St. Mary's Law Journal

Volume 19 | Number 2 Article 8

1-1-1987

Real Property - Homestead - Covenant to Pay Assessments Enforced by Foreclosure Provision Is Superior to After-Acquired Homestead Exemption Case Note.

Randy B. Warmbrodt

REAL PROPERTY—Homestead—Covenant To Pay Assessments Enforced By Foreclosure Provision Is Superior To After-Acquired Homestead Exemption

Inwood North Homeowners' Association, Inc. v. Harris
736 S.W.2d 632 (Tex. 1987)

Between 1981 and 1983, Charlie Harris and Rolando Pamilar purchased various lots in the Inwood North subdivision in Harris County, Texas.[1] The deeds given to Harris and Pamilar contained references to maintenance charges to be assessed by the Inwood North Homeowners' Association.[2] In December 1980, prior to the sale of lots in the subdivision, the developer properly filed a declaration of covenants and restrictions for Inwood North which included a provision stating that each Inwood North homeowner "is deemed to covenant and agree[s] to pay the Association the following: (a) annual assessment charges; and (b) special assessments for capital improvements."[3] These assessments, along with administrative costs, were to run with the land and to be secured by a vendor's lien upon the lot in which the assessment was due.[4]

Harris and Pamilar became delinquent in their payment of assessment charges.[5] Subsequently, the association brought suit in state district court to recover the amount due and to foreclose on the vendor's lien as provided for in the Inwood North Associations' declaration of covenants and restrictions.[6] By default, the Association obtained judgment allowing recovery of the amounts owed by Harris and Pamilar; however, neither the trial court nor the court of appeals would permit foreclosure on the homes due to their

1. *See* Inwood North Homeowners' Ass'n, Inc. v. Harris, 736 S.W.2d 632, 633 (Tex. 1987).

2. *See id.* at 634.

3. *Id.* at 633-34. The declaration of covenants and restrictions created the Inwood North Homeowners' Association, a non-profit corporation responsible for: (1) enforcing restrictions, (2) management and expenditure of assessment funds, (3) architectural control, (4) general supervision, and (5) collections. *See* Inwood North Homeowners' Ass'n v. Pamilar, 707 S.W.2d 125 (Tex. App.—Houston [1st Dist.] 1986), *rev'd sub nom.* Inwood North Homeowners' Ass'n, Inc. v. Harris, 736 S.W.2d 632 (Tex. 1987).

4. *See* Harris, 736 S.W.2d at 633.

5. *See id.* at 632. Although the past due assessment fees for Harris and Pamilar were not mentioned by the court, the association's judgments against all delinquent homeowners ranged from $577 to $705. *See* Pamilar, 707 S.W.2d at 126.

6. *See* Harris, 736 S.W.2d at 634. The declaration provided that the assessment fees were to be "a charge on the land and shall be secured by a continuing Vendor's lien upon the Lot against which such assessments or charges are made." *Id.*

homestead character.[7] The court of appeals held that the failure to pay the annual assessments could not be secured by a valid vendor's lien because assessment fees were not part of the purchase price.[8] Therefore, the remedy for failure to pay was a judgment lien and not foreclosure.[9] The Texas Supreme Court granted the Association's writ of error to consider the propriety of foreclosure on the homes to collect the past due assessment fees.[10] Held—*Reversed and Remanded.* A covenant to pay assessments enforced by a foreclosure provision is superior to an after acquired homestead exemption.[11]

Beginning with the first American constitutional homestead exemptions in 1845, Texas enacted laws to liberally protect homestead claimants from foreclosure.[12] The Texas Constitution provides, in part, "the homestead . . . is . . . protected from forced sale, for the payment of all debts except for the purchase money thereof . . . the taxes due thereon, or for work and material

---

7. *See* Inwood North Homeowner's Ass'n v. Pamilar, 707 S.W.2d 125, 125 (Tex. App.—Houston [1st Dist.] 1986), *rev'd sub nom.* Inwood North Homeowners' Ass'n, Inc. v. Harris, 736 S.W.2d 632 (Tex. 1987). The Houston Court of Appeals considered the appeal of the Inwood North Homeowners' Association for foreclosure of the lien in two separate opinions; however, these opinions, *Inwood North Homeowners' Association v. Pamilar*, 707 S.W.2d 125 (Tex. App.—Houston [1st Dist.] 1986) and *Inwood North Homeowners' Association v. Harris*, 707 S.W.2d 127 (Tex. App.—Houston [1st Dist.] 1986), are identical. The court of appeals held that the declarations' attempts to secure payment of assessments by a vendor's lien were invalid because the assessment charges were not a part of the purchase price. Furthermore, no secured lien existed since: (a) full title was transferred to the homeowners and the developer retained no interest, and (b) there was no deed of trust to evidence the homeowners' intent to pledge their property for assessment fees. *See id.* The suit was one "based on the covenant to pay and not foreclosure." Pamilar, 707 S.W.2d at 126; Harris, 707 S.W.2d at 128-29.

8. *See* Pamilar, 707 S.W.2d at 126.

9. *See id.*

10. *See* Inwood North Homeowners' Ass'n, Inc. v. Harris, 736 S.W.2d 632 (Tex. 1987).

11. *See id.* at 636-37.

12. *See* TEX. CONST. art. VII, § 22 (1845)(exempting homestead property from foreclosure). Prior to 1983, the Texas Constitution limited the urban homestead to a value not to exceed $5,000 at the time of designation, which under present standards would hardly exempt the typical home. *See* TEX. CONST. art. XVI, § 51 (1876, amended 1983). In 1983, an amendment to the Texas Constitution was passed which dramatically increased the potential value of the homestead by exempting the homestead property up to one acre, and all improvements thereon. *See id.*; *see also* Inge v. Cain, 65 Tex. 75, 77-80 (1985)(analyzing expansion of homestead provisions from Texas Constitution of 1845 to adoption of 1876 Constitution); 1018d-3rd Street v. State, 331 S.W.2d 450, 453 (Tex. Civ. App.—Amarillo 1959, no writ)(panic of 1837 incited creation of Texas homestead laws due to numerous farms lost by foreclosure). *See generally* Schroeder, *Perspectives on Urban Homestead Exemptions—Texas Amends Article XVI, § 51*, 15 ST. MARY'S L.J. 603 (1984). The 1983 amendment to article XVI, section 51, of the Texas Constitution greatly enlarged the scope of the homestead exemptions by changing the exemption from a value limitation to one of acreage, which permits a claimant to improve the value of homestead property without limitation. *Id.* at 611-612.

used in constructing improvements thereon."[13] The purpose behind protecting the homestead from forced sale is to prevent impoverished debtors from becoming unable to provide a home for their families.[14] With the exception of those liens enumerated in the Texas Constitution, creditors are prohibited from enforcing otherwise valid liens through forced sale of the homestead to the extent the homestead right pre-existed the lien attachment.[15] Consequently, Texas homestead laws have provided somewhat of a debtor's haven.[16] Although other policy considerations exist for preservation of the homestead laws,[17] the inequities against the creditor have been historically

---

13. TEX. CONST. art. XVI, § 50.

14. *See, e.g.*, Cocke v. Conquest, 120 Tex. 43, 52-53, 35 S.W.2d 673, 678 (1931)(Texas Constitution protects homestead claimant from loss of home due to improvidence or misfortune); Franklin v. Coffee, 18 Tex. 413, 416 (1857)(principles of homestead protection were to protect family from dangers of destitution); Stewart v. Clark, 677 S.W.2d 246, 249 (Tex. App.—Corpus Christi 1984, no writ)(homestead laws protect home of single individual as well as family).

