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## Real Property Law

Ralph E. Boyer

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# REAL PROPERTY LAW\*

RALPH E. BOYER\*\*

The past biennium witnessed considerable activity in both the legislative and judicial arenas in the development of real property law. Significant legislation included a more virgorous regulation of installment land sales<sup>1</sup> and an amendment to the Uniform Commercial Code provisions applicable to fixtures.<sup>2</sup> Noteworthy judicial decisions included: a determination that a sub-subcontractor is not entitled to a mechanic's lien under the 1965 act;<sup>3</sup> a reaffirmation by the supreme court that the sales price in a mortgage foreclosure proceeding is conclusive evidence of value in spite of considerable contrary holdings by Florida district courts of appeal;<sup>4</sup> a rejection of a novel "zoning in progress" concept;<sup>5</sup> a delineation by the supreme court of the applicability of "just" and "full" compensation in eminent domain proceedings;<sup>6</sup> and a strict adherence to the distinction between limitations on a fee as distinguished from promissory limitations on use only.<sup>7</sup>

The style of the article is similar to that of previous surveys with legislative developments being incorporated under appropriate headings with the case law. The material is discussed in order under the following headings:

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This survey covers the 1965 legislation and a review of Florida cases from 1963 to 1965. More specifically it covers volumes 176 through 198 of the Southern Reporter, second series. Federal cases were checked through volume 373 of the Federal Reporter, second series, but no federal cases are included.

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1. See p. 280 *infra* and thereafter.
2. See p. 301 *infra*.
3. See p. 295 *infra*.
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## I. VENDOR AND PURCHASER

## A. Sales Regulations—Legislation

Legislation in 1967<sup>8</sup> abolished the Florida Installment Land Sales Board and created in its place the Florida Land Sales Board. The act amended extensively chapter 478 of the Florida Statutes and changed its title from The Florida Installment Land Sales Law to The Florida Uniform Land Sales Practices Law. The new act is apparently intended to broaden and strengthen the replaced act.

The new Board, which has seven members instead of the previous five, is authorized, after notice and hearing, to issue cease and desist orders for violations of the provisions of the Act.<sup>9</sup> It is also authorized to issue temporary cease and desist orders without notice and hearing if it makes a finding of fact in writing that the public interest will be irreparably harmed by delay.<sup>10</sup> Civil remedies are accorded purchasers of subdivided lands when the subdivider disposes of such lands in violation of the Act, makes an untrue statement of a material fact, or omits a required material fact from a registration statement, unless the purchaser is aware of such untruth or omission.<sup>11</sup> The purchaser is authorized to sue either in law or in equity to recover the consideration paid together with interest, property taxes paid, court costs and reasonable attorney's fees for the prevailing party, less any income received from the subdivided lands, upon tender of appropriate instruments of reconveyance. Such tender may be made at any time before entry of judgment.<sup>12</sup> The limitation for bringing such a civil action under the new act is three years after discovery of the untrue statement or omission, or after such discovery should have been made by the exercise of reasonable diligence, but in no event may any such action be brought more than five years after the date the purchaser made his first payment of money to the subdivider.<sup>13</sup>

Criminal penalties against subdividers for wilfull violations of the act and for untrue statements or omissions in applications for registration provide for a fine up to 100,000 dollars and imprisonment not exceeding two years, or both.<sup>14</sup> Penalties under the repealed Installment Land Sales Law were limited to 5,000 dollars and imprisonment not exceeding six months, or both.<sup>15</sup> Further, violation under the former law was held to be a misdemeanor only,<sup>16</sup> whereas violation under the new law is held to be a felony in the case of a wilful violation by a subdivider,

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8. Fla. Laws 1967, ch. 67-229.

9. FLA. STAT. § 478.171 (1967).

10. *Id.* § 478.171(2).

11. *Id.* § 478.191(1).

12. *Id.* § 478.191(2).

13. *Id.* § 478.191(5).

14. *Id.* § 478.211.

15. FLA. STAT. § 478.211 (1965) (repealed, 1967).

16. *Id.*

but for a wilfull violation by any other person, conviction is only for a misdemeanor with penalties of 5,000 dollars and imprisonment not exceeding six months, or both.<sup>17</sup>

### B. *Fraud and Misrepresentation—Justifiable Reliance*

A number of cases during the biennium involved actions for rescission. Two cases, reaching different results, dealt with the problem of fraud and misrepresentation. In *Scocozzo v. General Development Corporation*,<sup>18</sup> which denied rescission, the purchasers had inspected the lot on which they ordered a home to be built by the developer. A creek adjacent to their lot allegedly would be made navigable and connect with other waters to provide access to the ocean. This ocean access was not and could not be provided. Whether misrepresentations had in fact been made became immaterial in view of the many reasons advanced for holding for the seller. It was stated first that one is not entitled to relief because of false representations if the person deceived could have ascertained the truth by ordinary care and his failure to do so was the result of his own negligence.<sup>19</sup> Second, the contract had a provision that the written agreement constituted the entire agreement between the parties and could not be changed orally. The court stated that such a recital is evidence that the purchasers did not in fact rely upon the alleged misrepresentations.<sup>20</sup> This statement seemingly assumes that the purchasers read all the fine print, fully understood it, and were completely indifferent to any contrary enthusiastic assurances of a pressuring salesman. Further developing the non-reliance point, the court stated that if navigable water from the purchasers' home to the designated river and ocean were important, prudence dictated that the buyers require a provision thereon in the contract, and failure to do so was evidence that they did not rely upon such representation and that such representation was not regarded by them as material.

Another source of contention between the purchasers and the seller was a heating plant. After two years of unsatisfactory performance, the seller's representative told the purchasers that the seller would install an entirely new heater if the purchasers would be happy with the situation. Later, the purchasers asked that another heater be installed, and the seller expended 1,200 dollars in doing so.

The court referred to the rule that a "person by accepting benefits may be estopped from questioning the validity and effect of a contract;

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17. FLA. STAT. § 478.211 (1965).

18. 191 So.2d 572 (Fla. 4th Dist. 1966).

19. *Id.* at 576.

