Real Property

Ralph E. Boyer
Robert L. Jamerson Jr.
Jeffrey R. Surlas

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The authors explore recent developments in Florida Real Property Law. Topics discussed include vendor and purchaser, estates and related interests, mortgages, mechanics' liens, landlord and tenant, condominiums, water law, and eminent domain.

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* Professor of Law, University of Miami School of Law.
** Articles & Comments Editor, University of Miami Law Review.
*** Articles & Comments Editor, University of Miami Law Review
I. INTRODUCTION

The format of this survey¹ is similar to that of the preceding two. Once again, the scope will be narrowed to a relatively small number of cases and recent significant legislation. The authors have attempted to focus only on those cases which in some way change or clarify established principles of law. Other sources² are available for those wishing to consult a compendium of all decisions and legislation covering the subject matter during the survey period.

II. VENDOR AND PURCHASER

A. Abstracts of Title

Since the common law liability of abstractors for errors or omissions is governed by contract principles, liability is limited to those in privity of contract.³ Although the principal Florida case, Sickler v. Indian River Abstract & Guaranty Co.,⁴ has followed the privity rule, that concept has been liberalized somewhat in Chelsea Title

¹. This survey covers volumes 311 through 337 of the Southern Reporter, Second Series, and legislation in 1975 and 1976 Florida Laws.
². See, e.g., R. Boyer, Florida Real Estate Transactions (1976).
³. See 1 R. Boyer, supra note 2, § 4.05[4], at 29 (Dec. 1976 Supp.).
⁴. 195 So. 195 (Fla. 1940).
& Guaranty Co. v. Louis Briggs Construction, Inc.\(^5\) In the latter case the District Court of Appeal, First District, held that where a purchaser had picked up and paid the fee for the abstract, he was in privity with the abstractor and could hold it liable for defects, even though the vendor had ordered the abstract and reimbursed the purchaser.\(^6\)

**B. Sales Regulation—Real Estate License Law**

Florida Statutes section 475.01(2) (1975) defines those required to be licensed as real estate brokers. The statute exempts, *inter alia*, corporate presidents from the licensing requirements if they are engaged in the sale of corporate property, unless the corporation is otherwise classified as a real estate broker or salesman.

In *Florida Real Estate Commission v. McGregor*\(^7\) the defendant corporation financed the purchase of homes by buying the receivables (note and mortgage) from a particular corporate vendor, which sold and built homes on its buyers’ real estate. In the course of its business, the defendant sometimes obtained title to real property by foreclosure or by deed in lieu of foreclosure. It did not utilize registered real estate brokers to sell any of its repossessed homes. Brokers had been unwilling to handle this type of property because of its location and the small commissions available. Therefore, the corporation employed field representatives who devoted approximately fifteen percent of their time to finding purchasers for the properties. These representatives were neither corporate officers nor registered Florida real estate brokers, and they received no bonus or commission for their procurement efforts.

Seeking an injunction against the corporation and its mortgage representatives, the Florida Real Estate Commission filed a complaint alleging that the defendants were violating the Florida Real Estate License Law\(^8\) by selling the repossessed property without a Florida real estate license. The trial court held that Florida Statutes section 475.01(2) (1975) was unconstitutional as applied to the de-

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5. 315 So. 2d 229 (Fla. 1st Dist. 1975).
6. In reaching its decision, the court found it unnecessary to decide whether Moyer v. Graham, 285 So. 2d 397 (Fla. 1973), overruled the Sickler case. Moyer held that “a third party general contractor, who may foreseeably be injured or sustained an economic loss proximately caused by the negligent performance of contractual duty of an architect, has a cause of action against the . . . negligent architect, notwithstanding absence of privity.” Id. at 402.
7. 336 So. 2d 1156 (Fla. 1976).
8. FLA. STAT. ch. 475 (1975).
fendants. On appeal, the Supreme Court of Florida affirmed, holding that the statute denied the corporation and its employees equal protection. The court found the licensing exemption for corporate presidents to be arbitrary since there was no "logical connection between the classification involved and the stated purpose . . . of protecting members of the general public who are involved in real estate transactions."10

C. Covenants for Title: Encumbrances Versus Clouds on Title

The covenant against encumbrances is considered to be a present covenant and is breached immediately, if at all, upon delivery of the deed.11 The covenant is an assurance that there are no encumbrances outstanding against the premises. In Florida, as elsewhere, an encumbrance generally is defined as "every right to or interest in the land, which may subsist in a third party, to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance."12

In *Boulware v. Mayfield*13 the District Court of Appeal, First District, dealt with a case of first impression involving the question of whether a mortgage, satisfied in fact but unsatisfied on the public record, thereby constituting a cloud on title, violates the covenant against encumbrances in a Florida statutory warranty deed. The purchasers had brought an action to cancel a mortgage and to recover costs of that suit from the vendor for alleged violation of the covenant against encumbrances contained in the warranty deed. The trial court entered judgment in favor of the purchasers with respect to the suit to cancel title and in favor of the vendor with respect to the breach of covenant action. After noting that the purchasers were successful in cancelling the mortgage and that no encumbrance existed, the First District held that there is no cause of action for breach of the covenant against encumbrances where the alleged encumbrance is invalid and unenforceable. The court rejected the plaintiffs' contention that the common law covenant

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9. 336 So. 2d at 1160 n.5. The Supreme Court of Florida held that the statute violated article 1, section 2, of the Florida Constitution and the United States Constitution's fourteenth amendment equal protection clause.
10. 336 So.2d at 1159.
13. 317 So. 2d 470 (Fla. 1st Dist. 1975).
against encumbrances warrants to the purchaser a record title even though such record encumbrance is invalid and unenforceable:

In short, [plaintiffs'] complaint is lodged because of a cloud on the record title, not that the grantor has breached her common law covenant against encumbrances. The distinction between an encumbrance and a cloud on a title for property has been delineated for many years. To be a cloud upon a record title, the claim may be invalid, while only lawful or valid claims violate the covenants as to encumbrances.¹⁴


In Mathews v. Florida Crossbreeds, Inc.¹⁵ a lessee of farmland brought an action against the lessor for specific performance of an option to purchase provision within the lease. The lessee also sought reformation because the legal description within the lease of a parcel of land failed to close when charted on a map. In considering whether it could properly go outside the lease agreement to supply a description for such a reformation, the District Court of Appeal, Second District, noted that although the rule differentiating between patent and latent ambiguities with respect to the admission of parol evidence has been criticized and even discarded in some jurisdictions, the Florida courts have continued to recognize the proposition that parol evidence cannot be introduced to explain a patent ambiguity.¹⁶ Finding the legal description within the lease to be patently ambiguous, the court, in an apparent effort to circumvent the patent-latent distinction, held that neither party had intended the parcel to be described in the manner set forth within the lease, and thus on the ground of a mutual mistake, affirmed a judgment granting reformation and specific performance.

The court attempted to distinguish Connelly v. Smith,¹⁷ in which the District Court of Appeal, Third District, refused to reform a patently ambiguous deed description and denied the introduction of parol evidence. However, the Mathews and Connelly decisions appear to be conflicting. While the Mathews court did not openly reject the patent-latent distinction, as is the trend in other jurisdic-

¹⁴ Id. at 472.
¹⁵ 330 So. 2d 183 (Fla. 2d Dist. 1976).
¹⁶ Carson v. Palmer, 139 Fla. 570, 190 So. 720 (1939); Landis v. Mears, 329 So. 2d 323 (Fla. 2d Dist. 1976). See generally R. Boyer, supra note 2, § 13.06[1].
¹⁷ 97 So. 2d 865 (Fla. 3d Dist. 1957).
tions, it appears to have done so in an indirect manner. The Second District's use of mutual mistake as a basis for reformation would seem to allow the court to consider parol evidence any time an instrument contained an ambiguous legal description of land, for it is unlikely that the parties would ever "intend" to describe a parcel of land inaccurately within a legal document.

E. Documentary Stamp Tax and Surtax

Florida Statutes section 201.17(2) (1975) requires the payment of a penalty, equal to the payment due, anytime a document, instrument, or paper upon which a tax is imposed does not bear the proper value of stamps upon audit or at the time of recordation. In Dominion Land & Title Corp. v. Department of Revenue the Supreme Court of Florida held that this penalty provision was neither so harsh as to constitute a denial of due process, nor an excessive fine under the eighth amendment of the United States Constitution.

In Florida Department of Revenue v. DeMaria the District Court of Appeal, First District, held that a deed by which a corporation transferred real estate to its sole stockholder, subject to an outstanding mortgage which the stockholder paid but did not assume, was not taxable under Florida Statutes section 201.02 (1973). This statute imposes a tax in an amount determined by the consideration paid on deeds and other instruments whereby realty is conveyed to a purchaser. The supreme court subsequently reversed the First District, holding that the shifting of the economic burden was sufficient consideration to make the taxpayer a purchaser within the meaning of the statute.

In Department of Revenue v. Brookwood Associates, Ltd. a purchaser of realty gave the seller a mortgage which included the balance owed by the seller on an earlier mortgage. The obligation

19. 320 So. 2d 815 (Fla. 1975).
21. 338 So. 2d 838 (Fla. 1976).
23. 324 So. 2d 184 (Fla. 1st Dist. 1975).
24. This is commonly called a "wrap-around mortgage." It enables the purchaser to
on the first mortgage was not assumed by the purchasers, but re-
ained with the seller. The District Court of Appeal, First District,
held that the "'amount' [of the first mortgage], for the purposes
of the surtax, shall not be included in the 'consideration paid' on
which the tax is computed."25

F. Agreement for Deed

The trend in Florida cases has been to construe agreements for
deed as equivalent or similar to mortgage agreements.26 Continuing
this trend in State ex rel. Four-Fifty Two-Thirty Corp. v. Dick-
inson,27 the supreme court held that agreements for deed exe-
cuted in connection with the sale of real property are taxable under
Florida Statutes section 199.032(2) (Supp. 1976) as intangible prop-
erty secured by mortgage, deed of trust, or other lien upon real
property. The court further held that the nonrecurring two-mill tax
is due when the agreements for deed are recorded or sought to be
enforced pursuant to Florida Statutes section 199.042(2) (1975),
while the recurring annual tax of Florida Statutes section 199.032(1)
(Supp. 1976) is inapplicable. In reaching its decision, the court
found that the nature of the transaction was not changed even
though the agreement, providing for no personal liability on behalf
of the purchaser, limited the vendor's remedy to recapture of the
land and retention of payments.

G. Rights of Creditors

Although the doctrine of equitable conversion has been applied
for some purposes to land contracts, it had been held inapplicable
to enforce creditors' claims against either vendor or purchaser.