15. *See* Lincoln v. Bennett, 138 Tex. 56, 57, 156 S.W.2d 504, 504 (1941). In *Lincoln*, the property owners sought to cancel a lien and deed of trust given to secure a note on the basis that the encumbered property was their homestead at the time of execution. *See id.* The *Lincoln* court held that the transaction violated the Texas Constitution because the owners executed a deed of trust on property they occupied as a homestead. *See id.* at 58, 156 S.W.2d at 506; *see also* Anglin v. Cisco Mortg. Loan Co., 135 Tex. 188, 193, 141 S.W.2d 935, 938 (1940)(pre-existing homestead right controls despite owner's attempt to encumber homestead property by pretended sale); First Nat'l Bank of Harlingen v. Farrier, 113 S.W.2d 285, 287 (Tex. Civ. App.—Beaumont 1938, no writ)(declarations of wife or husband denying homestead in order to obtain lien are invalid).

16. *See* Steenland v. Texas Commerce Bank Nat'l Assoc., 648 S.W.2d 387, 390 (Tex. App.—Tyler 1983, writ ref'd n.r.e.)(where debtor increased value of homestead from original value of $25,000 to present value of $800,000, it is creditor's burden to prove excess non-exempt property in action for foreclosure); Hoffman v. Love, 494 S.W.2d 591, 594 (Tex. Civ. App.—Dallas)(owner of homestead property may sell homestead and re-invest proceeds within six months in another homestead more valuable than prior one), *writ ref'd per curiam*, 499 S.W.2d 295 (Tex. 1973); *see also* Schroeder, *Perspectives on Urban Homestead Exemptions-Texas Amends Article XVI, § 51*, 15 ST. MARY'S L.J. 603, 610 (1983)(1983 amendment to article XVI, section 51 of the Texas Constitution changed value to area limitation affording greater protection to homesteader). In the early days of the Republic of Texas, Stephen F. Austin encouraged settlers to migrate into Texas by advertising the new Republic's homestead protections; consequently, many migrated to escape creditors. *See id.*

17. Many other policy considerations exist for preservation of the homestead laws; however, several commentators have suggested that they no longer enjoy a viable purpose in contemporary society. *See* Vukowich, *Debtor's Exemption Rights*, 62 GEO. L.J. 779, 780 (1974). Vukowich generally criticizes homestead laws as being too liberal, too restrictive, antiquated, and lacking a consistent policy. Specifically, he suggests that new forms of housing exist, such as apartments, which make the necessity of fee simple ownership anachronistic. *See id.* at 805-806. Furthermore, he asserts that homestead laws are too restrictive because they effectively prohibit a homeowner from obtaining a loan against the homestead which may be a owner's greatest, if not only, asset. *See id.* Homestead laws are too liberal in the sense that creditors are not the outlaws history suggests, but rather offer attractive and creative forms of financing,

justified under a rehabilitation concept which gives the debtor the limited means to recover his prior financial status and satisfy his creditors.[18]

In order for a homeowner to establish a homestead interest in property under Texas law, the claimant must show both an intent to use the land as homestead and a manifestation of such use.[19] The issue of homestead or lien predominance, in lieu of pending foreclosure, is often narrowed to the question of which one attached first.[20] Until a party is in a position to claim the

---

such as an open-ended mortgage, that are economically favorable to the homeowner. *Id.* at 781; *see also* Mixon, *Duplex Cotenancies: Not Quite Condominium*, 19 HOUS. L. REV. 193, 231-32 (1982). Mixon addresses the problematic relationship between homestead laws and new forms of housing relationships through co-tenancy. *See id.* He suggests that homestead laws interfere with the basic accountability between co-tenants for repair and maintenance contributions by limiting the means by which one co-tenant may expect to pay only his pro-rata share. *See id.* at 232. In another respect, homestead laws are too liberal in that a debtor may own an enormously valuable piece of land, yet be completely judgment-proof, thwarting the efforts of his aggrieved creditors. *Id.*; *see also* Davis, *New Money for Old Homesteads*, 35 TEX. B.J. 39, 40-47 (1972)(Texas homestead limitations prevent using capital from homestead).

18. *See* TEX. CONST. art XVI, § 49 (legislature shall provide protection for certain personal property); TEX. PROP. CODE ANN. § 42.002 (Vernon 1984)(provides list of exempt personal property); TEX. CONST. art. XVI, § 50 (homestead exemptions); TEX. PROP. CODE ANN. § 41.002(a)(defines rural and urban homestead in terms of acreage); TEX. CONST. art. XVI, § 51 (business exemption); TEX. PROP. CODE ANN. § 41.002(a) (Vernon Supp. 1987)(business homestead may exist in one or more lots not to exceed one acre); Skyrock v. Latimer, 57 Tex. 674, 677 (1882)(business homestead exists for every legitimate vocation). *See generally* Bergen, *PROPERTY-Business Homestead-Contiguousness of Lots*, 21 BAYLOR L. REV. 116 (1969)(examines statutory construction of business exemption); *see also* Gage v. Neblett, 57 Tex. 374, 376 (1882)(homestead protection gives debtor means to retrieve fortune and satisfy obligations); Vukowich, *Debtor's Exemption Rights*, 62 GEO. L.J. 779, 780 (1974)(homestead laws promoted to preserve family unit, rehabilitate debtor, provide place to live).

19. *See, e.g.*, Kostelnik v. Roberts, 680 S.W.2d 532, 536 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.)(homestead created by usage and intent to claim property as homestead); Lifemark Corp. v. Merritt, 655 S.W.2d 310, 315 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.)(actual use of land claimed as homestead satisfies intent); Rose v. Carney's Lumber Co., 565 S.W.2d 571, 573 (Tex. Civ. App.—Tyler 1978, no writ)(purchase contract giving grantee equitable title is sufficient basis for homestead claim); Sims v. Beeson, 545 S.W.2d 262, 263 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.)(overt acts and intent to claim land required to prove homestead).

20. *See, e.g.*, United States v. Ray Thomas Gravel, 380 S.W.2d 576, 579 (Tex. 1964)(priority of lien depends upon time at which it affixed); Johnson v. First Southern Properties, Inc., 687 S.W.2d 399, 401 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.)(assessment lien foreclosure case turns on whether homestead claim attached); Savell v. Flint, 347 S.W.2d 24, 26 (Tex. Civ. App.—Eastland 1961, writ ref'd n.r.e.)(homestead protection determined in order of time); *see also* Glenn v. Panhandle Constr. Co., 110 S.W.2d 1217, 1218 (Tex. Civ. App.—Amarillo 1937, no writ). In *Glenn*, the homeowners executed a mechanic's lien to secure assessment fees for road paving. *See id.* at 1217. The court permitted foreclosure on the property pledged even though it was urged by the debtor to be homestead property. *See id.* The court stated that the case turned on the time at which the claim was made. However, the debtor failed to offer any evidence as to when the homestead was established. *See id.* at 1218.

homestead right, the property is fully subject to liens and encumbrances.[21] Thus, as early as 1882, the Texas Supreme Court held that homestead claims are not unassailable and should not be construed to destroy pre-existing liens attached to the subject property.[22] However, liens of any type, apart from the three constitutional exceptions, whether voluntary or involuntary, if affixed to the property subsequent to the homestead claim, are not enforceable through forced sale of the homestead.[23] Applying a liberal construction to homestead laws, Texas courts have held that liens which attach simultaneously to the acquisition of homestead property are subordinate to the debtors' homestead claim.[24]

One type of contractual arrangement which may predate a valid homestead claim is a covenant running with the land. Since covenants running with the land bind all purchasers with notice of the restrictions,[25] some Texas courts have held the homestead claim to be subordinate to the pre-

---

21. *See, e.g.*, Linch v. Broad, 70 Tex. 92, 96, 6 S.W. 751, 752 (1888)(date of homestead designation controls permissible exemption); Brooks v. Chatham, 57 Tex. 31, 34 (1882) (although Texas Constitution prohibits all liens upon homestead, it fails to exempt property from pre-existing lien); Farmer v. Simpson, 6 Tex. 303, 310 (1851)(homestead not acquired until party can demand title; prior to demand, lien may attach); Minnehoma Financial Co. v. Ditto, 566 S.W.2d 354, 357 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.)(homestead laws not construed to defeat pre-existing lien).