20. *Id.* at 577. The court stated that had the buyer relied on such representations, he could have inserted a provision in the contract to protect against the contingencies covered by the representations.

and, that where one has an election to ratify or disaffirm a conveyance, he can either claim under or against it, but he cannot do both, and having adopted one course with knowledge of the facts he cannot afterwards pursue the other." It was then concluded that the purchasers, by "accepting benefits (a new heater) under the contract, with knowledge of the facts, have waived their rights, if any they ever had, to rescind the contract and deed and now are estopped from seeking such relief."<sup>21</sup>

In *Tonkovich v. South Florida Citrus Industries, Inc.*,<sup>22</sup> the court, in reversing a summary judgment for the vendor,<sup>23</sup> indicated that the purchasers would be successful in their counterclaim for rescission on the basis of fraudulent representations. The controversy grew out of a sale of 15 acres to be used as a citrus grove and an ancillary contract of management with the seller.

The misrepresentations concerned the location of the parcel and the condition of the trees thereon. During a visit to the premises, the purchasers were shown a parcel of land containing orange trees. The parcel was represented by a salesman to be the one described in the contract of sale. Later, the purchasers agreed to purchase an additional five acres of grove lands, which were to be contiguous and similar to the ten already purchased. About a year later, on another visit to Florida, the purchasers discovered that the land which they had been told was their grove, did not belong to them, but that some other 15 acre tract was the one they had purchased. The trees on the 15 acres owned by the purchasers were considerably smaller than those on the acreage shown to them by the seller.

The court pointed out that to be entitled to relief, the misrepresentations must be of a material fact as opposed to opinions, and that the purchaser must be justified in relying on the misrepresentations and must not have been negligent. The court held that the statements as to the location of the land and the planting of the trees were statements of fact and not opinion. It was then concluded that the purchasers, having made a visual inspection of the land, were unaware of the fraudulent concealment by the seller, and could only have discovered the fraud by having a survey taken of the property described in the deed. The court found no decision, either in Florida or elsewhere, that required a purchaser to have a survey conducted of the land in order to identify its location once the purchaser has been shown the land by the seller. Accordingly, it was decided that the facts in the instant case fell within the rules of justifiable reliance.<sup>24</sup>

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21. *Id.* at 579.

22. 185 So.2d 710 (Fla. 2d Dist. 1966), *cert. granted and cause remanded for reconsideration of waiver*, 196 So.2d 438 (Fla. 1967).

23. The action by the vendor was to foreclose a statutory lien for labor and materials furnished to the grove.

24. 185 So.2d 710, 716 (Fla. 2d Dist. 1966).

### C. Rescission Generally

#### 1. LAW VS. EQUITY

A judicial attempt at further amalgamation of law and equity in matters of damages and rescission met with no success in *Corak Construction Corporation v. Scott*.<sup>25</sup> In this case the purchasers refused to consummate the sales contract because of defective workmanship, and then brought an action in the civil court of record seeking damages in an amount almost equal to their down payment plus incidental expenses.

The trial court, recognizing that the purchasers could not recover damages for defects in construction where they had renounced the contract and refused to accept the house, nevertheless granted judgment against the seller for the amount of the purchasers' 4,500 dollars deposit on the theory that the purchasers had established a right to rescission. It was held on appeal that the trial court, having jurisdiction only in legal actions, had no authority to grant rescission. The case was remanded with directions to transfer it to the equity side of the circuit court.<sup>26</sup> Because of the jurisdictional limitation of the civil court of record to legal matters, the result of the case would not be affected by the new Rules of Civil Procedure.<sup>27</sup>

#### 2. CONCEALMENT

In *Gercas v. Davis*<sup>28</sup> the buyer was successful in rescinding a contract for the purchase of a bar business because of restrictive covenants prohibiting use of the property for the sale of alcoholic beverages. The written contract provided against oral representations. The land was sold subject to restrictions on the reverse side of the agreement, but the listed restrictions contained no prohibition against the sale of alcoholic beverages.

The court concluded that the sellers were under a duty to inform the plaintiff of the restrictions against the sale of alcoholic beverages, and that the withholding of this information amounted to a false representation as a matter of law and justified the entry of a summary judgment in favor of rescission.<sup>29</sup> The restrictions provided that they could be enforced by the subdivider and the owners of the residential lots in the subdivision. Although there was an attempted modification of the restrictions by the owners of the business lots to permit the sale of alcoholic beverages, the court pointed out that no release of the restrictions was obtained from the subdivider or any of the residential lot owners in the subdivision. It was then stated (and correctly it would seem) that a re-

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25. 184 So.2d 460 (Fla. 3d Dist. 1966), *cert. denied*, 189 So.2d 633 (Fla. 1966).

26. 184 So.2d 460 (Fla. 3d Dist. 1966).

27. *In re* Fla. Rules of Civil Procedure, 1967 Revision, 187 So.2d 598 (Fla. 1966).

28. 188 So.2d 9 (Fla. 2d Dist. 1966).

29. *Id.* at 11.

lease or modification of the restrictions only by the owners of the restricted business lots would be a nullity.<sup>30</sup>

### 3. SELLER'S DEFAULT—ABSTRACT OF TITLE

In *Ehringer v. Gross*<sup>31</sup> it was held that the buyer was justified in rescinding a contract when the seller failed to deliver an abstract of title approximately a month and a half after the time provided for in the contract. During this time the purchaser apparently endeavored to obtain the abstract from the seller. The court held that this forbearance did not amount to a waiver and did not serve to extinguish the right of the buyer to thereafter rescind for failure of the seller to comply with the contract. Nothing was said about time being of the essence in this particular contract, but it is believed that a month and a half is more than reasonable time in the absence of a showing of special circumstances, and, at the same time, it is not so long a time as to show indifference on the part of the purchasers as to when the contract should be consummated. In short, the decision appears sound.

#### D. Marketable Title

*Fretwell v. Crisafulli*<sup>32</sup> held that the record disclosed material issues of fact precluding summary judgment in favor of the vendors. The court noted that time was not made of the essence in the contract, and therefore it was not to be so regarded in a court of equity. Issues of fact which were noted as precluding a summary judgment were: (1) whether the title was merchantable and "whether the bill of sale of marl had been cleared of the public records" as requested by the purchasers; (2) whether a ten day period demanded by the sellers' letter was a reasonable time for the buyers to accept the title and consummate the purchase under the circumstances; and (3) whether the sellers had cleared the defects previously raised by the buyers.<sup>33</sup> When time is not made of the essence of a contract, the party not in default is justified in making a demand on the other and giving notice that the other party perform within a reasonable time, but the question of reasonable time depends upon the facts of each particular case. Accordingly, the summary judgment in favor of the sellers was reversed.