25. 324 So. 2d at 187, quoting the trial court.
26. See, e.g., Torcise v. Perez, 319 So. 2d 41 (Fla. 3d Dist. 1975) (held that where
contracts for deed were intended to secure payment of money, they are deemed to be mort-
gages, thus entitling purchasers to possession and use of the property prior to making all of
the installment payments); Hoffman v. Semet, 316 So. 2d 649 (Fla. 4th Dist. 1975) (held that
an agreement for deed is essentially a security device intended to take the place of a purchase
money mortgage); Zeigler v. Hawkins, 315 So. 2d 200 (Fla. 1st Dist. 1975) (held that an action
to vacate a contract for deed should have been considered as a mortgage foreclosure). See
also Part IV, Section A, infra.
27. 322 So. 2d 535 (Fla. 1975). See also Department of Revenue v. GAC Properties, Inc.,
324 So. 2d 167 (Fla. 3d Dist. 1975).
Thus, a vendor's creditors had been permitted to make an ordinary levy and execution sale against his legal title. 28 A vendee's creditors, on the other hand, had to resort to equitable proceedings to attach his interest in the land contract. 29 The continued general viability of this distinction recently has been put in doubt. 30 Furthermore, a mortgagor's "equity of redemption" has been made specifically attachable by legal execution pursuant to Florida Statutes section 56.061 (1975). 31

In Hoffman v. Semet 32 the District Court of Appeal, Fourth District, held that a vendee in possession under an agreement for deed, after default and before relinquishing possession to the vendor, also has an equity of redemption within the meaning of section 56.061, thereby making his interest subject to levy and execution upon a judgment at law. The court noted that while the term "equity of redemption" has reference to a mortgagor's interest in land, it is equally appropriate to apply the term to a vendee's interest under a contract for deed in view of the Florida courts' construction of that instrument as a mere mortgage agreement.

H. Damages

In the absence of controlling provisions in the sales contract, the most common remedy for a breach by either vendor or purchaser is an action for damages. 33 While the general measure of damages for a nondefaulting vendor is either the loss of the bargain or the difference between the agreed purchase price and the actual value of the property at the time of the breach less the amount paid, 34 the amount of damages recoverable by a vendee may also depend upon the good or bad faith of the breaching vendor. 35 If the breach is not occasioned by bad faith, the proper measure of damages is the recovery of any purchase money paid with interest and the expenses of title investigation, as well as any profit made by the vendor as a

29. First Nat'l Bank v. Peel, 107 Fla. 413, 145 So. 177 (1932).
30. Arko Enterprises, Inc. v. Wood, 185 So. 2d 734 (Fla. 1st Dist. 1966) (dicta). The Arko court stated that a vendee's interest is "subject to sale on execution." Id. at 737.
31. See 1 R. BOYER, supra note 2, § 5.02, at 75 n.11.
32. 316 So. 2d 649 (Fla. 4th Dist. 1975).
33. See generally 1 R. BOYER, supra note 2, § 4.07[6].
result of the subsequent sale. Where the breach involves bad faith, the vendor is liable for the value of the land at the time of the breach with interest from that date.\textsuperscript{36}

Seeking not only compensatory damages, as delineated by the above general rules, but punitive damages as well, the vendee in American International Land Corp. \textit{v. Hanna}\textsuperscript{37} brought an action against a vendor for the alleged breach of an installment land sale contract. The vendee had paid in full for two lots of alleged waterfront land and pursuant to the terms of the contract was entitled to a deed. Instead of providing a deed, the vendor offered to exchange two other lots in the same subdivision for the vendee's lots. At the time of the offer, the vendor had begun construction of a golf course on the lots of the vendee without the latter's knowledge. The vendee refused the exchange offer and filed suit when the vendor persisted in his refusal to issue a deed.

The trial court limited the vendee's recovery to compensatory damages. The District Court of Appeal, Second District, reversed\textsuperscript{38} and allowed punitive damages because the vendee's complaint alleged a bad faith breach of contract plus the independent tort of an intentional, willful, and irrevocable conversion of the property by the vendor. The Second District relied on the rationale of Griffith \textit{v. Shamrock Village, Inc.},\textsuperscript{39} wherein the Supreme Court of Florida had said:

\begin{quote}
The general rule is that punitive damages are not recoverable for breach of contract, irrespective of the motive of defendant. But where the acts constituting a breach of contract also amount to a cause of action in tort there may be a recovery of exemplary damages upon proper allegations and proof. In order to permit a recovery, however, the breach must be attended by some intentional wrong, insult, abuse or gross negligence which amounts to an independent tort.\textsuperscript{40}
\end{quote}

The Supreme Court of Florida rejected the Second District's reasoning and reinstated the trial court's order limiting recovery to compensatory damages. After stating its approval of the rule of law

\textsuperscript{36} Id.; Key \textit{v. Alexander}, 91 Fla. 975, 108 So. 883 (1926).
\textsuperscript{37} 323 So. 2d 567 (Fla. 1975).
\textsuperscript{38} Hanna \textit{v. American Int'l Land Corp.}, 289 So. 2d 756 (Fla. 2d Dist. 1974).
\textsuperscript{39} 94 So. 2d 854 (Fla. 1957).
\textsuperscript{40} 289 So. 2d at 758, \textit{quoting} Griffith \textit{v. Shamrock Village, Inc.}, 94 So. 2d 854, 858 (Fla. 1957).
articulated in Associated Heavy Equipment Schools, Inc. v. Masiello, that punitive damages are not recoverable for breach of contract, the supreme court pointed out that real property cannot be the subject of conversion. Treating the appellate court’s finding of “conversion” as an assertion that the complaint alleged the tort of fraud and deceit, the court held that the vendor’s exchange offer did not constitute a false representation and that the vendee did not rely upon a false representation to his injury when he refused the offer. Thus, the breach of contract was held not to constitute tortious fraud and deceit, and the vendee was not entitled to punitive damages. While noting that it did not disagree with the Griffith case, the court stated the general rule that a breach of contract cannot be converted into a tort merely by allegations of malice.

In a dissenting opinion, Chief Justice Atkins argued that the complaint sufficiently alleged an independent tort. He pointed out that even if the construction of a golf course on the vendee’s property, without his knowledge or consent, and the refusal to deliver the deed did not meet the requirements of pleading an independent tort, the misrepresentation that the vendee’s property consisted of waterfront lots did.

I. Legislation

The state legislature amended sections 177.071 and 177.111 of the Florida Statutes in 1976 to clarify which governing body has jurisdiction to approve plats. As amended, the statutes provide: Where a plat to be submitted for approval is located wholly within the boundaries of a municipality, the municipality has exclusive jurisdiction to approve the plat; where the plat lies wholly within the unincorporated areas of a county, the governing body of the county has exclusive jurisdiction; and where a plat lies within the boundaries of more than one governing body, two plats are to be prepared and each governing body has exclusive jurisdiction to approve the plat within its boundaries. Any provision within a county charter which is inconsistent with the foregoing statutory provisions prevails to the extent of the inconsistency.

41. 219 So. 2d 465 (Fla. 3d Dist. 1969).
42. 1976 Fla. Laws ch. 76-110 (codified at Fla. Stat. § 177.071 (Supp. 1976)).
45. Id.
REAL PROPERTY

The legislature also created section 177.132, 46 which provides for the recording with the clerks of the circuit courts certain otherwise unrecorded maps and plats for informational purposes only.

III. ESTATES AND RELATED INTERESTS

A. Dower

Although Florida abolished inchoate dower in 1973, 47 and in 1975 provided that the surviving spouse, regardless of sex, is entitled to an "elective share," 48 litigation still exists with respect to the laws in effect prior to October 1, 1973, which allowed the wife, but not the husband, dower. 49 The Supreme Court of Florida recently held in In re Estate of Rincon 50 that the distinction between treatment of the sexes under the 1973 law was constitutional.

In Rincon, a widower sought to take dower under the 1973 law although the administration of his deceased wife's estate began prior to the effective date 51 of the act. In reviewing the circuit court's denial of the election, the supreme court found the discrimination between treatment of the sexes "reasonably justified by the disparity between their economic capabilities." 52 Therefore, the court held it did not violate the equal protection clause of either the federal or state constitution. The court noted that the 1968 Florida Constitution provided that "dower or curtesy may be . . . regulated by law," 53 and as such, vested authority in the legislature to distinguish between a husband and wife regarding property rights in their deceased spouses.

B. Concurrent Estates

The rule is well settled that cotenant spouses may not unilaterally convey their interests in an estate by the entireties to a third

47. 1973 Fla. Laws ch. 73-107, § 1 & ch. 73-106, § 1 (amending Fla. Stat. §§ 731.34-.35 (1975)).
50. 327 So. 2d 224 (Fla. 1976).
party. In MacGregor v. MacGregor the wife, without joinder of her husband, executed a quitclaim deed of entireties property to a grantee. Six weeks later, the husband, without joinder of his wife, quitclaimed the same property to the same grantee. The court found that neither deed adversely affected the interests of the other spouse. Since the husband’s subsequent deed amounted to his assent to his wife’s conveyance, the deeds effected a valid transfer of the entireties property to the grantee. Therefore, the District Court of Appeal, Fourth District, reversed the trial court’s determination that the transfers did not convey title to the grantee and remanded the case to determine whether the separate deeds were intended to create a security interest only.

C. Homestead

1. CASE LAW

Although individual spouses may not transfer property held by the entireties to a third person without joining in such conveyance, pursuant to statute, either may convey his or her interest in their homestead to the other without joinder in the deed. However, the strict requirements for conveyance in Florida Statutes section 689.01 (1975) are applicable to such transfers.

The Supreme Court of Florida held in Williams v. Foerster that the statute which eliminated the necessity of joinder of the other spouse in conveying the homestead by one spouse to the other was constitutional and did not conflict with the state constitutional requirement that necessitates joinder of both spouses for alienation of the homestead. The court invalidated the transfer in that case, however, on the ground that only one witness signed the deed in contravention of the statute requiring two witnesses.

The dissent suggested that the contract of conveyance should be upheld on an estoppel basis. Apparently, there was evidence that

54. 1 R. BOYER, supra note 2, § 20.02[3].
55. 323 So. 2d 35 (Fla. 4th Dist. 1975).
56. See discussion in Part IV, Section B, supra.
57. FLA. STAT § 689.11 (1975).
58. 335 So. 2d 810 (Fla. 1976).
60. FLA. STAT § 689.01 (1975). For a discussion of whether two witnesses are required in executing a mortgage, see Part IV, Section B, supra.
the husband did not act in good faith and purposely deceived his wife by failing to fulfill the statutory requirements.61

2. LEGISLATION

The Florida Legislature changed the homestead exemption laws in 1976, but continued the policy of liberally construing homestead exemptions. One new provision62 states that the head of the family status required to qualify for the creditor exemption shall inure to the benefit of the surviving spouse of the owner, or tenant by the entirety. Furthermore, the statute permits acquisition of such status to inure to the survivor despite the fact two persons are not living together as one family under the direction of one who is recognized as head of the family.

A change was also made regarding the homestead tax exemption for certain permanently and totally disabled veterans. The new law63 eliminates the recital of specific criteria defining what constitutes total disability.

D. Easements

In creating an easement, careful draftsmanship is extremely important. The language used should be clear so that proper construction of the instrument may be determined without considering extraneous matters or surrounding circumstances.64 In Procacci v. Zacco65 an estate sold one parcel of land to an heir and subsequently conveyed an adjoining parcel of land to a corporation "subject to an easement for road right-of-way," although no prior easement existed. The corporation subsequently conveyed its land, and the new owners began construction which infringed on the strip supposedly designated as an easement. The heir of the original estate, who owned the adjoining property, sought to enjoin the construction. The trial court denied such injunction stating that no easement was reserved since the language "subject to" was insufficient to create any easement.