22. *See* Gage v. Neblett, 57 Tex. 374 (1882). In *Gage*, the judgment debtor attempted to change his homestead claim from one parcel to another on which a judgment lien had already attached. *See id.* at 375. The court scanned the various cases where debtors had attempted to evade creditors with subsequent homestead claims. *See id.* at 376-78. The court concluded that a previously acquired lien cannot be defeated by a subsequent homestead claim. *See id.* at 378; *see also* Ditto, 566 S.W.2d at 357 (liens pre-dating homestead claim not defeated by subsequent claim).

23. *See* Inge v. Cain, 65 Tex. 75, 79 (1881)(quoting Texas Constitution of 1876, "No mortgage, trust deed, or other lien on the homestead, shall ever be valid . . ."). The court stated, "If [liens] are never valid they can never be operative . . . and what cannot "ever be valid" is never valid, and what is never valid is always void." *Id.*; *see also* Cline v. Henry, 239 S.W.2d 205, 208 (Tex. Civ. App.—Dallas 1951, writ ref'd n.r.e.)(courts have universally held that homestead is protected from forced sale and no lien leading to forced sale shall ever be valid); Atkins v. Schmid, 129 S.W.2d 412, 414 (Tex. Civ. App.—Dallas 1939, no writ)(forced sale of homestead to satisfy any debt except as provided in constitution void).

24. *See* Freiburg v. Walzem, 85 Tex. 264, 266, 20 S.W. 60, 61 (1892). A judgment lien was granted against Walzem on March 13, 1886. *See id.* at 264, 20 S.W. at 60. On March 23, 1889, Walzem purchased new homestead property, and the creditor simultaneously brought suit to have the lien enforced against the new parcel. *See id.* at 266, 20 S.W. at 61. The court held that when a lien attaches simultaneously with the acquisition of homestead property, the homestead protection prevails. *See id.* In response to the "interim" period problems where an existing homestead is sold for the benefit of a new one, the legislature enacted section 41.001(c) of the Texas Property Code, which exempts the proceeds from the sale of the homestead for a period of six months. *See* TEX. PROP. CODE ANN. § 41.001(c) (Vernon Supp. 1987).

25. *See* Cooksey v. Sinder, 682 S.W.2d 252, 253 (Tex. 1984)(purchaser bound by provisions in deeds which form link in purchaser's chain of title).

existing restrictions.[26] In order for a covenant to run with the land, the courts have generally required that the covenanting parties intend to bind themselves and their successors, that the covenant touch and concern the land, and that privity of estate between the parties exist.[27] Furthermore, the covenantor must have either actual or constructive notice of the restrictions.[28] Although covenants are often referred to as "restrictive," the parties may provide for affirmative duties, such as the payment of assessments for the benefit and maintenance of the common elements.[29] Since affirmative duty covenants associated with common property usually contemplate monetary payment, an additional feature, such as a lien, may be introduced into

---

26. *See* Machicek v. Barcak, 141 Tex. 165, 169, 170 S.W.2d 715, 717 (1943). In *Machicek*, the grantee accepted a deed which provided that care be given to the elderly grantor until death. *See id.* at 168, 170 S.W.2d at 716-17. The court held that the duty to care for the grantor constituted a valid encumbrance and a subsequent homestead claim was subject to that encumbrance. *See id.* at 169, 170 S.W.2d at 717; *see also* Berry v. Boggess, 62 Tex. 239, 241-42 (1884)(homestead claim does not rise above terms of deed which reserved lien for sum of money not part of purchase price); Smith v. Bowers, 463 S.W.2d 222, 224 (Tex. Civ. App.—Waco 1970, no writ)(purchaser bound by all valid restrictions in chain of title).

27. *See* Selected Lands Corp. v. Speich, 702 S.W.2d 197, 199 (Tex. App.—Houston [1st Dist.] 1985, no writ)(covenants running with land require intent, touch or concerns land, relate to something in esse, and privity of estate); Billington v. Riffe, 492 S.W.2d 343, 346 (Tex. Civ. App.—Amarillo 1973, no writ)(all elements must be met before covenant will run with land); Homsey v. University Gardens Racquet Club, 730 S.W.2d 763, 764 (Tex. App.—El Paso 1987, no writ)(touch and concern element is whether covenant relates to land so to enhance its value and confer benefit upon it); 5 R. POWELL, THE LAW OF REAL PROPERTY § 673[2], at 60-46 (15th ed. 1986)(covenant to pay maintenance assessments satisfies touch and concern element since both benefits and burdens property of each individual lot owner). *See generally* Williams, *Restrictions on the Use of Land: Covenants Running with the Land*, 28 TEXAS L. REV. 419, 429 (1949)(American application of real covenant elements from adoption of English common law). An inherent limitation on creating real covenants is that they cannot be created against public policy. *See* Goodstein v. Huffman, 222 S.W.2d 259, 260 (Tex. Civ. App.—Dallas 1949, writ ref'd). Furthermore, covenants running with the land must be reasonable, not arbitrary or capricious. *See* Preston Tower Condominiums Assocs. v. S.B. Realty Inc., 685 S.W.2d 98, 100 (Tex. App.—Dallas 1985, no writ). In *Preston Tower*, the condominium owners' association sought an injunction to prevent a homeowner from allowing his sixteen-year-old daughter to live with him in violation of the condominium bylaws which restricted permanent residency to adults only. The court held that age restrictions on real estate are valid if not applied unreasonably or arbitrarily. *See id.*

28. *See, e.g.*, Davis v. Huey, 620 S.W.2d 561, 566 (Tex. 1981)(purchaser not bound by restrictions without notice); Speich, 702 S.W.2d at 199 (key to enforcing assessment fees in subdivision is purchaser took with notice); Cullum v. Neuhoff, 505 S.W.2d 920, 922 (Tex. Civ. App.—Dallas 1974, no writ)(notice is key to enforcing equitable servitudes).

29. *See* Frey v. DeCordova Bend Estates Owners Ass'n, 647 S.W.2d 246, 248 (Tex. 1982)(restrictive covenant requiring homeowners to pay assessments for maintenance of common property runs with land); Speich, 702 S.W.2d at 199 (restrictive covenants which require homeowner to pay maintenance fees are enforceable as equitable servitudes). *See generally* Note, *Enforcement of Affirmative Covenants Running with the Land*, 47 YALE L.J. 821 (1938)(addresses affirmative covenants that run with land requiring monetary payment).

the covenant to secure the assessment payments.[30]

Affirmative duty covenants within a residential subdivision provide for management and maintenance of the commonly owned property and would be ineffective without a governing body to assess, collect, and expend the funds.[31] Therefore, a developer, when filing a declaration of covenants and restrictions, must provide for a homeowners' association whose mandatory membership consists of all the homeowners within the subdivision.[32] The homeowners' association either leases or owns the common property and is responsible for its upkeep, as well as for ensuring that the related expenses are equally distributed among all the homeowners.[33] Consequently, if one or more of the homeowners fail to pay their pro-rata share of expenses, the other homeowners, through the association, may rely on the covenants or the judicial process to enforce payment.[34] In *Johnson v. First Southern Properties, Inc.*,[35] the Houston Court of Appeals held that a contractual obli-

---

30. *See* Johnson v. First Southern Properties Inc., 687 S.W.2d 399, 402 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.)(valid contractual lien accompanied condominium deed to secure maintenance assessment fees).

31. *See* Frey, 647 S.W.2d at 248. The typical organization of the homeowners' association was described by the court in *Frey*:

> [A]ll property owners were also Association members; that the Association was to take title to the common property and recreational facilities in trust for all its members; that the association was to maintain and operate the common properties . . . to charge user fees when appropriate and to levy only those monthly assessments sufficient to defray the actual costs of maintaining and operating its facilities . . . .