Restrictive covenants providing that the entire lot should be used as a docking area in perpetuity were held, and correctly it would seem, to render the title unmarketable in *Tamiami Abstract & Title Company v. Malanka*.<sup>34</sup> In this case, a contention was made that the restrictions

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30. *Id.*

31. 182 So.2d 460 (Fla. 1st Dist. 1966).

32. 185 So.2d 504 (Fla. 4th Dist. 1966).

33. *Id.* at 506-07.

34. 185 So.2d 493 (Fla. 2d Dist. 1966).



were destroyed as a result of a tax sale of the encumbered lot. However, the court pointed out that under a Florida Statute<sup>35</sup> restrictive covenants survive and are enforceable after the issuance of a tax deed. The restrictions were in the form of covenants and thus within the terms of the statute. There was no forfeiture, right of re-entry or other reverter involved.

#### E. *Terms and Conditions*

The court in *330 Michigan Avenue, Inc. v. Cambridge Hotel, Inc.*,<sup>36</sup> affirming a decree of specific performance in favor of the purchasers, held that the contract was sufficiently definite, and that the seller could not object on the basis that the corporate buyer was not incorporated at the time the contract was entered into.

The dispute as to the completeness of the terms and conditions dealt with the sufficiency of the provisions concerning a mortgage to be executed by the purchasers. The court stated that although such provisions did not state which property was to be used as security, it was apparent that the property purchased was to be used for that purpose. Further, the insert "10 percent per year amortization," along with provision for interest at 6 percent, was held sufficient as to the terms of payment since there is an established presumption that equality of payment is intended.<sup>37</sup>

Since the seller knew that the corporation which was to take title had not been organized on the date of the contract, the court held that, having contracted with a corporation under its corporate name, the seller cannot now object that the corporation had not then been duly incorporated. In addition, there was no lack of mutuality as the corporation later effectively ratified the contract.<sup>38</sup>

In *Osborn v. H. D. H., Inc.*,<sup>39</sup> the proper construction of an option agreement included within a purchase contract was the subject of judicial determination. The option contract provided for the sale of additional lots: 54 within one year from the closing of the transaction on the sale of the first 46 lots, and 100 each year thereafter until a total of 420 lots had been purchased under the option agreement. The provision that caused the difficulty was a clause providing that any improvement not fully completed within ninety days, the period within which the purchaser would be required to purchase additional lots, would be extended for a like period equivalent to the delayed completion of the improvements.

The purchaser contended that the meaning and intent of the parties

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35. FLA. STAT. § 192.33 (1965).

36. 183 So.2d 725 (Fla. 3d Dist. 1966).

37. *Id.* at 727.

38. *Id.*

39. 192 So.2d 22 (Fla. 4th Dist. 1966).

was the ninety day delay period and the right to exercise the option on the purchase of the additional lots was suspended during any period in which the improvements were not constructed within the times therein provided for in the purchase of the initial 46 lots. A majority of the appellate court approved the trial court's interpretation that the contract was clear and unambiguous, and that the option for the purchase of the additional lots was timed to begin upon the closing of the transaction on the initial purchase. The court further held that except for the beginning of the running of the time within which the option could be exercised, the agreements were separate and distinct arrangements for the purchase of additional lots in the same subdivision.<sup>40</sup> Accordingly, the decree removing the option to purchase as a cloud on the title was affirmed. The dissenting opinion would have construed the agreement and the option as providing that, if the sellers failed to complete the improvements on the first 46 lots within the time provided, then the first option period granted to the purchaser would be extended to one year after completion of the improvements. Accordingly, the dissenting judge thought the agreement was ambiguous and of uncertain meaning, that it could be construed in more ways than one, and that therefore the issues should not have been resolved on summary judgment.<sup>41</sup>

## II. LANDLORD AND TENANT

### A. *Forcible Entry and Unlawful Detainer—Legislation*

Chapter 82 of the Florida Statutes, relating to forcible entry and unlawful detainer (which provisions, of course, are not restricted to landlord and tenant litigations) was revised by Florida Laws, chapter 67-254. The revised chapter is essentially the same as the provisions under the 1963 Florida Statutes except that instead of spelling out the procedure in chapter 82 the new chapter simply states that the plaintiff is entitled to the summary procedure under section 51.011 of the Florida Statutes. Section 51.011, under the 1967 legislation,<sup>42</sup> is a general summary procedure statute applicable to all summary procedures specified by statute or rule. The general statute does not specify in which court or courts the action may be brought, and the new forcible entry and unlawful detainer statutes likewise do not specify what court or courts have jurisdiction. Under the repealed sections, the statutes specified the county judge's court, county court, or circuit court. Jurisdiction now is determined solely by the statutes or constitutional provisions setting up the courts, which provisions indicate that the above-mentioned courts as well as the Civil Court of Record in some counties have jurisdiction.<sup>43</sup>

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40. *Id.* at 23.

41. *Id.* at 23-4.

42. Fla. Laws 1967, ch. 67-254, § 7, creating FLA. STAT. § 51.011 (1967).

43. FLA. CONST. art. V, § 6(3) as to the circuit courts; FLA. CONST. art. V, § 7(3) and FLA. STAT. § 36.01(2) (1965) as to the county judge's court; FLA. STAT. § 34.01(2) (1965), as to the county courts; FLA. STAT. 33.14 (1965) as to the civil court of record in counties

### B. *Landlord and Tenant Legislation Generally*

Chapter 83 of the Florida Statutes relating to landlord and tenant has been revised.<sup>44</sup> Statute sections 83.01 through 83.07, relating to tenancies at will and tenancies at sufferance, the termination of tenancies at will, the landlord's right of entry upon default in rent, the landlord's right to double rent on refusal of the tenant to deliver possession, and the landlord's action for use and occupation, contain minor changes in style and punctuation but otherwise retain the substantive provisions heretofore applicable.

Statute sections 83.08 through 83.19, relating to the landlord's remedy of distress, likewise retain the preexisting substantive provisions but make some changes in language and punctuation.