61. 335 So. 2d at 813-14.
64. 1 R. Boyer, supra note 2, § 23.03[1]. See generally Robinson v. Feltus, 68 So. 2d 815 (Fla. 1953); Kotick v. Durrant, 143 Fla. 386, 196 So. 802 (1940).
65. 324 So. 2d 180 (Fla. 4th Dist. 1975).
There had been no prior Florida appellate decision regarding this issue, and the heir appealed to the District Court of Appeal, Fourth District, which affirmed the trial court's ruling. The court noted that the use of the "subject to" phrase to create an easement often leads to unclear and ambiguous results. Therefore, it was necessary to examine the surrounding circumstances in attempting to understand the intentions of the parties. But the court had no such facts which would have permitted creation of an easement by the words "subject to."

The court held that no easement in favor of the estate could exist. The estate had quitclaimed its interest in the parcel to the corporation without the two parties agreeing to reserve an easement for the benefit of the heir. There had been no reference to any easement in the conveyance of land from the estate to the heir. Furthermore, the court noted there could be no easement by implication since there was no unity of ownership of the alleged dominant and servient tracts at the time of the conveyance. No easement by prescription existed since there was no evidence of use of the strip.

In Hollywood, Inc. v. City of Hollywood, however, the possibility that a prescriptive easement existed was noted by the Supreme Court of Florida. The City of Hollywood had uninterruptedly published to the world that it owned certain beaches, and it openly and adversely occupied such beaches by erecting showers, planting trees, providing life guards, and posting signs. Although the city had not obtained permission to use the beaches, it had spent over one million dollars maintaining and improving the beaches over a fifty year period for the public's daily use. The court stated that the public could obtain a prescriptive right to use the beaches and remanded the case to the trial court to determine if a prescriptive easement had been created.

E. Restrictive Covenants

Restrictive covenants may be of unlimited duration since they do not create an interest in land and are not subject to disqualification by the Rule Against Perpetuities. However, enforcement of such covenants may be enjoined if there is sufficient change in the

66. Id. at 182. But see Owen v. Yount, 198 So. 2d 360 (Fla. 2d Dist. 1967).
67. 321 So. 2d 65 (Fla. 1975).
68. 1 R. Boyer, supra note 2, § 24.12[1].
character of the neighborhood to frustrate the objectives of the restriction:69 It is difficult to generalize from the cases precisely how much change is sufficient in order to remove the restriction.70

In Crissman v. Dedakis71 the District Court of Appeal, First District, affirmed a trial court's ruling that restrictive covenants may be removed from part, but not all, of a landowner's property. There had been substantial and radical changes in the general area of the landowner's subdivision, although no changes had occurred within the subdivision itself. Relief from the restrictive covenants was granted since there would be no detrimental effect upon other properties in the subdivision.

The court distinguished Allen v. Avendale Co.72 since that decision had emphasized that all the changes had occurred prior to the time plaintiff purchased his land subject to the restrictions, while the changes in Crissman occurred subsequent to her acquisition. The court also noted that the covenants had no expiration date, whereas in Allen the covenants had only fourteen months to run. Although Crissman did not delineate the facts which constitute substantial change, it seems quite likely that the court was influenced by the fact that the restrictive covenants had no expiration date.

In determining whether a significant change has occurred such that continued enforcement of restrictive covenants, such as the ones in Crissman, would be inequitable, a declaratory judgment would appear to be a logical and useful device. A landowner could then determine a covenant's validity without having to violate it first. The District Court of Appeal, Second District, however, ruled that procedure inappropriate in such cases because precedent had held that where there is no doubt as to the meaning of a written instrument and the only issue is a factual determination of whether the parties fall within the terms of the particular instrument, declaratory judgments may not be obtained.73 Nevertheless, the court did

69. Id. § 24.12[2].
70. Id. See generally Allen v. Avendale Co., 135 Fla. 6, 185 So. 137 (1938); Osius v. Barton, 129 Fla. 184, 176 So. 65 (1937); Barton v. Moline Properties, Inc., 121 Fla. 683, 164 So. 551 (1935).
71. 330 So. 2d 103 (Fla. 1st Dist. 1976).
72. 135 Fla. 6, 185 So. 137 (1938).
73. Lambert v. Justus, 313 So. 2d 140 (Fla. 2d Dist. 1975), rev'd, 335 So. 2d 818 (Fla. 1976), citing Travelers Indem. Co. v. Johnson, 201 So. 2d 705 (Fla. 1967); Columbia Cas. Co. v. Zimmerman, 62 So., 2d 338 (Fla. 1952); New Amsterdam Cas. Co. v. Intercity Supply Corp., 212 So. 2d 110 (Fla. 4th Dist. 1968).
believe the issue was of great public interest and certified it to the
Supreme Court of Florida.

Fortunately, the supreme court, in Lambert v. Justus, quashed the Second District's decision and found that the "declaratory judgment procedure was an appropriate and available remedy" in this case. The court noted that the cases deemed by the Second District to be controlling were easily distinguishable in that they merely sought judicial determination of a fact unrelated to the construction or validity of the instrument.

IV. MORTGAGES

A. Contracts for Deed

The Florida statutory definition of mortgages makes it clear that a number of instruments not formally termed mortgages may be mortgages under certain conditions. One such instrument, the contract or agreement for deed, generally has been construed as equivalent or similar to mortgage agreements by recent cases.

In Torcise v. Perez land purchasers sought a temporary injunction prohibiting the vendor, inter alia, from further use and trespass on property conveyed by contracts for deed. The contracts for deed provided that the purchasers would make down payments and monthly payments until the amount paid was equal to the original selling price plus interest, but were silent as to who was entitled to possession prior to payment of all the installments. The trial court granted temporary injunctive relief, and on appeal, the District Court of Appeal, Third District, affirmed. Citing Florida Statutes section 697.01(1) (1975), the Third District held that the contracts for deed were mortgages, thus entitling the purchasers to the use and possession of the properties in the absence of a contrary provision in the agreements.

74. 335 So. 2d 818 (Fla. 1976).
75. See cases cited in note 73 supra.
77. See generally 2 R. Boyer, supra note 2, § 32.02.
79. 319 So. 2d 41 (Fla. 3d Dist. 1975).
B. Formalities of Execution

Under the former Florida Constitution, a mortgage of the homestead had to be properly attested by two witnesses in order to be effective. This result was a logical conclusion from a group of cases holding that a contract for a conveyance of the homestead had to have two witnesses in order for it to be specifically enforced. The justification for such holdings was the constitutional provision that a homestead could be conveyed or mortgaged by a duly executed instrument. "Duly executed" has been interpreted to mean compliance with the statute prescribing the formalities of conveying. Such formalities include an "instrument in writing signed in the presence of two subscribing witnesses . . . ." Since the words "duly executed" are omitted from the comparable provision of the 1968 constitution, a question exists as to whether the conveying statute is still applicable to a mortgage of the homestead.

Because the pertinent provision of the 1968 constitution uses the phrase, "alienate the homestead by mortgage," it is possible that the conveying statute, requiring two witnesses, might be construed as still applicable. However, the style of the present constitution appears to liberalize the homestead law. Upon examining the aforementioned constitutional changes, the District Court of Appeal, Second District, in Reliable Finance Co. v. Axon, expressed serious doubt as to the continued viability of prior cases which required the attestation of two witnesses to effectuate the mortgage of a homestead. The court did not reach that issue, however, because it found that the mortgaged property was not a homestead. Until the Supreme Court of Florida specifically holds otherwise, the only safe course of action is to assume that two witnesses still are required.

81. See, e.g., Zimmerman v. Diedrich, 97 So. 2d 120 (Fla. 1957); Abercrombie v. Eidschun, 66 So. 2d 875 (Fla. 1953); Scott v. Hotel Martinique, 48 So. 2d 160 (Fla. 1950).
82. FLA. CONST. art. X, §4 (1885).
83. FLA. STAT. § 689.01 (1975).
84. Id.
85. FLA. CONST. art. X, § 4(c).
86. Id.
87. 2 R. BOYER, supra note 2, § 32.06[3].
88. 336 So. 2d 1271 (Fla. 2d Dist. 1976).
C. Foreclosure

1. Parties

The proper party to bring foreclosure is the holder of the note and mortgage. During the survey period, a number of cases dealt with the issue of who is the proper party when a Massachusetts business trust is involved.

In Your Construction Center, Inc. v. Gross a trustee of a Massachusetts business trust brought suit to foreclose a note and mortgage on Florida real estate. The defendants, contending that each trustee of the trust company should be named as plaintiff, moved to dismiss. The trial court denied the defendants' motion. The District Court of Appeal, Fourth District, affirmed, holding that where a note and mortgage are executed naming as payee only one trustee of such a trust, that trustee is entitled to maintain an action on the note and mortgage to discharge the obligation.

Similarly, in Overseas Development Inc. v. Krause the defendant moved to dismiss a mortgage foreclosure action, arguing that the plaintiff, a Massachusetts business trust, must be represented by all the trustees. Citing Your Construction Center, the District Court of Appeal, Third District, held that where the nominee of a business trust is the named payee on the indebtedness which is the subject of a mortgage foreclosure, the nominee is a proper party to bring suit.

The court in Tampa Properties, Inc. v. Great American Mortgage Investors had to decide whether a Massachusetts business trust, qualified to do business in Florida, has the capacity to foreclose a mortgage without its trustees becoming plaintiffs in the suit. Noting the trend in the Florida decisions not to require the appearance of all the trustees as plaintiffs, the District Court of Appeal, Second District, answered this question in the affirmative. The decision failed to indicate who was named as payee on the mortgage.

2. Factors Affecting the Right to Foreclose

The general rule has been that bankruptcy proceedings against the mortgagor do not affect mortgage foreclosures if they are begun

89. 2 R. Boyer, supra note 2, § 32.20[3].
90. 316 So. 2d 596 (Fla. 4th Dist. 1975).
91. 323 So. 2d 679 (Fla. 3d Dist. 1975).
92. 333 So. 2d 480 (Fla. 2d Dist. 1976).
after the foreclosure suit is commenced. In that event the trustee would take title to the mortgaged property subject to the foreclosure proceedings, and the foreclosure could continue.\(^3\) Apparently this general proposition has been superseded by rule 11-44(a) of the the Rules of Bankruptcy Procedure.\(^4\) In *Heritage Family Pub, Inc. v. First Federal Savings and Loan Association*,\(^5\) the District Court of Appeal, Second District, held that pursuant to rule 11-44(a), a mortgagor’s filing of a petition in bankruptcy operates as a stay of the enforcement of a judgment foreclosing a mortgage, precluding a judicial sale of the property and the issuance of a certificate of sale.

### 3. Acceleration

In *Chopan v. Klinkman*\(^6\) the vendors conveyed realty subject to a mortgage and, as part of the transaction, received a second mortgage from the purchasers. The second mortgage contained an acceleration clause which permitted the vendor-mortgagees to foreclose if the purchaser-mortgagors resold the property. Subsequently, the mortgagors executed an agreement for deed by which they, as contract vendors, agreed to convey the realty to the contract vendees if the vendees made the payments and kept the other covenants provided for in the agreement.