Id. Currently, the Texas legislature does not provide regulations or guidelines for the creation of homeowners' associations; however, the Condominium Act, TEX. PROP. CODE ANN. § 81.002-.210 (Vernon 1984), provides requirements for the organization of condominium associations.

32. *See* W. HYATT, CONDOMINIUMS HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW 13 (1981). In a subdivision homeowners' association, the association itself owns the common property and all homeowners are mandatory members. *See id.* One essential duty of the association is to assess a proportionate share of the common expenses and pass that expense to the individual homeowners. *See id.* at 36.

33. *See id.*

34. *See* Selected Lands Corp. v. Speich, 702 S.W.2d 197, 201 (Tex. App.—Houston [1st Dist.] 1985, no writ)(homeowners' association permitted to enforce collection of past due maintenance fees against delinquent homeowner). Recently, courts have been aided in exploring the property owner and association relationship by examining the joint property interests inherent in common ownership of property. *Compare* Dutcher v. Owens, 647 S.W.2d 948, 949 (Tex. 1983)(dual property interest concept in condominiums refers to fee simple ownership of apartment with tenancy in common ownership of common property) *and* Posser v. Lovett Square Townhomes Owner's Ass'n, 702 S.W.2d 226, 231 (Tex. App.—Houston [1st Dist.] 1985, no writ)(relinquishment of certain property rights expected under common ownership aspects of condominium regime) *with* Inwood North Homeowners' Ass'n, Inc. v. Harris, 736 S.W.2d 632, 636 (Tex. 1987)(property interest inherent in pro-rata ownership of common property same as pro-rata ownership in homeowners' association).

35. 687 S.W.2d 399 (Tex. App.—Houston [14th dist.] 1985, writ ref'd n.r.e.).

gation to pay assessment fees, created upon purchase of a condominium unit and secured by a deed of trust, was enforceable as against a homestead claim.[36] The court reasoned that upon accepting the deed and deed of trust, which referenced prior declarations providing for an assessment lien, the purchaser agreed to a prior relinquishment of his homestead claim.[37] Although the *Johnson* court held that a condominium owner may by contract create a lien superior to his homestead rights in his unit, a question remained whether affirmative duty covenants which import common ownership relationships through a subdivision homeowners' association are inherent property interests.[38]

Courts have established that a homestead claim will not circumvent interests inherent in the property attempted to be impressed with the claim.[39] Although a homestead right may attach to an interest less than fee simple, as a general rule, the homestead claim may never rise any higher than the right, title, or interest that the claimant owns in the property attempting to be

---

36. *See id.* at 402. Although the *Johnson* court did not use an affirmative duty covenant analysis, it did suggest that co-owners—each condominium owner owns a pro-rata share percentage of the common property—may establish remedies in advance. Johnson, the delinquent condominium owner, made a compelling argument that the Texas Condominium Act provides for past due assessments by requiring payment out of the sale of the apartment. *See id.* The Texas Condominium Act provides in pertinent part: "If an apartment owner conveys the apartment and assessments against the apartment are unpaid, the apartment owner shall pay the past due assessments out of the sale price of the apartment . . . ." TEX. PROP. CODE ANN. § 81.208 (Vernon 1984). *But see* Florence, Johnson v. First Southern Properties, Inc.: *The Texas Homestead and Condominium Assessments*, 38 BAYLOR L. REV. 987, 993-95 (1986)(application of inherent property interest theory is more favorable to resolution of *Johnson* due to common owership rights).

37. *See* Johnson, 687 S.W.2d at 402.

38. *See* Inwood North Homeowners' Ass'n, Inc. v. Harris, 736 S.W.2d 632, 636 (Tex. 1987)(membership in homeowners' association is inherent property interest); *see also* Florence, Johnson v. First Southern Properties, Inc.: *The Texas Homestead and Condominium Assessments*, 38 BAYLOR L. REV. 987, 993-95 (1986)(suggests that condominium ownership should be inherent property interest which homestead claims cannot defeat).

39. *See* Sayers v. Pyland, 139 Tex. 57, 64, 161 S.W.2d 769, 773 (Tex. 1942). In *Shepler v. Kubena*, a corporation owned property and encumbered it with a lien. *See* Shepler v. Kubena, 563 S.W.2d 382, 383-84 (Tex. Civ. App.—Austin 1978, no writ). The corporate property was possessed by tenants at will who claimed it as their homestead. *See id.* at 385. Upon default upon the debt owed by the corporation, the creditor foreclosed on the corporation's property which was also the tenants' homestead property. *See id.* at 386. The court permitted the foreclosure stating that homestead laws are based upon the claimant's rights in property and, therefore, a tenant could not prevent foreclosure and sale because the homestead only protects the estate capable of being claimed by tenant. *See id.* at 386. The result is that the homestead claim could not rise above the right of the corporation's creditor's superior property interest to collect. *See id.*; *see also* First Nat'l Bank of Paris v. Wallace, 13 S.W.2d 176, 183 (Tex. Civ. App.—Texarkana 1928), *rev'd on other grounds*, 35 S.W.2d 1036 (Tex. 1931)(due to superior property interest of landlord, tenancy homestead claim lasts no longer than term of tenancy).

impressed with homestead status.[40] For example, a homestead right in leased property does not rise above the rights of the landlord to collect rent,[41] nor will the homestead right rise above the right of a co-tenant to obtain judicial partition.[42] Consequently, concurrent possessory interests in property impose special rights and duties which will not permit one's homestead interest to prejudice the other's interests.[43] Whether the property owner seeks to assert his homestead claim against a lien or an inherent property interest, priority depends upon the order of attachment of the competing interest.[44]

---

40. *See, e.g.*, Sayers, 161 S.W.2d at 773 (homestead claims are subject to concurrent possessory interest in property attempting to be impressed); Villareal v. Laredo Nat'l Bank, 677 S.W.2d 600, 606 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.)(wife may have vested homestead interest although husband holds title); Sterling Nat'l Bank & Trust v. Ellis, 75 S.W.2d 716, 720 (Tex. Civ. App.—Amarillo 1934, writ dism'd)(well established Texas law permits homestead on leased premises).

41. *See, e.g.*, Capitol Aggregates v. Walker, 448 S.W.2d 830, 835-36 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.)(homestead attaches to mobile home placed on lot as month to month tenancy and exempts trailer from execution); Gann v. Montgomery, 210 S.W.2d 255, 258 (Tex. Civ. App.—Fort Worth 1948, writ ref'd n.r.e.)(homestead claim not dependent on fee simple ownership, but may attach to any possessory interest); *see also* Stephans v. Cox, 256 S.W. 643, 643 (Tex. Civ. App.—Austin 1923, no writ). In *Stephans*, the court stated that homestead rights may be created and limited by contract, such as an apartment lease. Since a tenant's homestead rights may be lost by a breach of the contract, the homestead right on leased premises is not as broad as a fee simple guaranteed by the Constitution. *See id.* Consequently, the tenant's right to occupy the premises is subject to the superior obligation to pay rent. *See id.* at 644.

42. *See* Sayers, 161 S.W.2d at 773 (homestead laws will not prejudice tenant's in common inherent right to equitable partition); Julian v. Andrews, 491 S.W.2d 721, 727 (Tex. Civ. App.—Fort Worth 1948, writ ref'd n.r.e.)(husband's relinquishment of homestead rights does not affect wife's property interest in homestead property); Gann v. Montgomery, 210 S.W.2d 255, 258 (Tex. Civ. App.—Fort Worth 1948, writ ref'd n.r.e.)(homestead claim non-exclusive possessory interest subject to rights of remaining interest).