Statute sections 83.20 through 83.38 of the 1965 statutes related to the summary removal of tenants by the county judge and the county court. The new provisions relating to the summary removal of tenants are covered in six brief sections; 83.20 through 83.251. Section 83.20, relating to the causes for removal of tenants is substantially the same as the old 83.20; the differences being simply in style and phraseology. Section 83.21, relating to the procedure for summary removal of the tenant, is similar to the repealed section except that the court having jurisdiction is not designated, and the applicable procedure is simply stated to be the summary procedure provided in section 51.011 of the Florida Statutes.<sup>45</sup> The sections relating to service of process, judgment of removal, process for restoring possession, and costs are stated in a much more succinct fashion than in the 1965 statutes. Thus, sections 83.28 through 83.38, relating to the removal of tenants by the county court, have been deleted from the new legislation as unnecessary since they are covered by sections 83.21 and the subsequent sections relating to removal of the tenant, chapter 51 relating to summary procedure, constitutional provision article V statutes pertaining to specific courts, and the applicable rules of procedure. Jurisdiction to remove tenants is conferred on the county judge's court,<sup>46</sup> county courts,<sup>47</sup> and the civil court of record in some counties.<sup>48</sup>

### C. *Types of Tenancies*

The nature of the Florida statutory tenancy at will became an important factor in *Drum v. Pure Oil Company*,<sup>49</sup> wherein the plaintiff

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having a population of 260,000 or more. *Leaders Int'l Jewelry, Inc. v. Board of County Commr's*, 183 So.2d 242 (Fla. 3d Dist. 1966) (upheld the jurisdiction of the Civil Court of Record of Dade County in eviction proceedings).

44. Fla. Laws 1967, ch. 67-254, § 34.

45. Fla. Laws 1967, ch. 67-254, § 7, creating FLA. STAT. § 51.011 (1967).

46. FLA. STAT. § 36.01(2) (1965).

47. *Id.* § 34.01(3).

48. *Id.* § 33.14(1), applicable to counties having a population of 260,000 or more.

49. 184 So.2d 196 (Fla. 4th Dist. 1966).

sought damages against both the lessor and lessee of a filling station as a result of a fall. The immediate lease to the operating tenant was oral, thereby making the tenancy a tenancy at will.<sup>50</sup> The plaintiff slipped and fell on the first day of the month.

In order to justify recovery against the *lessor*, the plaintiff contended that the statutory tenancy at will begins anew on the first day of each month. Therefore, he contended, the landlord has a duty on the day of the beginning of the period to have the premises in a safe condition and is liable to third persons for injuries caused by defects in leased premises when a defect in the premises at the beginning of the lease is a violation of law or in the nature of a nuisance. The court noted a conflict of authority in other jurisdictions as to whether such a tenancy is of a continuing nature or whether it constitutes a series of new tenancies.

The court decided, however, that the Florida statutes were controlling, and noted the statutory provision that such a tenancy may be terminated by giving notice not less than 15 days prior to the end of any monthly period.<sup>51</sup> The court thus concluded that under the statute such a tenancy is continuous until terminated. Therefore, such a tenancy does not terminate at the end of each month and arise anew at the beginning of the next. Accordingly, the landlord was not liable for the condition of the premises on the day of the plaintiff's fall.

An attempt by a holdover tenant to transform the tenancy into a statutory tenancy at will was unsuccessful in *Leaders International Jewelry, Inc. v. Board of County Commissioners of Dade County*.<sup>52</sup> In this case, the tenant was unsuccessful in obtaining a renewal of his lease because of a higher bid by another tenant. The outgoing tenant was permitted to remain for an additional thirty day period with the consent of the new tenant. The outgoing tenant contended that his tenancy was converted into a statutory tenancy at will<sup>53</sup> because he remained with the consent of the landlord. The court rejected the contention, pointing out that the evidence clearly established that there was no intention on the part of the plaintiff to create a new lease with the defendant, and that this fact was conveyed to the defendant. The acceptance of rent for one month, the issuance of a receipt therefor, and the explicit permission to remain for an additional month, did not convert the tenancy into a tenancy at will.

#### D. Assignment

In *Tiernan v. Sheldon*,<sup>54</sup> the court literally followed the terms of the lease permitting free assignability and release thereafter from any lia-

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50. FLA. STAT. § 83.01 (1965).

51. *Id.* § 83.03.

52. 183 So.2d 242 (Fla. 3d Dist. 1966), *cert. denied*, 188 So.2d 816 (Fla. 1966).

53. FLA. STAT. § 83.04 (1965).

54. 191 So.2d 87 (Fla. 4th Dist. 1966). *See also Sheldon v. Tiernan*, 147 So.2d 167 (Fla. 2d Dist. 1962), regarding other issues.

bility to the lessor when the tenant made an assignment to a corporation formed for the express purpose of taking an assignment of the lease. It was stated that courts will set aside fraudulent schemes perpetrated upon innocent parties, but that it is not proper to relieve one from the consequences of a bad bargain. Thus, although there was evidence that the corporation was undercapitalized and that it later failed to file annual reports, the court noted that the corporation was a legal entity pursuant to the laws of Florida and entitled to transact business on the date that the lease was assigned to it. The lessor specifically reserved no control over the assignment of the lease, and hence it was the lessor's own improvidence that led to the situation.

In *ABC Liquors, Inc. v. Athanason*,<sup>55</sup> a corporation in possession of leased premises was placed in receivership. The store operated by the corporation was sold by the receiver without any assignment or mention of the lease. It was held that the buyer at the receivership sale, although he took possession of the leased premises and paid the monthly rental reserved in the lease during occupancy, was not bound by the terms of the lease. Therefore the buyer was not obligated for rental payments after he vacated the premises. The fact that the receiver executed an assignment of the lease to the buyer after the buyer had vacated the premises and delivered the keys was ineffective to hold the purchaser under the lease. The court, by analogy, applied the general rule that an assignee of a lease, where there is no assumption of a leasehold obligation by the assignee, is liable only for rent during occupancy. Generally, an assignee is liable during privity of estate or until he in turn assigns the lease, and he cannot escape liability by simply abandoning possession. In the instant case, however, the result is justified since there was in fact no assignment to the purchaser.