Thereafter, the mortgagees commenced an action to foreclose the second mortgage under the acceleration clause. The trial court dismissed the complaint with prejudice, and the District Court of Appeal, Fourth District, affirmed. Noting that the controlling issue was whether the agreement for deed constituted a sale of property so as to give the mortgagees a right to accelerate the balance of the mortgage, the Fourth District held that the execution of an agreement for deed was not such a sale since it provided for the convey-

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\(^3\) Tucker v. Crown Corp., 136 Fla. 517, 183 So. 740 (1938). See also 2 R. Boyer, supra note 2, § 32.20[2].

\(^4\) Rule 11-44a applies to chapter XI proceedings and reads:

(a) *Stay of Actions and Lien Enforcement.* A petition filed under Rule 11-6 or 11-7 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor, or the enforcement of any judgment against him, or of any act or the commencement or continuation of any court proceeding to enforce any lien against his property, or of any court proceeding, except a case pending under Chapter X of the Act, for the purpose of the rehabilitation of the debtor or the liquidation of his estate.

\(^5\) 315 So. 2d 558 (Fla. 2d Dist. 1975).

\(^6\) 330 So. 2d 154 (Fla. 4th Dist. 1976).
of absolute title in the future. The court noted that while an acceleration clause is a valid contractual provision,77 to enforce such a clause "a court of equity should require the showing of a clear, unequivocal right to forthwith call due the balance of the debt."78

4. USURY LEGISLATION

A 1976 legislative amendment79 provides that the Florida usury provisions shall not apply to either a Federal Housing Administration or Veteran’s Administration loan or a sale made by a financial institution at the time of a loan origination to the Federal National Mortgage Association, Government National Mortgage Association, Federal Home Loan Mortgage Corporation, or any other instrumentality of the Federal Government.

D. Deficiency Decrees

After sale of the property for less than the amount found to be due by the final judgment of foreclosure, the mortgagee bank in Bradberry v. Atlantic Bank of St. Augustine80 filed a motion for a deficiency judgment. The mortgagor filed an answer denying that the bank was entitled to a deficiency judgment and demanding a jury trial. The trial court denied the demand for a jury trial, and after a hearing, entered judgment for deficiency.

On appeal, the mortgagor contended that a denial of his demand for a jury trial on the issues of the deficiency proceeding would violate his right of trial by jury under the Florida Constitution.81 However, the District Court of Appeal, First District, rejected this contention and affirmed, holding that a mortgagor has no statutory or constitutional right to a jury trial on the question of a deficiency decree in a chancery foreclosure action when a deficiency exists after the foreclosure sale of the property. In reaching its decision, the First District concluded that the consolidation of law and chancery procedure into one form did not eliminate the court’s chancery jurisdiction over deficiency decrees in foreclosure actions. Moreover, it

77. For a more complete discussion of acceleration clauses, see 1 R. Boyer, supra note 2, § 32.20[4]. See also Comment, Debt Acceleration on Transfer of Mortgaged Property, 29 U. Miami L. Rev. 584 (1975).
78. 333 So. 2d 154, 156 (Fla. 4th Dist. 1976).
80. 336 So. 2d 1248 (Fla. 1st Dist. 1976).
found that while the statute providing for deficiency decrees in mortgage foreclosure proceedings preserves the complainant’s right to sue at common law for a deficiency, the statute does not give a corresponding right to the defendant to be sued at common law for the deficiency.

E. Priorities and Recording—Constructive Notice

A duly recorded instrument constitutes constructive notice of its existence and contents. It is also constructive notice of such other facts as would have been learned if the record had been examined and inquiries suggested thereby duly prosecuted. Thus, references in recorded instruments to an unrecorded option, a mortgage, and restrictions placed on land by a common grantor have been held to constitute constructive notice of such interests. Similarly, a recorded mortgage describing a lot by the proper subdivision name, but referring to the wrong plat book, has been held to be constructive notice to a subsequent purchaser at an execution sale.

However, in Air Flow Heating & Air Conditioning, Inc. v. Baker, the District Court of Appeal, Fourth District, held that references in a recorded mortgage to a legal description in “attached Exhibit A,” which was in fact not attached, and to an unrecorded loan agreement for purposes other than to provide a legal description were not sufficient to impart constructive notice even though the loan agreement contained such legal description. Accordingly, the court held that mechanics’ liens, which related back to the notice of commencement recorded later in the same day as the defective mortgage, had priority. While noting that reference may be made in a recorded document to another document for the purpose of aiding any defect or uncertainty created by the recorded instrument, the court explained: “[t]he reference to the existence of another deed or unrecorded document must be specific not only

103. Davis v. Brewer, 135 Fla. 752, 186 So. 207 (1938). See generally 1 R. Boyer, supra note 2, § 27.01[1].
109. 326 So. 2d 449 (Fla. 4th Dist. 1976).
in terms of identifying the other deed or document with particularity but in putting a reasonable person on notice of the need to make reference to such other deed or unrecorded document."

The language in the mortgage creating the reference to the loan agreement only related to the default by the mortgagor and the options available to the mortgagee after such default. Thus, the court found that the reference to the loan agreement in this context would not compel a reasonable person to inquire about the missing legal description or reasonably suggest that it would be necessary to refer to the loan agreement in order to locate such description.

F. Balloon Mortgages

In defining balloon mortgages, Florida Statutes section 697.05(2)(a) (1975) states, in pertinent part: “Every mortgage in which the final payment or the balance due and payable upon maturity is greater than twice the amount of the regular monthly or periodic payment of the said mortgage shall be deemed a balloon mortgage . . . .” Thus, in Vlock v. Capodilupo the District Court of Appeal, Third District, held the balloon mortgage statute inapplicable to a note executed by mortgagors in connection with their agreement to purchase an interest in a condominium project, where the note provided for one part payment of principal and the remainder to be paid seven months thereafter. The court found that this method of payment did not constitute regular monthly or regular periodic payments.

V. Mechanics’ Liens

A. Privity

The Mechanic’s Lien Laws establish different procedures and regulations for lienors in privity with the owner from those not in privity. The chief distinction is that lienors not in privity must serve notice that they are furnishing service or materials within forty-five days of the date their service begins. The obvious reason for such a rule is to protect the owner from surprise and unfair loss.

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110. Id. at 451-52.
111. 327 So. 2d 787 (Fla. 3d Dist. 1976).
Because the statutes do not specifically include sub-subcontractors or their materialmen, the District Court of Appeal, Second District, had held that neither were to be accorded liens.\textsuperscript{115} Such rulings were unfortunate since the statutory procedures which protect an owner from being surprised by a subcontractor or his materialmen likewise would protect the owner from a sub-subcontractor.

The Second District recently receded from its prior position and held in \textit{Hey Kiley Man, Inc. v. Azalea Garden Apartments}\textsuperscript{118} that the statutory term "subcontractor" encompasses sub-subcontractors as well as anyone else not in privity with the owner who performs a portion of a contract to enhance realty. The court disavowed former decisions to the contrary\textsuperscript{117} and subscribed to the reasoning used by the District Court of Appeal, Third District, in \textit{Ceco Corp. v. Goldberg},\textsuperscript{118} where a sub-subcontractor was allowed to enforce such a lien.

\section{B. Perfection}

A contractor is required by statute either to give the owner, at the time final payment is due, an affidavit stating that all liens have been paid, or to provide the names of those not paid in full and the amounts owed them.\textsuperscript{119} Failure to furnish the affidavit will prevent the contractor from perfecting a lien or having an action against the debtor during the period of his default.\textsuperscript{120} However, if the contract attached to the foreclosure complaint indicates that some prospective lienors were to be paid by the owner and that others were to be paid by the contractor, an affidavit attached to the complaint list-

\textsuperscript{115} J. P. Driver Co. v. Claxton, 193 So. 2d 440 (Fla. 2d Dist. 1967)(holding a sub-subcontractor was not entitled to a lien). Although FLA. STAT. § 713.06 authorizes materialmen to have a lien, FLA. STAT. § 713.01(11) defines materialman only in terms of supplying an owner, contractor, or subcontractor. But see \textit{Ceco Corp. v. Goldberg}, 219 So. 2d 475 (Fla. 3d Dist. 1969).

\textsuperscript{116} 333 So. 2d 48 (Fla. 2nd Dist. 1976).

\textsuperscript{117} See J. P. Driver Co. v. Claxton, 193 So. 2d 440 (Fla. 2d Dist. 1967).

\textsuperscript{118} 219 So. 2d 475 (Fla. 3d Dist. 1969). The court noted that \textit{Ceco} "reasoned that the statute should be construed broadly in order best to protect the interests of both the owners and those for whose benefit the . . . [statute] was enacted . . . those who furnish labor, services and materials to the benefit of the owners": 333 So. 2d at 50. Because the owner is protected against "hidden liens" of those not in priority with him, the definition of subcontractor must include sub-subcontractor as well.

\textsuperscript{119} FLA. STAT. § 713.06(3)(d)(1)(1975).

\textsuperscript{120} Id.
ing all the materialmen and laborers paid by the contractor (plain-
tiff) may constitute compliance with the statute. These were the
facts in Walter Harvey Corp. v. Cohen-Ager, Inc.,\textsuperscript{121} where the Dis-
trict Court of Appeal, Third District, affirmed the trial judge's de-
nial of a motion to dismiss the complaint, finding the sworn state-
ment sufficient under the statute.

The Mechanic's Lien statutes also provide for a blanket lien
which may encumber more than one parcel of realty in certain cir-
cumstances.\textsuperscript{122} In Kettles v. Charter Mortgage Co.\textsuperscript{123} a supplier of
landscaping materials and services agreed with a builder to a price
per yard for sod and a price per shrub for ornamentals. The materi-
als were to be supplied for an unspecified number of lots under
construction by the builder. The builder acquired the lots and built
upon them in groups of a few lots at a time, and the landscaper
presumed the arrangement would continue as long as his work was
satisfactory. Rather than filing separate claims of lien\textsuperscript{124} on each of
approximately forty lots for which he provided services and materi-
als, the landscaper elected to file a blanket lien pursuant to Florida
Statutes section 713.09(1) (1975).