43. *See* Pooser v. Lovett Square Townhomes Owner's Ass'n, 702 S.W.2d 226, 231 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.)(surrender of certain traditional property rights in accord with condominium ownership); Wierzchula v. Wierzchula, 623 S.W.2d 730, 732 (Tex. App.—Houston [1st Dist.] 1981, no writ)(valid lien placed on spouse's homestead property to secure amount awarded in divorce action). For instance, one of the protective rights of tenants in common is owelty, which permits one co-tenant to obtain a lien on the other tenant's property after partition to secure an equal division. *See* Sayers, 161 S.W.2d at 771 (right of owelty is implied by law since it is incident to right of partition whether by agreement or court order).

44. *See, e.g.*, Johnson v. First Southern Properties, Inc., 687 S.W.2d 399, 401 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.)(assessment lien foreclosure turns on when homestead claim attached); Abilene White Truck Co. v. Petrey, 384 S.W.2d 211, 213 (Tex. Civ. App.—Fort Worth 1964, writ ref'd n.r.e.)(character of property as of time deed of trust is executed determines priority of homestead claim); Savell v. Flint, 347 S.W.2d 24, 27 (Tex. Civ. App.—Eastland 1961, writ ref'd n.r.e.)(homestead protection determined in order of time);

In *Inwood North Homeowners' Association, Inc. v. Harris*,[45] the Texas Supreme Court held that Texas homestead laws failed to protect a homestead claimant's property from forced foreclosure for failure to pay homeowners' association assessment fees.[46] The court determined that the Association was entitled to satisfaction through foreclosure based on either of two theories:[47] the homestead of the delinquent owners was subject to forced sale because (1) the restrictions contained a valid contractual lien that ran with the land and predated the homestead claim,[48] or (2) the purchase of an Inwood North lot included the obligation to pay maintenance assessments, as an inherent property interest, related to the common property.[49]

Despite the restrictions' recitations, which characterized the means to secure payment of the assessment fees as a vendor's lien, the court held that the lien was contractual and existed years before the purchasers obtained their lots.[50] The court also found that the contractual lien satisfied the elements of covenants that run with the land since the Declaration of Covenants reflected an intent that the covenant bind both the parties and subsequent owners,[51] that the covenant to pay maintenance fees touched and concerned the land,[52] and that the requirement of privity was met by succes-

---

Glenn v. Panhandle Constr. Co., 110 S.W.2d 1217, 1218 (Tex. Civ. App.—Amarillo 1937, no writ)(case balanced on time in which homestead claim was made).

45. 736 S.W.2d 632 (Tex. 1987).

46. *See id.* 636-37.

47. *See id.* The two theories, pre-existing contractual lien and superior property interest of the association, serve to effectively predate the homestead claim and prevent avoidance of foreclosure. *See id.*

48. *See id.* at 635-36.

49. *See id.* at 636.

50. *See id.* at 635. The *Inwood* court reasoned that the parties intended a contractual lien, despite erroneously labeling it a vendor's lien. *See id.* The basis for permitting the court to alter the labeling of the lien is founded under the rule that the courts are permitted to harmonize the language of a covenant to further the intent of the parties in creating the covenant. *See* Maryland Casualty Co. v. Willig, 10 S.W.2d 415, 418 (Tex. Civ. App.—Waco 1928, writ ref'd); *see also* Moore v. Smith, 443 S.W.2d 552, 556 (Tex. 1969)(provision out of harmony with "thrust of the instrument" should not cloud intent of parties); Cartwright v. Trueblood, 90 Tex. 535, 538, 39 S.W. 930, 932 (Tex. 1897)(courts may reject language out of harmony with deed).

51. *See* Harris, 736 S.W.2d at 635. Intent to covenant is satisfied by accepting terms of the deed which is subject to the previously filed declaration of covenants and restrictions. *See* Westland Oil Dev. Corp. v. Gulf Oil Corp., 637 S.W.2d 903, 908 (Tex. 1982).

52. *See* Harris, 736 S.W.2d at 635. The *Harris* court cited the Restatement of Property to support the touch and concern element, which states that the benefit of common property use and the burden of assessment fees serve to make the property more marketable and attractive, despite the additional cloud on the title. *See id.*; RESTATEMENT OF PROPERTY § 537, at 3224 (1944). Futhermore, the benefit may touch and concern a tract of land different from the burdened one. *See id.*

sive fee simple conveyances.[53] The court reasoned that because the restrictions filed by the developer were valid contractual liens that ran with the land and the purchasers signed deeds that provided constructive notice of the lien and foreclosure provisions in their chain of title, "they were bound by them."[54] Therefore, foreclosure on the purchasers' property was appropriate for nonpayment of maintenance assessment fees.[55]

The second theory applied by the *Harris* court upheld foreclosure on the basis that the obligation to pay assessment fees for the common property was an inherent property interest.[56] The court found the purchase of an Inwood North lot with its inherent obligations was a property right, and further declared that the "remedy of foreclosure was an inherent characteristic of the property right."[57] The *Harris* majority explained that a homestead claim which opposed those obligations was ineffective since the homestead right could not rise any higher than the interest which the claimant owned.[58]

---

53. *See* Harris, 736 S.W.2d at 635 (Harris and Pamilar purchased lots directly from builder; therefore, meeting requirement of privity).

54. *Id.* The *Harris* court applied the rationale of the Texas Supreme Court in *Cooksey v. Sinder*, which held that a purchaser is charged with notice of provisions in deeds which form links in his chain of title. *See* Cooksey v. Sinder, 682 S.W.2d 252, 253 (Tex. 1984). The *Cooksey* court held that foreclosure on a vendor's lien was permissible even against a subsequent purchaser since he accepted the deed subject to legal notice of its obligations and remedies. *See id.*; *see also* Westland Oil Dev. Corp. v. Gulf Oil Corp., 637 S.W.2d 903, 908 (Tex. 1982). The *Westland* court stated, "a purchaser is bound by *every* recital, reference, or reservation contained in or fairly disclosed by any instrument which forms an essential link in the chain of title under which he claims." *See id.* (emphasis original)(quoting Wessels v. Rio Bravo Oil Co., 250 S.W.2d 668, 670 (Tex. Civ. App.—Eastland 1952, writ ref'd)).

55. *See* Harris, 736 S.W.2d at 635-36. In reaching the result that the contractual liens ran with the land and foreclosure was proper, the court relied on similar cases in other jurisdictions. *See id.* at 636 n.1. A case concerning similar facts as *Harris* was *Bessemer v. Gertsen*, 381 So. 2d 1344 (Fla. 1980). In *Bessemer*, the court held that the homeowner accepted the deed with notice of its maintenance fee provisions and thereby agreed to let property stand as security for that fee. *See* Bessemer v. Gertsen, 381 So. 2d 1344, 1347 (Fla. 1980). Thus, the homestead claim by the homeowner was ineffective against the pre-existing assessment lien since it was an affirmative covenant relating back to when the developer filed the covenants and restrictions. *See id.* at 1348.

56. *See* Harris, 736 S.W.2d at 636. "The obligation to pay association dues and the corresponding right to demand that maximum services be provided within the association's budget are characteristics of [a] property interest." *Id.*

57. *Id.* Foreclosure is an inherent characteristic of the Inwood North property interest because it protects the homeowners from having to pay more than their pro-rata share of assessment fees for maintenance of the common property. *See id.*

58. *See id.* The *Pyland* decision, cited by *Harris*, is illustrative of the rule that "one's homestead right in property can never rise any higher than the right, title, or interest that he owns in the property attempted to be impressed with a homestead right." Sayers v. Pyland, 161 S.W.2d 769, 772 (Tex. 1942). The *Pyland* court held that, like a vendor's lien, the charge placed on property, by voluntary agreement or court ordered partition, to secure equitable partition is superior to the homestead claim. *See id.* *See generally* Florence, Johnson v. First

Therefore, since the obligations as to the property existed prior to the homestead claim and the purchaser acquired the land subject to a superior property interest, the remedy of foreclosure was appropriate.[59]

In forceful dissent, Justice Mauzy, joined by Justice Gonzalez, argued that the majority's opinion completely contradicted section 50 of article XVI of the Texas Constitution, as well as public policy with regard to homestead protection.[60] The dissent argued that the majority ignored the consistent protection afforded homestead claimants since the creation of the Republic of Texas.[61] Attacking the majority's reliance on a contractual lien theory, the dissent reasoned that although the lien may have existed prior to the homestead claim and judgment could be had against the homeowner for the amount of the unpaid assessment,[62] the court is prohibited from ordering foreclosure due to the property's homestead status.[63] Emphasizing that the Texas Constitution prohibits parties from contracting a lien against the homestead which provides the remedy of foreclosure unless it falls into one of the three constitutional exceptions,[64] the dissent concluded that the majority's result produced a judicially created fourth exception to Texas home-

---

Southern Properties, Inc.: *The Texas Homestead and Condominium Assessments*, 38 BAYLOR L. REV. 987, 993-95 (1986)(maintenance fee obligations related to condominium ownership should be inherent property interest).