*Johnson v. Jaquith*<sup>56</sup> held that the landlord's refusal to consent to an assignment was not unreasonable under the circumstances. The lease provided for assignment with the consent of the landlord and that such consent should not be unreasonably withheld.

It was found that a letter forwarded by the tenant stating that if he would guarantee the lease payments and forward them to the landlord, that this should remove any concern on the financial ability of the assignee, was only a preliminary negotiation and not a legally effective offer to remain personally liable on the lease. Further, the court concluded that if the statement was construed as a legally operating offer, then the offer was to guarantee payment of the rental only and not to remain personally liable for breach of the other lease covenants. The landlord was concerned with the financial ability of the assignee to meet other obligations under the lease, and until the landlord was furnished

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55. 184 So.2d 521 (Fla. 2d Dist. 1966).

56. 189 So.2d 827 (Fla. 4th Dist. 1966).

with satisfactory proof of such financial ability, the landlord was justified in refusing to consent to an assignment.

#### E. *Covenants for Exclusive Use*

A covenant that the lessee should be the only appliance store in a particular shopping center was the focal point of litigation in *Winter Park Appliance Center, Inc. v. Walling Crate Company*.<sup>57</sup> The court concluded that the lessor did not breach the covenant.

At the time the lease was executed, space in the shopping center was already under lease to and operated by a drug store, a ten cent store, a department store, a super market and a hardware store. After the lease was executed, other space was leased to a music center, which sold radios, portable phonographs, stereos, televisions and tape recorders. The drug and hardware stores sold small electrical devices, such as hot plates, mixers and the like. The department store sold ranges, refrigerators and freezers. The plaintiff contended that such items as delineated above were appliances, and that sale of such appliances by the other tenants breached his lease.

The court stated that it was obvious that none of the other businesses in the shopping center were appliance stores since the sale of household appliances therein was only a minor purpose of the business or department. The court noted the common practice of super markets, drug stores, department stores and other businesses in selling a wide range of merchandise today, without being considered primarily appliances stores. The court stated that although non-competitive covenants are legal and valid, such covenants must be positively expressed, and being in restraint of trade, they must be strictly construed.<sup>58</sup>

In *Hollywood Shopping Plaza, Inc. v. Schuyler*,<sup>59</sup> the landlord's violation of an exclusive covenant was held to release the assignor-tenant from liability under an agreement in which he had guaranteed full performance of the lease. The lease provided that while the tenant was not in default and was the original tenant under the lease, the landlord would not lease any other space in the shopping center to a store carrying competing lines of merchandise. Thereafter the tenant assigned his lease. The assignee assumed the obligations of the original tenant, the landlord consented to the assignment, and later the original tenant entered into an agreement guaranteeing to the landlord the full performance and observance of all the covenants in the lease.

Approximately one year after the guaranty agreement, the landlord

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57. 196 So.2d 198 (Fla. 2d Dist. 1967), *cert. denied*, 200 So.2d 183 (Fla. 1967) (Justice Ervin rendered a strong dissenting opinion concurred in by Justice O'Connell).

58. 196 So.2d 198 (Fla. 2d Dist. 1967).

59. 179 So.2d 573 (Fla. 2d Dist. 1965), *cert. denied*, 188 So.2d 315 (Fla. 1966).

leased space in the shopping center to a company carrying a line of merchandise directly competing with the line of merchandise carried by the successor tenant in violation of the covenants of the original lease. The court held that the assignment and consent by the landlord "recognized the successor tenant as if it were the original tenant." The court then stated that it is "well settled that any material violation of the terms of a contract by the person for whose benefit such contract is guaranteed releases the guarantor from liability."<sup>60</sup> The court concluded that since there was no denial of the material allegation that a store carrying competing merchandise was leased to a competitor in violation of the terms of the lease, the agreement and guaranty executed by the plaintiff was void, and there was no genuine issue of material fact for consideration by the court. Therefore, the summary final decree voiding the guaranty agreement was affirmed.

#### F. *Non-Implication of Covenant to Complete Shopping Center*

The noncompletion of a shopping center as proposed at the time the lease was executed was held not a sufficient basis for rescission in *S. H. Kress & Company v. Desser and Garfield, Inc.*<sup>61</sup> In this case the lease included a covenant that the landlord would make no substantial deviation in the location of buildings shown on a diagram.

The court pointed out that the lease did not specifically contain a covenant that the entire premises would be completed. The covenant to make no substantial deviations in location of buildings shown on the diagram was held not a covenant to build and the court refused to imply a covenant to complete the shopping center as contemplated. It stated that in the absence of an agreement to complete or substantially complete the shopping center according to a prescribed plan, there was no basis for implying a time of performance. Therefore, the tenant was not entitled to any relief.

#### G. *Landlord's Lien; Priorities*

The statutory lien of the landlord for past due rent was held superior to a judgment lien in *McKesson & Robbins, Inc. v. Taft Street Shopping Center.*<sup>62</sup> The decision was predicated on the Florida statute<sup>63</sup> which gives the landlord a lien for rent upon the property found and usually kept on the rented premises. The statute also provides that such lien shall be superior to any lien acquired subsequent to the bringing of such property on the premises.

It was thus held that the judgment which was obtained after institu-

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60. 179 So.2d 573 (Fla. 2d Dist. 1965).

61. 193 So.2d 192 (Fla. 3d Dist. 1966).

62. 184 So.2d 210 (Fla. 2d Dist. 1966).

63. FLA. STAT. § 83.08 (1965).

tion of the distress proceedings was subject to the claim for rent, and the fact that the landlord claimed in its initial distress suit only a part of the rent was immaterial. All property of the tenant upon the premises was subject to the rent lien even though the landlord took action to enforce only a portion of its lien. The court further stated that the fact that an amended bond was not filed covering the additional rent due was immaterial because the bond would have been payable to the tenant,<sup>64</sup> and the tenant alone can object to such failure. The tenant made no objection. In this case, the landlord filed an amended affidavit to the distress suit seeking unpaid rent for additional months after the property had been already sold under the writ of attachment. The sale was subject to all prior liens, and this included the landlord's claim for the additional rent.