The trial judge ruled that the landscaper's claim of lien was
invalid in that he had no "same direct contract"\textsuperscript{125} with the builder
for the work on the forty lots. The District Court of Appeal, Third
District, affirmed, stating that "to hold that any future services in
an indefinite amount and duration constitute a 'same direct con-
tract' would destroy the orderly use of the mechanic's lien laws."\textsuperscript{126}

C. Lienor's Notice

The Mechanic's Lien Law requires non-privity lienors, other
than laborers or those furnishing professional services, to file notice
to the owner within forty-five days of commencement of services to
perfect their liens.\textsuperscript{127} Although the statutory language is mandatory,

\textsuperscript{121} 317 So. 2d 775 (Fla. 3d Dist. 1975).
\textsuperscript{122} FLA. STAT § 713.09(1) (1975).
\textsuperscript{123} 337 So. 2d 1012 (Fla. 3d Dist. 1976).
\textsuperscript{124} If the landscaper had filed separate claims on each of the lots, he would have lost
his priority on certain lots and blocks on which he completed work more than ninety days
prior to filing his claim of lien. See FLA. STAT § 713.08(5) (Supp. 1976).
\textsuperscript{125} FLA. STAT § 713.09(1) (1975) requires the work to have been done as part of the
"same direct contract."
\textsuperscript{126} 337 So. 2d at 1014.
\textsuperscript{127} FLA. STAT. §§ 713.03-.06(2) (1975).
the Supreme Court of Florida adopted a more liberal construction in order to afford protection most compatible with justice and equity. Therefore, lienors who file notice after the forty-five day limit still may participate either in full or pro rata to the extent funds remain due from the owner to the contractor after payment has been made to the "priority" lienors.\(^{128}\) Of course, it is necessary for the complaint to allege the existence of any undisbursed or improperly paid funds in order to avoid dismissal.\(^{129}\) However, an owner may have the burden of proving as a defense that his payments were proper when the lienor shows a proper claim and the owner failed to file a notice of abandonment of the contract with the general contractor.\(^{130}\)

A recent Fourth District case seems to be in contravention of the well settled rule. In \textit{Partin v. Konsler Steel Co.}\(^{131}\) the court stated: "This law [Florida Statutes section 713.06 (1975)] is explicit that a notice to owner must be served before commencing or not later than forty-five days from commencing to furnishing its materials. This is an \textit{absolute prerequisite} to perfecting a lien."\(^{132}\) The lienor claimant had filed its notice after the forty-five days had passed, but the owner had paid all sums due on the contract except for a small amount for some extras, which was paid to the claimant. The owner sought to cancel the lien and the lienor counterclaimed for foreclosure to recover the balance due him from the contractor. Apparently, the owner failed to obtain a final payment affidavit from the contractor.\(^{133}\)

The trial court found the lienor was entitled to foreclosure, but the Fourth District, requiring that the Mechanics' Lien Law be strictly construed, reversed and held that the lienor could not rely on the owner's failure to obtain a payment affidavit to excuse the lienor's failure to file notice within forty-five days. This broad statement seems inconsistent with the intent of the supreme court in that it indicates an absolute bar to recovery, rather than simply affecting the lienor's priority.\(^{134}\) However, in this particular case the actual

\(^{128}\) Crane Co. v. Fine, 221 So. 2d 145 (Fla. 1969). Numerous cases have applied the Crane rule. See 2 R. Boyer, \textit{supra} note 2, § 33.09.

\(^{129}\) Bell v. Boy's, Inc., 325 So. 2d 28 (Fla. 4th Dist. 1976). \textit{See also} Economy Suppliers & Fabricators, Inc. v. Centennial Homes, Inc., 325 So. 2d 421 (Fla. 4th Dist. 1976).

\(^{130}\) See Torres v. MacIntyre, 334 So. 2d 59 (Fla. 3d Dist. 1976).

\(^{131}\) 336 So. 2d 684 (Fla. 4th Dist. 1976).

\(^{132}\) \textit{Id.} at 685 (emphasis added).

\(^{133}\) FLA. STAT. § 713.06(3)(d)(1) (1975).

\(^{134}\) \textit{See} note 127 \textit{supra} and accompanying text.
result may have been the same since all the money had been paid out.

D. Security Bonds

1. Transfers of Liens to Security

A lien may be transferred to other security by the owner of the encumbered property. The other security may consist of either depositing a sum of money with the clerk, or executing and filing a surety bond. If the owner properly transfers the lien to a surety bond and is not in privity with the lienor, a question arises as to whether the owner is a necessary or proper party to a foreclosure suit on the mechanic's lien. The District Court of Appeal, Second District, answered that question in the negative in Deltona Corp. v. Indian Palms, Inc. The owner properly had transferred the lien to a surety bond, and a materialman not in privity with the owner brought suit to foreclose on the lien. The trial judge dismissed the action against the owner and ordered joinder of the surety company.

In affirming, the Second District reasoned that since there was no privity, no direct action existed against the owner. Any such action would be to impress a lien on the property, and the only reason the owner would be a necessary party is to satisfy due process as to his property. The court stated that the purpose of the statute was to permit an owner to remove the cloud of lien from his property by posting a bond. Since the rights of a lienor not in privity with the owner are determined by the equities between the lienor and the parties with whom he has privity (i.e., the general contractor), the court reasoned that the owner is not a necessary party to the action. In fact, it noted that the owner may not be a proper party if he chooses not to contest the amount of lien.

A different result was obtained in McGuire v. Consolidated Electrical Supply, Inc. There the District Court of Appeal, Fourth District, held that a lien cannot be foreclosed unless the property owner is made a party to the suit despite the fact that the lien has

136. Id.
137. 323 So. 2d 282 (Fla. 2d Dist. 1975).
138. The court noted in a footnote that if the lienor had been in privity with the owner, the result would have been different since the lienor could have brought a personal action against the owner if he failed to establish all or part of his lien. 323 So. 2d at 283 n.2.
139. 329 So. 2d 411 (Fla. 4th Dist. 1976).
been transferred to a surety bond. In *McGuire*, the individual defendants owned a tract of land which they sold to a corporation. Just prior to the sale, a materialman commenced delivering materials to be used in improving the realty. Subsequently, the materialman brought suit against the former individual owners to foreclose a mechanic’s lien, although he was well aware the corporation was the true owner. The corporation transferred the lien to a surety bond, and the bonding company was made a party defendant. The corporate owner was never made a party, and the trial court entered judgment against the former individual owners and the surety.

The Fourth District reversed as to the individuals stating that even if they had been the owners, no personal action would lie against them as there was no privity with the lienor. The court also reversed the judgment against the bonding company on the ground that the liability of a surety ordinarily is measured by the liability of its principal, and the principal had not been made a party to the action. The Fourth District noted that since the bond had not been introduced into evidence, the court could not determine if the lienor could maintain suit against the surety without its principal. Such language might be viewed as stating that in some cases the owner would not be a necessary party if he transferred the lien to a security. However, the *Deltona* decision presumably indicates that the Third District would not make such a qualification.

2. PAYMENT BONDS

If an owner wishes to exempt himself from the Mechanics’ Lien Law, he may, at his option, require the contractor to furnish a payment bond pursuant to section 713.23 of the Florida Statutes (1975). In *Guin & Hunt, Inc. v. Hughes Supply, Inc.* a general contractor and the surety contended the bond was a performance bond rather than a payment bond envisioned by section 713.23.

The bond in question contained a condition that the surety would not be liable unless the owner and lender made all payments and fulfilled all conditions pursuant to the contract with the general contractor. When a subcontractor who had not been paid sought to recover on the bond as provided by section 713.23, the contractor and surety claimed as an affirmative defense that the bond was a common law bond, that they were free to contract for any type of

140. 335 So. 2d 842 (Fla. 4th Dist. 1976).
bond they desired, and that, therefore, they need not pay on such bond since the contractor had not received certain payments from the owner or lender.

The trial court rejected their affirmative defense and granted summary judgment in favor of the subcontractor. The Fourth District affirmed the trial court, holding that a bond purporting to protect against mechanics' liens must be construed as a payment bond contemplated by section 713.23, and not merely a performance bond. The court noted that the subcontractor was a third party donee obligee of the bond, and his rights were vested and could not be defeated by failure of the owner or lender to comply with special provisions of the bond.

E. Attorney's Fees

The prevailing party in an action brought to enforce a lien may recover a reasonable attorney's fee. Determining who is the prevailing party may become more difficult if there are several counterclaims, crossclaims, or third party claims involved. In Padgett v. Gulfstream Air Conditioning Co. the court held that when final judgment in a suit to foreclose a mechanic's lien was entered in favor of defendant against plaintiff, with an amount ultimately awarded to defendant based upon the court's recognition of the defendant's counterclaim, which was substantially satisfied by further judgment in favor of plaintiff in a third party action, the award to plaintiff of attorney's fees was erroneous.

Whether the statute permits recovery of attorney's fees at the appellate level as well as the trial level had been the subject of some disagreement. The First and Second District Courts of Appeal had held that such fees are not recoverable, while the Fourth District allowed the prevailing party to recover attorney's fees for the appeal.

The Supreme Court of Florida recently decided the issue in Sunbeam Enterprises, Inc. v. Upthegrove. The court stated that

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142. 312 So. 2d 473 (Fla. 4th Dist. 1975).
143. R. F. Driggers Constr. Co. v. Bagli, 313 So. 2d 450 (Fla. 2d Dist. 1975); Babe's Plumbing, Inc. v. Maier, 194 So. 2d 666 (Fla. 2d Dist. 1967); John T. Wood Homes, Inc. v. Air Control Prods., Inc., 177 So. 2d 709 (Fla. 1st Dist. 1965).
144. Foxbilt Elec., Inc. v. Belefant, 280 So. 2d 28 (Fla. 4th Dist. 1973).
145. 316 So. 2d 34 (Fla. 1975).
awarding attorney's fees was in derogation of the common law and that statutes authorizing such fees should be strictly construed. Because the statute does not expressly authorize awarding attorney's fees incurred on appeal, the supreme court held they were not recoverable.

VI. LANDLORD AND TENANT

A. General Legislation

Other than passage of the new Mobile Home Act, little significant landlord-tenant legislation was passed during the survey period. In 1976 the security deposit law was amended to provide that if the landlord makes a claim on part of the tenant's security deposit and the tenant does not object, the landlord must remit the balance of the security deposit to the tenant within thirty days.

Security deposits were the subject of litigation in Department of Business Regulations, Division of Hotels and Restaurants v. Stein, which held that Florida Statutes section 83.49(2) (1973) did not require the payment of interest on security deposits created prior to the effective date of the statute, October 1, 1972. However, the court specifically refused to rule on the effect of the 1975 amendment which created subsection (6) to provide that security deposits carried forward upon renewal of an existing lease are to be considered "new security deposits." Presumably, any lease with a security deposit created prior to October 1, 1972, but renewed subsequent to the 1975 amendment, would require payment of interest.

Rule 2-11.07 under Florida's "Little FTC" Act, created pursuant to the department's rulemaking authority, has declared retaliatory conduct by landlords, such as increased rents or eviction, to be an unfair trade practice. The rule itself might constitute an

149. 326 So. 2d 205 (Fla. 3d Dist. 1976).
153. See also 76 Op. Atty's Gen. 48 (1976). It might also be argued that retaliation would constitute a breach of the good faith requirement, or it may be found unconscionable, such that it should be a permissible defense. Fla. Stat. § 83.51(1) (1975). See generally 2 R. Boyer, supra note 2, § 37A.03.
affirmative defense in an eviction action brought by the landlord in county court, but a more certain method of asserting it may be to file a counterclaim based on the remedies afforded by Florida’s “Little FTC,” and remove the case to the circuit court which would have jurisdiction to grant an injunction.

In *Kendig v. Kendall Construction Co.* the tenant had sought a declaration that the landlord’s termination of his tenancy and threatened eviction were retaliatory actions and asked that the landlord be enjoined from evicting the tenant without good cause. The landlord subsequently brought an eviction action in county court, and the two suits were consolidated and tried in circuit court. The trial court found the landlord’s conduct was a complete bar to his eviction action, but only enjoined its prosecution for two weeks. However, the District Court of Appeal, Fourth District, finding it unnecessary to address the injunction issue, held that the case should have been dismissed because of the landlord’s actions. Because *Kendig* is not clear on the proper procedure to invoke the rule, it would be advisable to seek an injunction and not rely on the rule itself as an affirmative defense.

