uses must not operate upon property interests in personalty. The Illinois courts seem to have accomplished the characterization of the beneficial interest as personalty by use of the doctrine of equitable conversion,²² or by virtue of an express stipulation of the parties.²³ This approach, however, has not been generally followed in other jurisdictions.²⁴

The Florida Land Trust Act specifically provides that the interests of the beneficiaries of the trust shall be personalty if the parties so designate in the recorded instrument.²⁵ Thus, the second issue left un-

Kurawski v. Malaga, 338 Ill. App. 182, 86 N.E.2d 898 (1949) (trustee had power to convey only upon direction of beneficiaries); *Chicago Title & Trust Co. v. Mercantile Trust & Sav. Bank*, 300 Ill. App. 329, 20 N.E.2d 992 (1939) (duty to convey or deal with trust property at direction of the beneficiaries).

19. *Breen v. Breen*, 411 Ill. 206, 103 N.E.2d 625 (1952); *Emery v. Emery*, 325 Ill. 212, 156 N.E. 364 (1927); *Chicago Title & Trust Co. v. Mercantile Trust & Sav. Bank*, 300 Ill. App. 329, 20 N.E.2d 992 (1939). *But see* *Masters v. Smythe*, 342 Ill. App. 185, 95 N.E.2d 719 (1950).

20. 261 Wis. 179, 52 N.W.2d 144 (1952).

21. *Elvins v. Seestedt*, 141 Fla. 266, 193 So. 54 (1940).

22. *Breen v. Breen*, 411 Ill. 206, 103 N.E.2d 655 (1952); *Chicago Title & Trust Co. v. Mercantile Trust & Sav. Bank*, 300 Ill. App. 329, 20 N.E.2d 992 (1939). See also *McKillop, Illinois Land Trust in Florida*, 13 U. FLA. L. REV. 173, 186 (1960).

23. *Horney v. Hayes*, 11 Ill. 2d 178, 142 N.E.2d 94 (1957); *Aronson v. Olsen*, 348 Ill. 26, 180 N.E. 565 (1932); *Duncanson v. Lill*, 322 Ill. 528, 153 N.E. 618 (1926).

24. For a general discussion of the characterization issue, see *McKillop, Illinois Land Trust in Florida*, 13 U. FLA. L. REV. 173, 183-93 (1960).

25. In all cases where said recorded instrument . . . contains a provision defining and declaring the interests of beneficiaries thereunder to be *personal property* only, such provision shall be controlling for all purposes where such determination shall become an issue under the laws or in the courts of this State. FLA. STAT. § 689.071(4) (1963). (Emphasis added.)

answered by the Florida Legislature is whether the Statute of Uses will apply to a personal property interest. Illinois²⁶ and the majority of jurisdictions have held that the Statute of Uses does not apply to an interest in personalty,²⁷ however, the Florida position is not clear. In *Deauville Corp. v. Blount*,²⁸ the trustee held stock under a trust agreement which provided that he must vote the stock as directed by the beneficiaries. He was also to receive and pay over to the beneficiaries all dividends and was subject to removal by the beneficiaries at any time. The court held that the trust provisions constituted a mere dry and passive trust and the trustee was nothing more than an agent. Although not relying upon the Statute of Uses, the court reached the same result through agency principles. Thus, two alternatives are presented for consideration to the Florida courts. The trustee's duties under a land trust may be sufficiently active to prevent the operation of the Statute of Uses, or the courts may hold that regardless of its passive nature, the trust is one of personalty and outside the statute. It is suggested that the latter theory would be more practical and one which is in keeping with the legislative intent. A determination of validity under the first theory would not remove all uncertainty from the practitioner's standpoint, since the validity of each land trust will be dependent upon its individual characteristics. Validation under the second theory, however, will remove all uncertainty so long as there is compliance with the statutory requirements.

The second major obstacle preventing the use of the land trust in Florida concerns the marketability of the title conveyed by the trustee. The law of trusts adheres to a bona fide purchaser²⁹ rule which is similar to the holder in due course concept in negotiable instruments law and the bona fide purchaser requirements under the recording acts. Simply stated, the rule is that if one acquires for value a legal interest in property without notice of an outstanding trust or other equitable interest, he may hold it free from the equitable interest. One taking an equitable interest is subject to the rule of priorities at the time of acquisition. Notice under the rule may be actual or constructive or may exist because the purchaser had knowledge of facts sufficient to put him on inquiry, which if investigated with reasonable care, would have disclosed the equitable interest.

In the recent Florida case of *Resnick v. Goldman*,³⁰ this rule was

26. *E.g.*, *Craig v. Kimsey*, 370 Ill. 321, 18 N.E.2d 895 (1939); *Smith v. Smith*, 254 Ill. 488, 98 N.E. 950 (1912); *Ure v. Ure*, 185 Ill. 216, 56 N.E. 1087 (1900).

27. BOGERT, *TRUST AND TRUSTEES* § 293 (1953); 1 SCOTT, *TRUSTS* 70 (2d ed. 1956). The leading trust authorities, however, disagree on this point. Bogert's view is that modern courts execute a passive trust of personalty either by analogy to the Statute of Uses or on the theory that a trust without a purpose is automatically executed. Scott, on the other hand, contends that except with a few isolated cases the Statute of Uses does not execute an interest of personalty.

28. 157 Fla. 322, 25 So.2d 812 (1946).