#### H. Termination

A number of cases involved litigation concerning termination of the lease. These held: rescission of a lease is permissible where a governmental agency had held the premises unfit for the contemplated use;<sup>65</sup> a landlord may cancel a lease for the nonpayment of rent and need not apply the security deposit to prevent the tenant's default;<sup>66</sup> acceptance of monthly rent as such payments became due precluded the landlord from declaring a forfeiture of the lease.<sup>67</sup> When a written lease did not become effective because the landlords in effect made a counteroffer, an oral lease resulted so that the tenants were justified in terminating the lease in accordance with statutory provisions,<sup>68</sup> and therefore were entitled to recover the rental paid for the period beyond such termination.<sup>69</sup>

Two cases involved purported termination of the lease by the landlord for nonpayment of the rent when the tenant forwarded a check for which there were insufficient funds. The landlord was successful in one case and not in the other. In *Baumwald v. Treasure Isle Motel, Inc.*,<sup>70</sup> the landlord promptly terminated the lease and re-entered the premises. The court held such an action was justified. In *Fort Walton Square, Inc. v. Purvis*,<sup>71</sup> on the other hand, the landlord was unsuccessful in terminating the lease. In this case, however, the landlord apparently acquiesced in the tenant's offer to make good the check and agreed that when the check was

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64. *Id.* § 83.11.

65. *Edmanuel, Inc. v. Jones Shutter Prods., Inc.*, 184 So.2d 224 (Fla. 3d Dist. 1966); *But see* earlier litigation, 168 So.2d 682 (Fla. 3d Dist. 1964) commented on in previous survey, 20 U. MIAMI L. REV. 313, 333-34 (1965). The court in the instant case said it was not bound by the previous construction of the use clause because neither *res judicata* nor another cause pending was pleaded or tried in the instant suit. 184 So.2d at 225.

66. *Mutual Employees Trade Mart v. Silverman*, 178 So.2d 616 (Fla. 3d Dist. 1965).

67. *Tropical Attractions, Inc. v. Coppinger*, 187 So.2d 395 (Fla. 3d Dist. 1966).

68. FLA. STAT. § 83.01 (1965), making an oral lease a tenancy at will; and § 83.03 specifying the length of notice for terminating such a tenancy.

69. *Sill v. Smith*, 177 So.2d 265 (Fla. 2d Dist. 1965).

70. 177 So.2d 252 (Fla. 3d Dist. 1965).

71. 177 So.2d 857 (Fla. 1st Dist. 1965).



returned by the bank to him, he, the landlord, would redeposit it. Several weeks later the landlord attempted to terminate the lease for failure to pay the March rent. The appellate court affirmed the trial court's conclusion that under the circumstances, especially since the tenant had an equity in the property because of an option to purchase, it would be unjust to terminate the lease. The court noted also that there had been a design on the part of the lessor for sometime to oust the lessee from the premises.

### I. Procedure

A number of procedural issues were raised in the case of *Fraze v. Fraze*.<sup>72</sup> An eviction action was filed in the county judge's court, and the tenant, instead of filing an answer, moved to dismiss. The motion was denied after hearing and judgment was rendered against the tenant. On appeal to the circuit court, the judgment was affirmed. Thereafter the tenant appealed to the district court of appeal. It was first pointed out that the proper procedure to reach the district court of appeal in the instant case was by writ of certiorari and not appeal, since a party is entitled to only one appeal. However, the court reviewed the case as if it had been presented by certiorari.

The court noted that the record on appeal was very indefinite and incomplete so that it was difficult for the court to pass upon the issues raised by the tenant. The proceedings in the county judge's court were not recorded, but the final judgment did recite that the cause came on for trial after due notice. The court thus concluded that the petitioner failed to demonstrate that the trial court denied her due process of law which she claimed was denied her because she was forced into a trial of the cause at a hearing of which notice was given for the sole purpose of disposing of pending motions, and at which she was not prepared to present her defense on the merits.<sup>73</sup>

The second contention of the tenant was that her motion to dismiss raised a real and substantial question of title to the real estate described in the petition, and therefore the county judge was without jurisdiction to proceed further. The court pointed out that the petition to remove the tenant alleged that the defendant was a tenant at sufferance, and that the method of raising a substantial question of title to the real estate was by answer or other return filed in response to the petition. Further, the court added, even if the motion should have been treated as a return or answer, an examination of the motion revealed that the defendant's claim to be the beneficial owner of the property was not alleged to be predicated upon any agreement, contract or other instrument. In fact, no basis for the claim of ownership was stated or alleged. Thus, the bare allegation of

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72. 185 So.2d 484 (Fla. 1st Dist. 1966).

73. *Id.* at 486.

ownership was deemed not sufficient to raise a real or substantial question of title to the land.<sup>74</sup>

The proper method of proceeding when a defendant has a counterclaim in excess of the court's jurisdiction was the principle question in *State v. Blanton*.<sup>75</sup> In that case the landlord filed an action in the civil court of record to remove a tenant under summary process. The tenant filed a counterclaim for damages in excess of the jurisdiction of that court, and the civil court of record ordered that only the tenant's counterclaim be transferred to the circuit court. The civil court of record retained jurisdiction for purposes of removing the tenant. This procedure was held proper.

The tenant claimed that the civil court of record should have transferred the whole case, including the removal question. This claim was predicated on the Florida Rules of Civil Procedure,<sup>76</sup> providing that the court to which the action is transferred should have full power and jurisdiction over the demands of all parties. The court noted that although the rule for transfer, taken literally, appears to command that the entire cause be transferred to the court of higher jurisdiction, the rule should not be given literal application in an anomalous situation where to do so would be impractical.

The court pointed out that the civil court of record had statutory jurisdiction to try the case for removal of a tenant.<sup>77</sup> The circuit court is given original jurisdiction under the Florida Constitution in cases of forcible entry and unlawful detainer,<sup>78</sup> but is not given such jurisdiction for removal of tenants under chapter 83 of the Florida Statutes. The court concluded that the transfer rule must be read together with the organic law and statutes relating to jurisdiction of the actions involved. In doing so, it concluded that the civil court of record properly retained jurisdiction in the action for removal of the tenant while transferring the case for damages.<sup>79</sup>

### III. MECHANICS' AND RELATED LIENS

#### A. *Statutory Number Change*

The Mechanics' Lien Law has been transferred from chapter 84 to chapter 713 of the Florida Statutes, designated Part I of said chapter, and renumbered accordingly.<sup>80</sup> The title, "Mechanics' Lien Law" is retained.