The procedures for enforcing Florida’s innkeeper’s lien statutes were declared unconstitutional in *Johnson v. Riverside Hotel, Inc.* The federal court stated that the procedures of excluding guests from their rooms and locking their belongings inside violated procedural due process. The court noted that postseizure procedures provided under Florida Statutes section 85.011 (1975) do not cure the defects. Finally, the court found the innkeeper’s seizure of a guest’s property to be “under color of state law” such as to fall within the purview of the Civil Rights Act of 1871.

B. Mobile Home Parks—Legislation

In 1976 the legislature enacted the Florida Mobile Home Landlord and Tenant Act. This Act considerably expands pre-existing legislation on mobile home parks and closely parallels Florida’s gen-

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154. 317 So. 2d 138 (Fla. 4th Dist. 1975).
eral Residential Landlord and Tenant Act. The new Act applies only to tenancies in which a mobile home is placed upon a rented or leased lot in a mobile home park for residential purposes. If both the mobile home and lot are rented, the tenancy is governed by the regular Residential Landlord and Tenant Act. The new Act excludes parks with ten or less mobile home lots as well as rentals of space for recreational type vehicles designed primarily for temporary living quarters.

The Mobile Home Act, like the regular Residential Act, imposes an obligation of good faith in the performance or enforcement of every rental agreement and renders unconscionable provisions unenforceable. Another similarity between the two acts is the new legislative provision relating to attorney's fees. This section provides that if a rental agreement contains a provision allowing attorney's fees to the mobile home park owner, the court also may allow attorney's fees to the mobile home owner who prevails in any action by or against him.

The Mobile Home Act expressly states that a rental agreement may provide a specific duration with respect to the amount of rental payments and other conditions of the tenancy; but the agreement may neither provide for, nor be construed to provide for, the termination of any rental agreement except as provided in the Act. Moreover, to the extent that a provision attempts to waive or preclude the rights or requirements set forth in the Act, it is void and unenforceable.

The park owner is allowed access to mobile homes only upon prior written consent of the homeowner or to prevent imminent danger to the occupant or the mobile home. Such consent may be revoked in writing by the mobile homeowner at any time. But the

159. FLA. STAT. §§ 83.40-.63 (1975), as amended by 1976 Fla. Laws ch. 76-15 (codified at FLA. STAT. § 83.49 (Supp. 1976)).
161. FLA. STAT. §§ 83.40-.63 (1975), as amended by 1976 Fla. Laws ch. 76-15 (codified at FLA. STAT. § 83.49 (Supp. 1976)).
162. FLA. STAT. § 83.760(6) (Supp. 1976).
164. FLA. STAT. § 83.753 (Supp. 1976).
165. FLA. STAT. § 83.754 (Supp. 1976).
166. FLA. STAT. § 83.756 (Supp. 1976).
park owner has the right of entry at all reasonable times for purposes of repair and replacement of utilities, as well as for the protection of the mobile home park, provided that such entry does not unreasonably interfere with the homeowner's quiet enjoyment of his lot.\footnote{170}

In addition, the Act delineates the respective obligations of the park owner and mobile home owner.\footnote{171} Both are required to comply with applicable building, housing, and health codes.\footnote{172} The homeowner must comply with all reasonable park rules and regulations, and keep his mobile home lot in a clean and sanitary condition.\footnote{174} In turn, the park owner must maintain the common areas, as well as the buildings and improvements therein,\footnote{175} and keep the utility connections in a reasonably usable condition.\footnote{176} The park owner also must provide access to the common areas, including buildings and improvements, at all reasonable times for the park residents.\footnote{177}

The Florida Act further requires mobile home parks to offer written leases to their tenants.\footnote{178} No tenancy for valuable consideration in such a park, except one for transient occupancy, may be enforced or terminated unless prior to the occupancy the tenant has been offered a written lease. If the mobile homeowner does not enter into a written lease or if the written lease has expired, the tenancy may be terminated only in accordance with the statutory provisions relating to eviction.\footnote{180}

A mobile home park owner or operator may not evict a mobile home or mobile home dweller other than for the following reasons: (1) nonpayment of rent; (2) conviction of a violation of a law or ordinance where the violation is deemed detrimental to the health, safety, or welfare of the other park dwellers; (3) violation of any reasonable park rule or regulation; or (4) change in the use of the land comprising the mobile home park subject to certain notice requirements.\footnote{181}
The Act is designed to protect tenants who have no available alternative for relocation from unexpected evictions when the park is rezoned or converted to other uses. It specifically provides that no local or state agency may approve an application for rezoning or take official action which would result in the removal or relocation of mobile home owners, or which is opposed by the park owner, without first investigating the adequacy of other parks or suitable facilities for relocation. Presumably, a governmental unit could investigate and find no adequate alternative facilities but nevertheless approve a rezoning and termination of the park.

Other significant provisions of the Mobile Home Act relate to such matters as the remedies available to park owners and mobile home owners, defenses to actions for rent or possession, the purchase of equipment and installation of appliances, the disclosure of and limitations on fees and charges, and restrictions on the sale of mobile homes.

C. Default—Waiver

Landlords frequently provide in their leases for a right of reentry should the tenant breach any of the conditions or covenants in the lease. In Dumor Avionics, Inc. v. Hangar One, Inc., a sixty month lease agreement provided that the filing of a petition in bankruptcy by the tenant would constitute a default. After the tenant filed for bankruptcy, the landlord orally notified the tenant that although it considered the lease in default the tenant would be permitted to remain on the premises as a tenant at will from month to month. Subsequently, the landlord notified the tenant that the monthly rent would be increased. The tenant paid the increase but thereafter fell in arrears, and the landlord sued for unlawful detention and claimed damages for the rent due. The tenant contended the landlord waived any default which may have resulted from the

188. 2 R. Boyer, supra note 2, § 35.03(2). See also Fla. Stat. §§ 83.53(2)-(3) (1975) for a statutory right of reentry in residential leasing.
189. 319 So. 2d 95 (Fla. 3d Dist. 1975).
filing for bankruptcy by accepting rent with full knowledge of that fact.

The trial court found for the plaintiff landlord, awarding damages for back rent and attorney's fees. However, the trial court also held that the tenant would have one more year as tenant at the increased rental rate. The landlord appealed and the tenant cross-appealed to the District Court of Appeal, Third District. The Third District stated that the question of waiver is generally one of fact to be tried on the issues properly defined in the pleadings. The court found that there was substantial evidence upon which the trier of fact could conclude that the landlord notified the tenant that the lease was null and void, that a tenancy from month to month was created, and therefore there was no waiver on the default.

However, the Third District correctly held that the trial judge's refusal to grant possession to the landlord was error. In effect, the trial judge had rewritten the lease agreement by enabling the tenant to retain possession for one year at the increased rent. That portion of the order was reversed and remanded with instructions to award possession of the premises to the landlord.

D. Damages

The landlord has a duty to deliver possession of the premises to the tenant on the date that the lease is to take effect; failure to do so may result in a breach of contract action against the landlord. A question arises as to whether special damages, such as disruption of business or loss of income, may also be recovered. In Sales Careers, Inc. v. Atrium Office Park, Inc. a tenant sought to recover special damages from the landlord as a result of its negligent notification to the tenant that the premises were ready for occupancy when in fact they were not ready. The lease provided that the recovery would be limited to the abatement of rent for a period no longer than seventeen days. The trial judge found the provision limiting damages to be controlling and transferred the action to county court since seventeen days of rent would be less than the minimum jurisdictional amount ($2,500.00) required by the circuit.
court. On interlocutory appeal, the District Court of Appeal, Third District, reversed and remanded the case to the circuit court. The Third District held that the cause of action sounded in tort and that special damages recoverable in tort were not limited by the contract provision.  

E. Options

Options to renew or purchase are often the subject of litigation, and the survey period did not prove to be an exception. There has been some question as to whether it is necessary for the tenant, who wishes to exercise his option to purchase, to tender the entire purchase price at the time he exercises the option. In 1958, the Supreme Court of Florida held that such tender was not necessary when the lessor notified the lessee that she did not intend to convey the property anyway. The court noted that generally the issue would be a question of construction of the instrument.

The District Court of Appeal, First District, may have broadened the rule somewhat in Doolittle v. Fruehauf Corp., where the court stated that it would not be necessary to tender the purchase money at the time the option was exercised if such condition was not stated expressly in the option. The court further noted that the only requirements for exercising an option are: (1) the optionee must decide to purchase the property under the terms of the option, and (2) such decision must be communicated to the optionor during the life of the option.

In Doolittle the tenants wrote to the landlord during the life of the option tendering “formal notice of their desire to purchase the property.” The court found that the letter, when read as a whole, was not equivocal, ambiguous, or conditional and that the option became a bilateral contract, which was binding on both parties and enforceable by specific performance.

It has been held that a timely renewal of a lease would carry with it and extend the life of an option to purchase which is exercisable during the term of the lease. It also has been recognized that
under special circumstances, equity will permit the lessee to exercise a renewal option although the time specified in the lease has expired.199 In Ledford v. Skinner200 the District Court of Appeal, First District, applied both of these principles in holding that an oral acceptance of the lessee's decision to renew the lease subsequent to the life of the option and the acceptance of monthly rental payments for thirty-three months after expiration of the initial term of the lease formed an equitable basis for allowing the lessees to exercise their option to purchase. Even though the original lease had required written notice to renew, the lessors were estopped from denying the lease was renewed, and therefore, the option to purchase was continued into the renewed lease under the rule of Sisco v. Rottenberg.201

VII. CONDOMINIUMS

In 1976 the Florida Legislature completely revised all the statutes relating to condominiums and cooperatives.202 Chapter 718, relating solely to condominiums, and chapter 719, relating solely to cooperatives, replaced chapter 711 of the Florida Statutes and became effective January 1, 1977.203 Except for certain definitional provisions, the chapters are substantially identical. Since condominiums are the more prevalent form of ownership, this discussion will briefly outline the most important changes with regard to condominiums.204

Although the primary focus of the comprehensive revision was the elimination of redundancies and ambiguities in the former law, there were also some substantive changes. Common law condominiums are no longer permitted, as all new condominiums must be created under the Act.205 However, condominiums may now be cre-

199. Dugan v. Haige, 54 So. 2d 201 (Fla. 1951). See also 2 R. Boyer, supra note 2, § 35.07[4].
200. 328 So. 2d 219 (Fla. 1st Dist. 1976).
201. 104 So. 2d 365 (Fla. 1958).
203. Florida Statutes section 718.102 (Supp. 1976) provides that the act shall apply to "every condominium created and existing in this state." But see Fleeman v. Case, 342 So. 2d 815 (1976) with regard to the nonretroactivity of certain provisions of the act.
205. See Fla. Stat. §§ 718.102, 718.104 (Supp. 1976). A constitutional question may be presented insofar as the statutory provisions might conflict with rights obtained under those
ated prior to actual construction,\textsuperscript{206} with subsequent amendment of the declaration after substantial completion. The Act has broadened the definition of developer to include those who offer condominium parcels in the ordinary course of business.\textsuperscript{207}

Every condominium association created after January 1, 1977, must be incorporated either for profit or not for profit.\textsuperscript{208} The association is now given a statutory right to sue.\textsuperscript{209} A unit owner may be personally liable for the acts or omissions of the association in relation to the common elements, but only to the extent of his pro rata share in the same percentage as his interests in the common elements.\textsuperscript{210} However, this exposure may be considerable, and a problem arises as to how the unit owner can protect himself.