59. *See* Harris, 736 S.W.2d at 636.

60. *See id.* at 637-38 (Mauzy, J., dissenting). The contradiction to the Texas Constitution exists because: "maintenance assessments do not constitute part of the property's purchase price; are not taxes, and are not monies for labor and materials for the construction of improvements on the land." *Id.*

61. *See id.* at 638-39. The dissent followed Texas homestead laws from the creation of the earliest American homestead provision in 1839 to the 1983 amendment with the conclusion that the legislature has made it abundantly clear that the only liens permitted on a homestead are for purchase money, taxes, and labor and material for improvements. *See id.*

62. *See id.* at 641.

63. *Id.* The dissent reasoned that under the rationale of *Freiburg v. Walzem*, 85 Tex. 264, 20 S.W. 60 (1892), the lien in *Inwood* could not arise until the property was purchased. *See id.* Therefore, the lien would only attach simultaneous to the homestead claim, making the homestead superior. *See* Freiburg, 85 Tex. at 266, 20 S.W. at 61. Furthermore, if the lien did run with the land, the judgment ordering foreclosure arose subsequent to the homestead claim and was ineffective to procure a foreclosure. *See* Harris, 736 S.W.2d at 641 (Mauzy, J., dissenting) (citing Gage v. Neblett, 57 Tex. 374, 376-77 (1882)).

64. *See* Harris, 736 S.W.2d at 641 (Mauzy, J., dissenting). The dissent attacked the majority's reasoning that the purchaser of an Inwood North lot, by accepting a deed, agreed to secure assessment fees with the home. *See id.* at 640-41. The reasoning follows the rule that a homestead owner cannot create a valid lien against the homestead property, except for the constitutional provisions. *See* Texas Land & Loan Co. v. Blalock, 76 Tex. 85, 88, 13 S.W. 12, 13 (1890). In *Blalock*, an attempted deed of trust was executed after claimant had established a homestead. *See id.* The court held that once a homestead is established, the homesteaders will not be able to evade the law and encumber their property, except for the three exceptions in the constitution. *See id.*

stead law.[65]

It is arguable that the *Harris* court, in holding that the recorded restrictions constituted a contractual lien running with the land, failed to recognize that the Texas Constitution expressly mandates that there are only three types of liens that are permitted to attach to homestead property.[66] Because the lien to secure assessment fees was not for taxes or improvements, nor was it part of the purchase price, none of the constitutional exceptions applied.[67] The *Harris* court overcame the constitutional prohibitions against homestead foreclosure, however, by applying restrictive covenant principles similar to those encountered in condominium regimes.[68]

Restrictive covenants, while typically involving encumbrances or "negative duties," have also been extended to include "affirmative duty" covenants, wherein homeowner associations and condominium regimes incur an obligation to provide certain benefits to the common property in return for payment through assessment fees.[69] However, for purposes of homestead protection, a question arises whether the duty to pay assessment fees preexist the homestead claim, or whether the duty attaches simultaneously with the purchase of the property attempted to be impressed with homestead character.[70]

It is fundamental law in this state that without a debt there can be no lien.[71] To permit a lien to attach to property without a debt would grant authority to create a lien, whether real or imagined, at leisure by merely envisioning an intent to secure a future debt.[72] Although a *provision* impos-

---

65. *See* Harris, 736 S.W.2d at 641-42 (Mauzy, J., dissenting).

66. *See* TEX. CONST. art. XVI, § 50 (liens may be fixed subsequent to homestead claim only for purchase money, taxes, and labor and materials for improvements on homestead).

67. *See id.*

68. *See* Johnson v. First Southern Properties, Inc., 687 S.W.2d 399, 402 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.)(assessment fee lien in deed of trust to condominium unit pre-existed homestead claim made at purchase).

69. *See* Frey v. DeCordova Bend Estates Owners Ass'n, 647 S.W.2d 246, 248 (Tex. 1982)(restrictive covenants required homeowners to pay assessments for maintenance of common property); *see also* Machicek v. Barcak, 170 S.W.2d 715, 716-17 (Tex. 1943)(covenant providing for future care of invalid father runs with land and is enforceable by foreclosure).

70. *See* Inwood North Homeowners' Ass'n, Inc. v. Harris, 736 S.W.2d 632, 641 (Tex. 1987)(Mauzy, J., dissenting) The *Harris* case was one of first impression in Texas with regard to enforcing a contractual lien running with the land against the homestead for homeowner association assessment fees. *See id.* at 633.

71. *See, e.g.*, Calvert v. Hull, 475 S.W.2d 907, 911 (Tex. 1972)(lien affixes to property when corresponding obligation to pay debt arises); Spencer v. Anderson, 669 S.W.2d 862, 867 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.)(specific debt necessary to support lien); Green v. American Nat'l Ins. Co., 452 S.W.2d 1, 4 (Tex. Civ. App.—San Antonio 1970, no writ)(lien is incident of debt secured by it and is terminated by full payment).

72. Spencer, 669 S.W.2d at 868 (courts will not impose debt or obligation to satisfy lien provision); *see also* Masterson v. Ginners Mut. Underwriters Ass'n, 222 S.W. 263, 267 (Tex.

ing a lien may exist absent a debt or obligation, the lien may only attach to the property sought to be secured once the debt comes into existence.[73] Despite the contractual lien's unilateral nature, the purchaser is bound by the terms which are in his chain of title.[74] The difficulty with foreclosing on such a lien is that prior to the purchase of a lot within the Inwood North subdivision, no debt or obligation existed against the purchaser for which a lien could be secured.[75] It may be construed, therefore, that the nonpayment of assessment fees did not occur until after Harris and Pamilar purchased their homes, and, consequently, at the time of the purchases, the homestead laws governed preventing liens or encumbrances from attaching for all debts which would cause a forced sale.[76] The court, however, denied this argument and held that the nonpayment of such fees would give rise to a valid lien against homestead property under a pre-existing restrictive covenant analysis even though the nonpayment of the maintenance fees would give rise to a valid lien on all nonexempt property.[77]

Civ. App.—Texarkana 1920), *aff'd*, 235 S.W. 1081 (Tex. Comm'n App. 1922, judgm't adopted)(debt must exist to make valid mortgage); Bledsoe v. Colbert, 120 S.W.2d 909, 910 (Tex. Civ. App.—Eastland 1938, no writ)(whether lien is common law, equitable or statutory, ownership of property is requisite to lien attachment).

73. *See, e.g.*, Posey v. Commercial Nat'l Bank, 55 S.W.2d 515, 517 (Tex. Comm'n App. 1932, judgm't adopted)(judgment lien attaches once homestead exemption ceases); Englander v. Kennedy, 424 S.W.2d 305, 309 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.)(creditor who obtains judgment for debt does not have lien against property used as homestead); Lewis v. Brown, 321 S.W.2d 313, 317 (Tex. Civ. App.—Fort Worth 1959, writ ref'd n.r.e.)(non-purchase or non-improvement deeds of trust, levies of execution, and attachment do not become lien on property used as homestead); Tyler Bank & Trust Co. v. Shaw, 293 S.W.2d 797, 799 (Tex. Civ. App.—Texarkana 1956, writ ref'd n.r.e.)(foreclosure on statutory lien permissible only when debt established by judgment).