29. BOGERT, *TRUSTS AND TRUSTEES* §§ 881-97 (2d ed. 1962).

30. 133 So.2d 770 (Fla. 3d Dist. 1961).

applied and the title tendered from the trustee of a land trust was held unmarketable. The vendee's examination of title showed that the vendor had previously conveyed the property to a trust company, "as trustee under the provisions of a certain trust agreement" ³¹ The deed contained recitals which purported to give the trustee full power of sale without the necessity of joinder or consent by the beneficiaries of the trust agreement to which it referred. The terms of the trust agreement were not revealed in the deed nor was the agreement recorded. The vendor tendered a deed executed by the trustee. The vendee rejected the deed, contending that the title was unmarketable and brought suit to rescind the contract for sale. The court held that the vendee, being unadvised as to the terms of the trust agreement, had no way of knowing whether the deed from the trustee was valid or invalid, and that such uncertainty rendered the title unmarketable.

The Land Trust Act attempts to cure this defect by narrowing the notice requirement of the bona fide purchaser rule. As a result, the class of qualified purchasers under the rule is broadened. Section 689.071(2) ³² provides that anyone dealing with the trustee with respect to the real property held in trust is not required to inquire as to (1) the identification or status of any beneficiaries; (2) the authority of the trustee to act and exercise the power granted him in the recorded instrument; (3) the adequacy or disposition of any consideration paid; or (4) the provisions of any unrecorded agreements collateral to the recorded instrument. Section 689.071(3) ³³ provides that any purchaser dealing with the trustee within the scope of section 689.071(2) shall take any interest transferred by the trustee, within the authority granted by the recorded instrument, free and clear of the claims of all beneficiaries or of any collateral unrecorded agreements, whether they are referred to in the recorded instrument or not. It appears, therefore, that notice under the statute must be either actual or, in a limited sense, constructive,

31. *Id.* at 771.

32. Any grantee, mortgagee, lessee, transferee, assignee, or person obtaining satisfactions, releases, or otherwise in any way dealing with the trustee with respect to said real properties held in trust under said recorded instrument . . . shall not be obligated to inquire into the identification or status of any named or unnamed beneficiaries, or their heirs or assigns to whom a trustee may be accountable under the terms of said recorded instrument, or under any unrecorded separate declarations or agreements collateral to said recorded instrument whether or not such declarations or agreements are referred to therein, nor to inquire into or ascertain the authority of such trustee to act within and exercise the powers granted under said recorded instrument, nor to inquire into the adequacy or disposition of any consideration, if any is paid or delivered to such trustee in connection with any interest so acquired from such trustee, nor to inquire into any of the provisions of any said unrecorded declarations or agreements. FLA. STAT. § 689.071(2) (1963).

33. All persons dealing with the trustee under said recorded instrument as hereinabove provided shall take any interest transferred by the trustee thereunder within the power and authority as granted and provided therein, free and clear of the claims of all the named or unnamed beneficiaries of such trust, and of any unrecorded declarations or agreements collateral thereto whether referred to in said recorded instrument or not, and of anyone claiming by, through or under said beneficiary. . . . FLA. STAT. § 689.071(3) (1963).

to the extent that the trustee is acting outside the powers granted in the recorded instrument. Inquiry notice appears to be virtually eliminated, with a possible exception when the property is in the possession of someone other than the holder of the record title. The application of these provisions to land trusts created subsequent to the act should be effective to remove any cloud of unmarketability upon the trustee's deed because of the *Resnick*³⁴ decision.

The act specifically provides that it is remedial³⁵ and retroactive,³⁶ thus raising a possible issue of due process under the federal and Florida constitutions. If a land trust created prior to the act is held to be passive and executed by the Statute of Uses, full title becomes vested in the beneficiaries. The act, however, would operate to preserve full title in the trustee. The effect, therefore, in the case of a conveyance by the trustee to a purchaser who qualifies under sections 689.071(2) and 689.071(3) of the act, would be, by legislative sanction, to allow the beneficiaries to be stripped of their title.

Depending upon how the Florida courts decide the Statute of Uses issue,³⁷ additional issue concerning dower, ejectment, homestead status and rights to partition may become pertinent. It should also be noted that the draftsman of a land trust must fully comply with the requirements of section 689.07 of the Florida Statutes,³⁸ in spite of the broad language of the Land Trust Act.

The scope of this article does not purport to cover every facet of the land trust. Its purpose, rather, is to point out some of the major difficulties that may be encountered in the use of this device in Florida under the new Land Trust Act. The land trust could provide an extremely forceful economic tool in the development of the Florida real estate industry. However, until further clarification of its status is received from the courts or the legislature, the creator of such a trust would appear to be treading on tenuous grounds.

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34. See note 29 *supra*.

35. "This act is remedial in nature and shall be given a liberal interpretation to effectuate the intent and purposes hereinabove expressed, and shall take effect immediately upon becoming a law." FLA. STAT. § 689.071(5) (1963).

36. "Every conveyance, deed . . . or other instrument heretofore or hereafter made . . ." FLA. STAT. § 689.071(1) (1963).

37. Note 16 *supra* and accompanying text.

38. FLA. STAT. § 689.07 (1963) provides that a deed or conveyance in which the words "trustee" or "as trustee" are added to the name of the grantee and in which no beneficiaries are named nor the nature and purpose of the trust set forth, will vest a fee simple title in the grantee. This result will obtain unless a trust instrument has been duly recorded, declaring the purposes of such trust, or that the real estate is held other than for the benefit of the grantee.