Prior to commencement of construction, a developer must post a bond or put an amount in escrow with the clerk of the county equal to 110 percent of the ad valorem tax liability of the parcel for the preceding year.\textsuperscript{211}

The new Act increases from five to ten percent the amount of sales deposits which must be placed in an escrow account.\textsuperscript{212} Deposits in excess of ten percent may be used by the developer if the contract of sale so provides.\textsuperscript{213}

The developer’s warranties of implied fitness and merchanta-

\begin{footnotesize}
\textsuperscript{206} FLA. STAT § 718.104(4)(e) (Supp. 1976).
\textsuperscript{207} FLA. STAT. § 718.103(13) (Supp. 1976). Consequently mortgage foreclosures are apparently governed by the provisions covering the rights and obligations of the developer.
\textsuperscript{208} FLA. STAT. § 718.111(1) (Supp. 1976).
\textsuperscript{209} “After control of the association is obtained by unit owners other than the developer, the association may institute, maintain, settle or appeal actions or hearings in its name on behalf of all unit owners concerning matters of common interest ...” FLA. STAT § 718.111(2) (Supp. 1976). This addition in the statute will permit the association to maintain an action for representations made by a developer to individual purchasers which affect the entire class of purchasers.
\textsuperscript{210} FLA. STAT. § 718.119(2) (Supp. 1976) is a direct reversal of former FLA. STAT § 711.18 (2) (1975) (repealed 1977) which provided that the unit owner should have no personal liability for damages caused by the association or those in connection with the use of common elements. However, the newly required corporate form does protect unit owners from joint and several liability. Since most associations were created as corporations, the requirement of corporate status has little effect. See also FLA. STAT. § 718.111(9) (Supp. 1976) which requires the association to maintain adequate liability insurance.
\textsuperscript{211} FLA. STAT. § 718.201 (Supp. 1976).
\textsuperscript{212} FLA. STAT. § 718.202(1) (Supp. 1976) (increased from the five percent provided in FLA. STAT. § 711.67(1) (1975) (repealed 1977)).
\textsuperscript{213} FLA. STAT § 718.202(3) (Supp. 1976).
\end{footnotesize}
Warranties for personal property transferred with or appurtenant to each unit are for the same period as that provided by the manufacturer, but they commence with the date of closing of the purchase or the date of possession. Condominiums may now be created on any leasehold which has an unexpired term of at least fifty years. The association must still be given an option to purchase the lease, but parties independent of the developer who hold underlying land leases are exempted from granting this option.

The Act provides specific enabling legislation for conversions, gives explicit detail on the creation of phase developments, and outlines the rights of unit owners in relation thereto.

The Division of Florida Land Sales was given the power to enforce and ensure compliance with condominium provisions in 1975. Each association was assessed a $1.00 per unit owner fee due on October 1. Fees are now due January 1 each year and failure to pay by June 1 will result in an additional assessment of ten percent and loss of standing to sue until payment.

The prospectus or offering circular requirements have been simplified under the recent legislation. The Act also added section 193.023(4), prohibiting the tax assessor from taking rental value into account when valuing leasehold interests in property serving the unit owners.

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214. FLA. STAT. § 718.203(1)(a) (Supp. 1976) (decreased from the five years provided in FLA. STAT. § 711.65(1)(1975) (repealed 1977)).


216. FLA. STAT. § 718.401 (Supp. 1976). FLA. STAT. § 711.08(1)(1975) (repealed 1977) had required the initial term to be in excess of 98 years and the unexpired term to be in excess of 50 years.


220. FLA. STAT. § 711.801 (1975) (current version at FLA. STAT. § 718.501(1) (Supp. 1976)). The name of the Division was also changed to the Division of Florida Land Sales and Condominiums.


222. FLA. STAT. § 718.504 (Supp. 1976).

VIII. WATER LAW

A. Submerged Lands

The 1921 Butler Act\textsuperscript{224} granted title to submerged lands, which previously had been vested in the Trustees of the Internal Improvement Fund, to upland riparian owners together with the authority to bulkhead and fill to the edge of the channel.\textsuperscript{225} Although it appeared that the Butler Act vested title automatically in the riparian owners, it was held that such grant was provisional and conditioned upon the riparian owners' compliance with the statute.\textsuperscript{226} Until the owners actually filled in the land, it was subject to reversion to the state at any time.\textsuperscript{227} This legislation was repealed in 1957 by the Bulkhead Act,\textsuperscript{228} and new procedures were enacted for bulkheading, filling, and conveying submerged lands to upland owners.\textsuperscript{229}

The effects of these legislative changes gave rise to the salient issue in Board of Trustees of the Internal Improvement Trust Fund v. Bankers Life and Casualty Co.\textsuperscript{230} In that case, the owner of land lying between the Atlantic Ocean and a lake brought an action against the Board of Trustees of the Internal Improvement Trust Fund seeking a declaration that the owner had the right to fill the area between the high water mark and the bulkhead line. The District Court of Appeal, First District, noted that the question to be resolved was whether the trial court properly found that the landowner fell within the terms of section 11 of the Bulkhead Act.\textsuperscript{231} That section made the Bulkhead Act inapplicable to the extension of, or addition to, existing lands or islands bordering on navigable waters for which an application for a permit to fill lands or bottoms lying between the high water mark and a bulkhead line was filed with the United States Corps of Engineers prior to the effective date of the Act.

Adopting the opinion of the trial court, the First District held that where a bulkhead line has been established prior to June 11, 1957 (the effective date of the Bulkhead Act), and an application

\textsuperscript{224} 1921 Fla. Laws ch. 8537 (repealed 1957).
\textsuperscript{225} Id. See generally 1 R. Boyer, supra note 2, §25.08.
\textsuperscript{226} Duval Eng'r & Contracting Co. v. Sales, 77 So. 2d 431 (Fla. 1955).
\textsuperscript{227} Holland v. Fort Pierce Fin. & Constr. Co., 157 Fla. 649, 2 So. 2d 76 (1946).
\textsuperscript{228} 1957 Fla. Laws ch. 57-362, § 9.
\textsuperscript{229} 1957 Fla. Laws ch. 57-362.
\textsuperscript{230} 331 So. 2d 381 (Fla. 1st Dist. 1976).
\textsuperscript{231} 1957 Fla. Laws ch. 57-362, § 11.
for a permit to fill land between the high water mark and a bulkhead line also has been filed with the Corps of Engineers before this date, this area of land is subject to the Butler Act. Therefore, the Board of Trustees had no authority to require the landowner to obtain a permit before engaging in its filling operation, and the landowner still had the right under the Butler Act to make the desired fill, thereby acquiring title to the filled land.

Under the 1957 legislation, the Trustees of the Internal Improvement Fund have the authority to convey those submerged lands affected by the legislation and to grant permits for their filling and development. However, in State Board of Trustees of the Internal Improvement Trust Fund v. Sea-Air Estates, Inc., the District Court of Appeal, Third District, held that the water bodies involved were artificially created navigable waters and thus fell within a statutory exception to the regulatory authority of the Board of Trustees. Apparently, the landowner had dredged canals on its land and then "pulled the plugs" to connect these canals to natural navigable waters. Since the court held the Board of Trustees did not have jurisdiction, the landowner was not required to replace the fill.

B. Nonnavigable Waters

The civil law has been adopted by the Supreme Court of Florida as the rule applicable to the use of nonnavigable lakes by abutting owners. This rule permits reasonable use of the entire water body by each individual owning a part of the water bed and denies to any one owner the right to fill or otherwise exclude other persons who also own part of the lake bed. But in Publix Super Markets, Inc. v. Pearson the District Court of Appeal, Second District, held that this "reasonable use" doctrine does not extend to artificial lakes.

In Publix the owners of homes bordering on water filled phosphate pits brought an action to prohibit another owner from reclaiming and filling approximately ten acres of the pits located on

233. 327 So. 2d 823 (Fla. 3d Dist. 1976).
236. Duval v. Thomas, 114 So. 2d 791 (Fla. 1959).
237. 315 So. 2d 98 (Fla. 2d Dist. 1975), cert. denied, 330 So. 2d 20 (Fla. 1976).
its land. The trial court enjoined the defendant from proceeding with its proposed reclamation and development of the phosphate pits. In reversing the trial court's ruling, the appellate court noted the general proposition that riparian rights ordinarily do not attach to artificial water bodies or streams. It also attempted to distinguish *Silver Blue Lake Apartments, Inc. v. Silver Blue Lake Home Owners Association* by observing that, unlike the artificial lake in that case, the phosphate pits in question were not encircled by a subdivision, nor had they been dedicated to recreational use by means of deed restrictions.

It should be noted, however, that while the supreme court in *Silver Blue Lake Apartments* upheld an injunction prohibiting the use of an artificial lake by tenants of an abutting landowner on the basis of a restrictive covenant, in dictum the majority opinion stated in response to a question certified by a district court:

> In our view, as an abstract proposition, the right of owners of a portion of the bed (of an artificial lake, which *is found as a fact from the evidence* to be a non-navigable lake,) to rent their rights to use of the water surface to tenants of an apartment complex on the land including a portion of the lake bed, is only the right of lawful and reasonable use not detrimental to other owners or lawful users . . . .

**C. Pollution**

In *Sexton Cove Estates, Inc. v. State Pollution Control Board*, a real estate developer, upon being denied the necessary certification that the canal dredging in its subdivision would not affect water quality standards, petitioned for writ of certiorari to review the order of the Florida Pollution Control Board. The District Court of Appeal, First District, held that although the real estate developer may have acted at its own peril in not securing a proper

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238. 245 So. 2d 609 (Fla. 1971).
239. Id. at 612 (emphasis in original).
240. 325 So. 2d 468 (Fla. 1st Dist. 1976). See the related case, United States v. Sexton Cove Estates, Inc., 389 F. Supp. 602 (S.D. Fla. 1975), *aff'd in part and rev'd in part*, 526 F.2d 1293 (5th Cir. 1976), *noted in* 31 U. MIAMI L. REV. 697 (1977), where the federal government obtained an injunction in the district court restraining the developer from conducting further fill or excavation of the tidal navigable waterway. On appeal, the Fifth Circuit held that the Corps of Engineers had jurisdiction over five canals which connected directly to a natural navigable water body, but that the Corps did not have jurisdiction over five landlocked canals.
permit before dredging, the required state certification that water quality standards would not be violated by the dredged canals could not be denied by using standards which had been established subsequent to the developer's application for an after-the-fact certification.241

D. Administrative Control

*Pinellas County v. Lake Padgett Pines*242 involved the question of whether the regulatory aspects of a well field project, particularly with regard to environmental impact, are controlled by the Water Resources Act243 or by the Environmental Land and Water Management Act.244 Development of the well field in Pasco County was undertaken to furnish water to densely populated Pinellas County. The plaintiff, a developer with large land holdings near the project, alleged that the construction and operation of the well field constituted a development of regional impact which was proceeding without complying with the Environmental Land and Water Management Act. It sought to enjoin the continuation of the project until such compliance had been obtained.