74. *See* Cooksey v. Sinder, 682 S.W.2d 252, 253 (Tex. 1984)(purchaser is bound by the provisions in deeds which form link in purchaser's chain of title).

75. *See* Inwood North Homeowners' Ass'n, Inc. v. Harris, 736 S.W.2d 632, 641 (Tex. 1987)(Mauzy, J. dissenting)(failure to pay gives rise to debt, therefore, there must first be opportunity to pay). As Texas law holds that the simultaneous attachment of the homestead right and a lien favors the homestead, the court could have argued that the assessment fees took on the character of a vendor's lien to reach this same conclusion. *See* Sayers v. Pyland, 161 S.W.2d 769, 772 (Tex. 1942)(comparing nature of partition to vendor's lien).

76. *See* Freiburg v. Walzem, 85 Tex. 264, 267, 20 S.W. 60, 60 (1892)(if lien attaches simultaneously with homestead claim, then homestead prevails). The *Harris* majority held that the homeowners, by accepting the deeds, agreed to let property stand to secure payments of assessment fees. *See* Harris, 736 S.W.2d at 635. The problem with this concept is that when the Inwood North purchaser accepted a deed, then the homestead claim arose immediately; however, homestead laws prohibit the husband and wife from contracting an encumbrance against the homestead, except for the constitutional exceptions. *See* Texas Land & Loan Co. v. Blalock, 76 Tex. 85, 89, 13 S.W. 12, 13 (1890); *see also* First Nat'l Bank of Harlingen v. Farrier, 113 S.W.2d 285, 287 (Tex. Civ. App.—Beaumont 1938, no writ)(declarations of husband and wife will not change homestead right in property in order to encumber it).

77. *Compare* Harris, 736 S.W.2d at 637 (contractual lien accepted in deed with purchase

The *Harris* court, in concluding that a contractual lien existed prior to the purchase of an Inwood North lot and was enforceable as a covenant running with the land, relied on similar holdings in several other jurisdictions.[78] However, these other jurisdictions operate under different constitutions which allow foreclosure on the homestead for unpaid assessment fees in instances inapplicable in light of Texas constitutional homestead laws.[79] For example, to support its contractual lien theory, the *Harris* court cited the Florida Supreme Court's decision in *Bessemer v. Gertsen*[80] wherein foreclosure was permitted on a lien to secure the payment of rental fees.[81] Although the facts and the holding are quite similar,[82] the distinction arises in that the Florida Constitution, unlike its Texas counterpart, supports a contractual lien theory.[83] Another significant difference between the jurisdictions is that while the Florida Constitution prohibits the use of process for foreclosure

---

of lot is superior to homestead claim) *with* Hearne v. Bradshaw, 312 S.W.2d 948, 951 (Tex. 1958)(remedy for breach of covenant to maintain property is for damages not forfeiture). *See also, e.g.,* Hodges v. Roberts, 74 Tex. 517, 519, 12 S.W. 222, 223 (1889)(party may contract enforceable lien against his nonexempt property); Barnett v. Eureka Paving Co., 234 S.W. 1081, 1082 (Tex. Comm'n. App. 1921, holding approved)(valid paving lien with foreclosure provision may be fixed only on nonexempt excess of homestead property); Bailey v. Mullens, 313 S.W.2d 99, 102 (Tex. Civ. App.—San Antonio 1958, writ ref'd n.r.e.)(court will construct deed to avoid forfeiture, if possible).

78. *See* Harris, 736 S.W.2d at 636 n.1.

79. *See id.* The *Harris* court cited to the case of *Boyle v. Lake Forest Property Owner's Ass'n, Inc.* which involved a covenant providing a lien for unpaid assessment fees. *See* Boyle v. Lake Forest Property Owner's Ass'n, 538 F. Supp. 765, 768 (S.D. Ala. 1982). *Boyle* is distinguishable simply because the court permitted foreclosure on investment property which was not a homestead. *See id.* In an Arkansas Supreme Court case with similar facts to *Harris*, the court permitted foreclosure on the homestead for unpaid assessment fees. *See* Kell v. Bella Vista Village Property Owners' Ass'n, 528 S.W.2d 651, 653 (Ark. 1975). The Arkansas court relied on a provision of the Arkansas Constitution which expressly provides an additional exception to homestead protection for "specific liens." *See id.* Again, in a similar case, the Mississippi Supreme Court permitted foreclosure on the homestead for non-payment of assessment fees; however, in Mississippi, homesteads are not constitutionally protected but are governed by the legislature. *See* William H. Bond, Jr. & Assoc., Inc. v. Lake of the Hills Maintenance Ass'n, 381 So. 2d 1043, 1044 (Miss. 1980). Furthermore, the Mississippi Code specifically provides for an "assessment" exception to the homestead laws. *See* MISS. CODE ANN. § 85-3-47 (1982).

80. 381 So. 2d 1344 (Fla. 1980).

81. *See id.* at 1345-47.

82. *See* Bessemer, 381 So. 2d at 1345. In *Bessemer*, the purchasers of the subdivision lots took subject to a lien to secure payment of "rental fees" for the common property. The court permitted foreclosure on the lien since the purchaser, by accepting the deed, agreed to let property stand as security for unpaid assessment fees. *See id.*

83. *Compare* TEX. CONST. art. XVI, § 50 (homestead exempt for payment of all debt and no lien on homestead shall ever be valid except for purchase money, taxes, and improvements thereon) *with* FLA. CONST. art. X, § 4 (homestead exempt from forced sale only under process of any court).

against homesteads, it expressly provides for an assessment exception.[84] The Texas Constitution, conversely, makes *any* lien providing for foreclosure on the homestead invalid and inoperative.[85] Furthermore, the Florida Constitution permits the owner and spouse to contract a mortgage against homestead property;[86] such conduct is clearly prohibited by the Texas Constitution.[87]

In addition to relying on homestead law in foreign jurisdictions, the *Harris* court applied the reasoning used by the Houston Court of Appeals in *Johnson v. First Southern Properties, Inc.*[88] to support the principle that a homestead in a non-exclusive possessory interest will not circumvent the property rights of the remaining property owners.[89] In *Johnson*, the condominium owner had purchased the condominium unit subject to certain restrictions and covenants providing in part that the purchaser was obligated to pay maintenance assessment fees for the "commonly owned" property.[90]

---

84. *See* FLA. CONST. art. X, § 4. The Florida Constitution provides in part:

(a) There shall be exempt from forced sale *under the process of any court*, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and *assessments* thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty. . . .

Id. (emphasis added).

85. *See* Inge v. Cain, 65 Tex. 75, 79 (1881). The court in *Inge* asserts that the constitutional homestead language stating that no lien "shall ever be valid" refers to the principle that the constitution specifies only three types of liens that will ever be operative against homestead property. *See id.*; *see also* Cline v. Henry, 239 S.W.2d 205, 208 (Tex. Civ. App.—Dallas 1951, writ ref'd n.r.e.)(Texas courts have universally held homestead protected from forced sale and no lien leading to forced sale shall ever be valid except as provided in constitution); Atkins v. Schmid, 129 S.W.2d 412, 414 (Tex. Civ. App.—Dallas 1939, no writ)(forced sale of homestead to satisfy any debt except as provided in constitution is void).