Sections 85.01 through 85.28 of the Florida Statutes, relating to mis-

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74. *Id.* at 487.

75. 195 So.2d 870 (Fla. 3rd Dist. 1967).

76. FLA. R. Civ. P. 1.170(j).

77. 195 So.2d at 871. *See also* p. 294 *supra*.

78. Art. V, § 6(3). *See* p. 287 *supra*.

79. 195 So.2d at 872.

80. Fla. Laws 1967, ch. 67-254, § 35.

cellaneous statutory liens on real property, have been transferred from chapter 85 to chapter 713 of the Florida Statutes, renumbered accordingly, designated Part II of said chapter, and entitled "Miscellaneous Liens."<sup>81</sup>

### B. Enforcement of Statutory Liens

Most of the provisions of chapter 86 of Florida Statutes, entitled "Enforcement of Statutory Liens," have been transferred to chapter 85, amended, renumbered, and entitled "Enforcement of Statutory Liens."<sup>82</sup> The style and phraseology of these provisions are altered considerably.

### C. Nurserymen and Landscape Gardeners

A new statute<sup>83</sup> provides a lien on real estate under former chapter 85<sup>84</sup> of the Florida Statutes in favor of any person, firm or corporation who furnishes trees, shrubs, bushes, or other plants planted upon the land on which they are situated. The lien is only applicable where the claim is for a value of \$300 or more.

### D. Non-Privity Lienors—Sub-subcontractors and Other Remote Parties

The 1963 Mechanics' Lien Law was construed in *J. P. Driver Co. v. Claxton* to preclude a sub-subcontractor from obtaining a mechanic's lien.<sup>85</sup> The decision is predicated on the statute<sup>86</sup> providing that a materialman not in privity with the owner or a subcontractor who complies with the provisions of the law shall have a lien. The court thus concluded that a sub-subcontractor was not included in the category of those protected persons.

The problem of sub-subcontractors and parties more remotely in privity with the owner has for some time been a source of litigation in Florida. During this biennium, for example, the Supreme Court of Florida in *Conway v. Sears Roebuck & Co.* held that a repealed statute,<sup>87</sup> providing that a sub-subcontractor was entitled to a lien, did not authorize a lien for a sub-sub-subcontractor.<sup>88</sup> This decision was used by analogy in the *Driver* case to apply a rule of strict construction and preclude the sub-subcontractor from getting a lien under the present act.

Under the former act both a sub-subcontractor<sup>89</sup> and a materialman supplying a subcontractor had been denied liens,<sup>90</sup> but a 1961 statute<sup>91</sup>

81. *Id.* § 36.

82. *Id.* § 37.

83. Fla. Laws 1967, ch. 67-201.

84. Fla. Laws 1967, ch. 67-254, § 36.

85. 193 So.2d 440 (Fla. 2d Dist. 1967).

86. FLA. STAT. § 84.061 (1965).

87. FLA. STAT. § 84.021 (1961) (repealed 1967).

88. *Conway v. Sears, Roebuck & Co.*, 185 So.2d 697 (Fla. 1966).

89. *Richard Store Co. v. Florida Bridge & Iron, Inc.*, 77 So.2d 632 (Fla. 1954).

90. *General Capital Corp. v. Adobe Brick & Supply Co.*, 138 So.2d 82 (Fla. 2d Dist. 1962); *Quality Lime Prods., Inc. v. Acme Paving Co.*, 134 So.2d 42 (Fla. 2d Dist. 1961).

91. FLA. STAT. § 84.021 (1961) (repealed).

was then enacted to provide a lien specifically for the sub-subcontractor. The 1963 act does not specifically provide a lien for the sub-subcontractor, and therefore the court concluded that he was not entitled to one.

It is interesting to note that in *Conway*<sup>92</sup> the dissenting justice would have construed the then applicable statute to encompass a sub-sub-subcontractor rather than adopt the limited construction of the majority. Justice Ervin in dissent stated:

[I]n the light of the overall objectives of the Mechanics' Lien Law it appears to me a subcontractor is any person who lawfully sub-contracts to perform a part of the contractor's contract, either with the contractor or with any other sub-contractor. The real essence of the definition is that the contractee is to perform a part of the prime contract. When any person other than the contractor lawfully enters into a sub-contract to perform any part of the work he is a sub-contractor.<sup>93</sup>

Under the present act, the lien is accorded materialmen and laborers not in privity with the owner and sub-contractors.<sup>94</sup> A subcontractor is defined statutorily as a person other than a materialman or laborer who enters into a contract with a contractor.<sup>95</sup> A sub-subcontractor is defined as a person other than a materialman or laborer who enters into a contract with a subcontractor.<sup>96</sup> Thus, it can be argued, as held in the *Driver* case, that since the legislature defined a sub-subcontractor and then specifically limited liens to subcontractors, there was an intent not to accord a lien to a sub-subcontractor. On the other hand, the 1961 statute, by specifically providing otherwise, obviously reflected a legislative disapproval of earlier decisions holding that a sub-subcontractor was not entitled to a lien. It thus seems somewhat inconsistent that by enacting the whole new Mechanics' Lien Law two years later, the legislature intended to preclude the sub-subcontractor from obtaining a lien. Also, it seems a little peculiar that the legislature would go to the trouble of defining a sub-subcontractor and then, without *specifically* denying him a lien, deny him a lien by not including him in the section of the statute mentioning persons entitled to a lien.

#### E. *Conditions Precedent—Furnishing Statements*

The present Mechanics' Lien Law requires the contractor to give the owner, at the time of final payment, a statement under oath to the effect that: (1) all lienors have been paid in full, or if the fact be other-

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92. *Conway v. Sears, Roebuck & Co.*, 185 So.2d 697 (Fla. 1966). This case denied a lien to a sub-sub-subcontractor under the 1961 statute.

93. *Id.* at 699.

94. FLA. STAT. § 84.061 (1965).

95. *Id.* § 84.011(16).