Upon finding the well field to be a development of regional impact, the trial court issued an injunction. On appeal, however, the District Court of Appeal, Second District, reversed, holding that the regulatory aspects of a well field project specifically designed to provide water for already existing developments in urbanized areas are controlled by the Water Resources Act, rather than the Environmental Land and Water Management Act. The Second District concluded that the legislature considered that the state's environmental concerns would be better met by holding that a development whose very purpose is to supply water under the Water Resources Act should be regulated solely within the purview of the appropriate governmental agencies set up under that Act.

E. Legislation

The Florida Legislature recently passed the Environmental

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241. During the pendency of the application for certification, Florida Statutes section 403.087(1) (1971) became effective.
242. 333 So. 2d 472 (Fla. 2d Dist. 1976).
243. FLA. STAT. ch. 373 (1975).
244. FLA. STAT. ch. 380 (1975).
Reorganization Act of 1975. This Act represents a comprehensive attempt to restructure the administration of the state’s environmental laws. Among other notable things, the Act created the Department of Environmental Regulation, which has assumed certain powers and functions formerly within the ambit of the Board of Trustees of the Internal Improvement Trust Fund. Moreover, the duties of the Pollution Control Board of the Department of Pollution Control were transferred to the governor and cabinet.

In 1976 the legislature also made substantial amendments in laws governing water management districts. In part, this legislation transfers certain areas within a number of water management districts to other districts. Each transferee district assumes all the contractual obligations with respect to the transferred area and receives all the property interests therein.

IX. EMINENT DOMAIN†

A. Nature and Extent of Power

The government’s eminent domain power is limited to situations where it can show a public purpose and a reasonable necessity for the taking. In *Baycol, Inc. v. Downtown Development Authority* the condemnation of property in downtown Fort Lauderdale was sought in order to make room for a parking garage. The parking garage was necessary to help ease the traffic problems that were sure to follow the construction of a shopping center above the parking garage. Baycol complained that no public purpose had been shown and argued that the goal of the condemnation was to construct a shopping center. Without the shopping center there would be no parking problems and no need for parking spaces.

While noting that there might be a “public benefit” from the construction of the shopping center, the Supreme Court of Florida drew a distinction between that kind of “public benefit” and the

246. 1976 Fla. Laws ch. 76-243, § 1 (amending Fla. Stat § 373.069(3) (1975)).
247. 1976 Fla. Laws ch. 76-243, § 2 (codified at Fla. Stat. § 373.0691 (Supp. 1976)).† The authors express their appreciation to Gerald J. Hayes, Articles & Comments Editor, *University of Miami Law Review*, for his valuable contribution in the preparation of this section of the survey.
248. Baycol, Inc. v. Downtown Dev. Auth., 315 So. 2d 451, 455 n.2 (Fla. 1975), citing City of Lakeland v. Buch, 293 So. 2d 66 (Fla. 1974); Ball v. City of Tallahassee, 281 So. 2d 333 (Fla. 1973); Canal Auth. v. Miller, 243 So. 2d 131 (Fla. 1970).
249. 315 So. 2d 451 (Fla. 1975).
showing of "public purpose" necessary to justify eminent domain action. Because the dominant purpose of taking the land was for private use and because the public necessity of having a parking garage was merely incidental to the condemnation, the supreme court reversed the District Court of Appeal, Fourth District, and remanded the action back to the circuit court with instructions to vacate the order of taking.

Another limitation on the government's eminent domain power is that "property devoted to a public use cannot be taken and appropriated to another and different public use unless the legislative intent to so take has been manifested in express terms or by necessary implication." This is known as the prior public use doctrine, and it was the subject of controversy in *Florida East Coast Railway Co. v. City of Miami.*

The Florida East Coast Railway Co. owned land which it leased to TMT Trailer Ferry, Inc. The lessee operated a marine terminal, allowing barges carrying truck-trailers from San Juan to dock and unload. When the City of Miami tried to condemn this land, the railroad invoked the prior public use doctrine. The District Court of Appeal, Third District, refused to allow the railroad to use the prior public use doctrine because, *inter alia,* it was not a "public body," but merely a "franchised public use company." The Supreme Court of Florida disagreed with the validity of that distinction. It held that if the public use was one which was necessary for the successful operation of the railroad, the doctrine applied. The case was remanded to find out if that use of the property was so needed.

B. *Compensation for Injuries to Property Not Taken*

Under Florida Statutes section 73.071(3)(b) (1975), a party may be awarded compensation for the damage to or destruction of a business of at least five years standing if less than the entire property is appropriated. Thus, in *Jamesson v. Downtown Development Authority* the lessees of a building, which had been condemned entirely, were denied the right to seek business damages. The court

250. Florida E. Coast Ry. v. City of Miami, 321 So. 2d 545, 547 (Fla. 1975).
251. Id.
252. City of Miami v. Florida E. Coast Ry., 286 So. 2d 247, 251 (Fla. 3d Dist. 1973).
253. 322 So. 2d 510 (Fla. 1975).
noted that the “Florida legislature has chosen not to allow damages in cases where all of the condemned property has been taken and the owner has been awarded full compensation.”

The five year requirement was explained by the District Court of Appeal, Second District, in *Hodges v. Division of Administration, State Department of Transportation*. There a hotel and marina had been operated on certain land for fifteen years. The business was discontinued for five months. Hodges bought the property and began operating the hotel and marina again. Less than five years later the property was condemned, and Hodges sought to recover business damages under the Florida statute. Though refusing to allow the recovery, the court pointed out that the change in owners was irrelevant. The court denied recovery because it determined that Hodges had bought only a “business place” and not a going concern. Since his business was unrelated to the one which had operated for fifteen years prior to the discontinuance, it was not one of five years standing.

Where the profitmaking capacity of a business is destroyed, the District Court of Appeal, Fourth District, has held that compensation is not limited to lost profits, but includes loss of goodwill. The condemnation of property adjacent to and owned by a laundromat completely destroyed its business. Since the court determined that compensation could be awarded for lost goodwill, even though the business might have been losing money, it reversed the circuit court’s exclusion of evidence relating to those damages.

The extent of compensation awarded for damages to property not taken by the condemnation of other property depends on whether the loss is substantial. ABS, Inc. owned a shopping center and land adjacent to it which provided direct access to a neighboring highway. The State Department of Transportation condemned part of the adjacent land, forcing shoppers to travel an extra hundred yards from the highway. When the jury awarded compensation only for the land taken, the circuit court awarded a new trial because no compensation was awarded for the loss of “direct” ac-

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254. *Id.* at 511.
255. 323 So. 2d 275 (Fla. 2d Dist. 1975).
256. FLA. STAT. § 73.071(3)(b) (1975).
257. *Hooper v. State Rd. Dep’t*, 105 So. 2d 515 (Fla. 2d Dist. 1958). Actually, during the fifteen years of continuous operation, there had been several owners.
258. *Matthews v. Division of Admin.*, State Dep’t of Transp., 324 So. 2d 664 (Fla. 4th Dist. 1975).
cess. The District Court of Appeal, Second District, reversed, holding that the award did not depend on whether the loss of access was "direct," but on whether it was "substantial." That being a jury determination, the verdict was reinstated.

C. Assessing Compensation

In *City of Jacksonville v. Yerkes* the District Court of Appeal, First District, affirmed the trial court's direction of a verdict for severance damages where the testimony of an expert witness was uncontroverted. A property owner relied on that decision in *Tuttle v. Division of Administration, State Department of Transportation*, where the taking of property for right of way purposes deprived the shopping center owner of parking spaces and resulted in business losses. The property owner presented a witness who said that the shopping center would lose $64,000 if there was a seventy percent reduction in its business. The state's witness reported that the average annual profits were only $12,500, which is the amount eventually awarded by the jury. Tuttle relied on *Yerkes* in arguing that since the $64,000 figure essentially was uncontroverted, the jury should have awarded at least that amount. However, the District Court of Appeal, First District, did not extend *Yerkes* that far and affirmed since there was a rational relationship between the jury's determination and the evidence.

The Supreme Court of Florida clarified *Yerkes* in *Behm v. Division of Administration, State Department of Transportation*. The taking of property in front of Behm's hardware store prevented the display of sales merchandise in front of the store. Behm's expert witness placed damages at $19,500. Although the state did not present a witness offering a contradictory figure, the jury awarded $9,500. Behm cited *Yerkes* as requiring a jury award of the minimum amount attested to at the trial. The supreme court disagreed

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259. State Dep't of Transp. v. ABS, Inc., 336 So. 2d 1278 (Fla. 2d Dist. 1976).
260. 282 So. 2d 645 (Fla. 1st Dist. 1973).
261. 327 So. 2d 841 (Fla. 1st Dist. 1976).
262. Tuttle claimed the business would decline seventy percent. *Id.* at 842.
263. *Id.* at 843. The court was careful to limit the *Yerkes* rule to severance damages, distinguishing such damages from business damages on the basis of burden of proof. While the question of burden of proof is unsettled with respect to severance damages, it is well established that the government has no burden to prove damages to business. Hence, only a rational relationship between the verdict and the evidence is required.
264. 336 So. 2d 579 (Fla. 1976).
and held that any amount introduced by the property owner must be regarded as a maximum. If the state offered evidence indicating the value of the loss, it would be considered a minimum. But the state did not, and is not required to sustain any burden regarding business losses.

The same day it decided Behm, the supreme court issued a ruling affirming the First District’s decision in Tuttle. However, the court noted that it disapproved the decision insofar as it reaffirmed Yerkes.

D. Miscellaneous

The trial court’s award of interest on compensation for business losses to a condemnee was reversed by the District Court of Appeal, First District, in Division of Administration, Department of Transportation v. Pink Pussy Cat, Inc. The court held that the business losses were consequential damages which did not have to be paid at the time of the taking but only after the damages were fixed by the jury.

In Pinellas County v. Austin the landowners sought damages because of the loss of the right of access to their property. Their neighbors had requested that the county close a road, causing the title to that property to revert to them. The county was held liable for inverse condemnation because its approval was necessary. Since the plaintiffs were able to show that the loss of access caused special damages not common to members of the general public, they were entitled to compensation.

In Askew v. Gables-by-the-Sea, Inc. a landowner was held entitled to require the state to institute condemnation proceedings through a mandatory injunction. The state had revoked plaintiff’s dredge and fill permit and thus deprived him of the right to use his land in the only way it could be of any value to him. Rather than recovering damages, the plaintiff would be awarded just compensation for the taking.

265. 336 So. 2d 583 (Fla. 1976).
266. Id. at 584.
268. 314 So. 2d 192 (Fla. 1st Dist. 1975).
269. 323 So. 2d 6 (Fla. 2d Dist. 1975).
270. 333 So. 2d 56 (Fla. 1st Dist. 1976).