86. *See* FLA. CONST. art. X, § 4. "The owner of homestead real estate, joined by spouse if married, may alienate the homestead by mortgage . . . ." *Id.*

87. *See* Lincoln v. Bennett, 156 S.W.2d 504, 506 (Tex. 1941). In *Lincoln*, the court held that when the family occupies homestead property in fact then no declarations of the husband or the wife to the contrary are valid in seeking to encumber it with a lien. *See id.*; *see also* Neil v. Mack Trucks, 542 S.W.2d 112, 114 (Tex. 1976)(once fixed, homestead is estate in land not subject to mortgage by owners); Anglin v. Cisco Mortg. Loan Co., 141 S.W.2d 935, 938 (Tex. 1940)(pre-existing homestead right controls despite owner's attempt to encumber homestead property by pretended sale); First Nat'l Bank of Harlingen v. Farrier, 113 S.W.2d 285, 287 (Tex. Civ. App.—Beaumont 1938, no writ)(neither declarations of wife nor husband denying existing homestead in order to attempt lien are valid).

88. 687 S.W.2d 399 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

89. *See id.* at 402. The *Johnson* court held that a contractual lien pre-existed the condominium homestead claim; however, the court reasoned that a valid lien arose when *Johnson* used his percentage ownership of the common property to secure payment of assessment fees through a lien. *See id.*

90. *See id.* at 401-02. The condominium declaration in *Johnson* had two distinct features that distinguished it from the declarations in *Harris*. First, the condominium declaration pro-

Furthermore, the condominium council under *Johnson* had a lien on each apartment for the unpaid assessment fees secured by a deed of trust.[91] Johnson, similar to Harris and Pamilar in *Harris*, failed to pay his assessment fees, and foreclosure on the property for the debt was sought.[92] Based upon a pre-existing contractual lien, the *Johnson* court permitted the condominium council to foreclose on the homestead property through the deed of trust.[93] The *Harris* court's application of *Johnson* is faulty in two respects. First, the condominium declaration provided a deed of trust as a vehicle for foreclosure rather than a vendor's lien as in *Harris*. However, the more significant difference between *Johnson* and *Harris* is that condominium owners are co-tenants with regard to the common property,[94] whereas, the homeowners in *Harris* each owned a pro-rata share in the association, which itself owned the common property.[95] Despite this substantial difference in the form of ownership the *Harris* court applied the legal effect of condominium regimes to homeowner associations, and, correspondingly, offered a second theory to foreclose on the homestead based on an inherent property interest.[96]

In expanding the legal relationship of co-tenants to homeowners' associa-

---

vided for a non-judicial foreclosure through a deed of trust. Secondly, a condominium unit owner was found to also be a co-owner of the common property; co-owners may establish remedies in advance. *See id.* It is arguable that condominium owners may use their percentage ownership of common property to create a lien for future assessment fees for the common property maintenance. *See* First Nat'l Bank of Corsicana v. Sarafonetis, 15 S.W.2d 155, 158 (Tex. Civ. App.—Waco 1929, writ ref'd).

91. *See* Johnson v. First Southern Properties, Inc., 687 S.W.2d 399, 402 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

92. *See id.* at 401.

93. *See id.* at 402.

94. *See* Dutcher v. Owens, 647 S.W.2d 948, 949 (Tex. 1983)(condominium owner owns fee simple estate in apartment and is tenant in common with other unit owners as to common property); *see also* W. HYATT, CONDOMINIUMS HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW 13 (1981). The primary difference between homeowner's associations and condominium regimes lies in the method of ownership. In condominium regimes, the common property is owned in common by all the unit owners of the complex. *See id.*

95. *See* W. HYATT, CONDOMINIUMS HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW 13 (1981). In a subdivision, the homeowners' association itself owns all the common property and each homeowner has only title to his or her own parcel with no percentage ownership in the common elements. *See id.* Many problems evolving from homeowners' associations are products of initial misconception between the homeowner and association. *See id.* Some common problems are as follows: (1) association membership is mandatory; (2) the relationship is one of contract which cannot be waived or cancelled; (3) the association board of directors are vested with substantial control over use of all property; (4) declarations are enforceable restrictions; and (5) association directors often fail to understand the "representative" nature of the association's governing body. *See id.* at 46.

96. *See* Inwood North Homeowners' Ass'n, Inc. v. Harris, 736 S.W.2d 632, 636 (Tex. 1987). The *Harris* court held that the distinction between a percentage ownership of the common property in condominium regimes and percentage ownership in a homeowner's associa-

tions, the court imparts the association with special rights and remedies afforded to tenants in common as inherent to its property interest,[97] despite the fact that the homeowner is not a tenant in common but by contract is a member of an organization that owns the common property elements.[98] For example, each tenant in common may concurrently claim homestead rights in undivided property. However, following a partition of the property each is permitted to place a lien—an owelty—on homestead property to secure the value of his share when the partition is unequal.[99] Applying the principle that a homestead claim will not be permitted to circumvent an inherent property interest[100] to the *Harris* case, the majority bridged the gap between condominium regimes and homeowners' associations by stating that there is no difference between pro-rata ownership in common property and pro-rata ownership in an association.[101] Therefore, a purchaser buying an Inwood North lot takes it subject to a superior property interest, a part of which is the obligation to pay assessment fees secured by a lien.[102]

The *Harris* court's contractual lien and property interest theories essentially developed out of the special relationship between homeowners and the

---

tion that owns the common property was so slight that common ownership principles should apply equally to both. *See id.*

97. *See* Raymond v. Aquarius Condominium Owners Ass'n, Inc., 662 S.W.2d 82, 89 (Tex. App.—Corpus Christi 1983, no writ). The *Raymond* court elaborated on the special obligations inherent in condominium ownership:

> Condominium unit owners constitute a democratic subsociety of necessity more restrictive in the use of condominium property than might be acceptable given traditional forms of property ownership. Therefore, each constituent must relinquish some degree of freedom of choice and agree to subordinate some of his traditional ownership rights when he elects this type of ownership experience.

Id.; *see also* Pooser v. Lovett Square Townhomes Owner's Ass'n, 702 S.W.2d 226, 231 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.)(surrender of certain property rights is in accord with condominium property interest).

98. *See* Harris, 736 S.W.2d at 636. The Inwood North declaration of covenants and restrictions provided that each homeowner agreed to be a member of the Association. *See id. But see* Pooser, 702 S.W.2d at 230 (delinquent condominium owner not excused from payment of assessment fees even though waived use of common property).

99. Sayers v. Pyland, 161 S.W.2d 769, 771 (Tex. 1942). Owelty may be created by express agreement or implied by law between the parties to partition since owelty is incident to the right of partition. *See id.*

100. *See id* at 773. "[O]ne's homestead right in property can never rise any higher than the right, title, or interest that he owns in the property attempted to be impressed with a homestead right." *Id.* The rights afforded to tenants in common are founded on principles that, although a tenant in common may claim a homestead in the common property, that right is not superior to the rights of the other joint owner(s). *See* Clements v. Lacy, 51 Tex. 150, 151 (1879).

101. *See* Inwood North Homeowners' Ass'n, Inc. v. Harris, 736 S.W.2d 632, 636 (Tex. 1987).

102. *See id.* The obligation to pay maintenance fees for upkeep of common property is part of the tenant-in-common relationship with regard to the common property. *See id.*

homeowners' associations with respect to the common property. Since all homeowners have an equal obligation to support the common property, some security, in the form of a lien, must exist to ensure equal distribution of these costs. The contractual lien theory, although well followed in other jurisdictions, poses some difficulty when enforced against the protective Texas homestead laws provided for in the Texas Constitution.

Texas homestead laws have been criticized for their rigidity, particularly with respect to their effect on relatively new forms of housing that involve common ownership interests. Certainly, the delinquent Inwood homeowner should not be able to unduly burden the other homeowners who will have to pay his share of the assessment fees to maintain the common property; however, a literal reading of the Texas Constitution would allow this result. The *Harris* decision evidences the questionable manner in which courts tend to construe homestead laws in order to give protection to common owners. Although it may be favorable to judicially declare that all homeowners' associations have an inherent property interest in order to provide protection for this relatively new form of common ownership, the legislature should react and institute guidelines for homeowners' associations in light of the protective shield of homestead laws.

Randy B. Warmbrodt