96. *Id.* § 84.011(17).

wise, (2) the name of each lienor who has not been paid in full and the amount due or to become due each for labor, services or materials furnished.<sup>97</sup> This requirement has been upheld and the contractor denied a lien where he had failed to comply with the requirement of filing such an affidavit.<sup>98</sup> In the same case the contractor had also failed to comply with the statute<sup>99</sup> requiring every lienor to record a claim of lien. It was likewise held that failure to record a claim of lien also precluded the contractor from obtaining a lien, but that it did not preclude him from maintaining an action at law on the contract.<sup>100</sup>

Lienors other than laborers not in privity with the owner are required to serve a notice on the owner setting forth the lienor's name and address and describing the nature of labor, service and materials furnished in order to be entitled to a lien.<sup>101</sup> This mandatory requirement has been upheld and literally applied in *Babe's Plumbing, Inc. v. Maier*.<sup>102</sup> Thus, a subcontractor who had failed to furnish such a statement was denied a lien. Although in this case the owners were also guilty of noncompliance with the Lien Law by making an improper payment,<sup>103</sup> the court, following a rule of strict construction, held that a lienor under the statute must rely on the correctness of his own position rather than on the weakness or flaws in that of his adversary.

In *Babe's Plumbing*, the court distinguished the earlier case of *John T. Wood Homes, Inc. v. Air Control Products, Inc.*<sup>104</sup> In the *Wood Homes* case, the owner was seeking affirmative relief, whereas in *Babe's Plumbing* the owner assumed a strictly defensive posture. The court concluded that the *Wood Homes* case thus confirmed that strict compliance with the statute is an indispensable prerequisite to an owner, contractor or subcontractor seeking affirmative relief under the Mechanics' Lien Law.

*Stancil v. Gardner*<sup>105</sup> reached a result compatible with *Babe's Plumbing*. In *Stancil*, a subcontractor failed to serve notice on the owner, and the owner failed to file a notice of commencement.<sup>106</sup> The court stated that the fact that the owner did not comply with the statute did not relieve the subcontractor from complying, and that since it is a prerequisite to give said notice and the subcontractor failed to comply, the trial court was correct in dismissing his complaint.

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97. FLA. STAT. § 84.061 (3)(d)(1) (1965).

98. *Halifax Constr. Co. v. Chastain Groves, Inc.*, 192 So.2d 15 (Fla. 1st Dist. 1966).

99. FLA. STAT. § 84.081 (1965).

100. *Halifax Constr. Co., v. Chastain Groves, Inc.*, 192 So.2d 15 (Fla. 1st Dist. 1966).

101. FLA. STAT. § 84.061(2) (1965).

102. 194 So.2d 666 (Fla. 2d Dist. 1966).

103. Proper payment provisions are found in FLA. STAT. § 84.061(3) (1965).

104. 177 So.2d 709 (Fla. 1st Dist. 1965).

105. 192 So.2d 340 (Fla. 2d Dist. 1966).

106. FLA. STAT. § 84.131 (1965), provides for the notice of commencement; § 84.061 (3)(c) for proper payment of progress payments to the contractor.

The necessity of parties to comply with all statutory procedures is also illustrated by *John T. Wood Homes, Inc. v. Air Control Products, Inc.*,<sup>107</sup> previously noted.<sup>108</sup> The owner failed to file a notice of abandonment<sup>109</sup> and then proceeded to subtract the cost of completing construction from the contract price and to prorate the balance among the lien claimants.<sup>110</sup> The proration was not accomplished and the owner filed an action against the lien claimants. The court held that the requirement of filing a notice of abandonment was mandatory, and that the owner's failure to do so precluded him from reducing the contract price by the amount of the cost of completion of the construction. Therefore, the balance due under the contract was available to pay lienors, and the particular lienor was entitled to a lien to the full extent of its claim.

#### F. Attorneys' Fees

The statute<sup>111</sup> authorizing the prevailing party to recover a reasonable fee for the services of his attorney was held not to authorize the allowance of attorneys' fees for prosecuting an appeal.<sup>112</sup>

#### G. Sureties

The surety on a bond to which a mechanic's lien has been transferred can be joined in an action to establish and foreclose the mechanic's lien. This procedure is new in Florida and is applicable both to the former act and the 1963 Mechanics' Lien Law. In *Kleinman v. Bal Harbour Towers, Inc.*,<sup>113</sup> arising under the former Mechanics' Lien Law, a majority of the third district court of appeal had held that the lienor could not enforce a mechanic's lien against such a surety in an equity suit to foreclose the lien. Judge Barkdull dissented,<sup>114</sup> saying that the law should not be ridiculous. He stated that when the property owner elected to transfer the lien to a bond, the surety substituted its obligation to pay in place of the property encumbered. Therefore, if the lienor is successful in establishing its right to payment, and if payment is not forthcoming within a day certain, then the lienor should have a right to go directly against the surety. The Supreme Court of Florida reversed the third district on the basis of Judge Barkdull's dissent.<sup>115</sup>

*Triangle Distributors v. Travelers' Indemnity Company*,<sup>116</sup> arising

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107. 177 So.2d 709 (Fla. 1st Dist. 1965).

108. *Id.*

109. FLA. STAT. § 84.071(4) (1965).

110. *Id.*

111. FLA. STAT. § 84.291 (1965).

112. *John T. Wood Homes, Inc. v. Air Control Prods. Inc.*, 177 So.2d 709 (Fla. 1st Dist. 1965).

113. 188 So.2d 398 (Fla. 3d Dist. 1966), *rev'd*, 198 So.2d 830 (Fla. 1967).

114. 188 So.2d at 402.

115. 198 So.2d 830 (Fla. 1967).

116. 195 So.2d 237 (Fla. 3d Dist. 1967).

under the 1963 Mechanics' Lien Law, reached the same result as the Supreme Court in the previous case on the basis of the reasoning set forth in Judge Barkdull's dissenting opinion.<sup>117</sup> This procedure of joining the surety in a foreclosure action was again upheld in *Val-Rich Corporation v. Tole Electric Company*.<sup>118</sup>

#### H. Miscellaneous

*O'Brian Associates of Orlando, Inc. v. Tully*<sup>119</sup> dealt with the right of a lien claimant, not in privity with the owner, to amend his notice to the owner.<sup>120</sup> Such notice must be served before commencing, or not later than 45 days after commencing, to furnish the materials. This notice may be amended<sup>121</sup> any time during the period allowed for recording a claim of lien, provided that such amendment shall not cause any person to suffer a detriment by having acted in good faith in reliance upon such claim of lien as originally recorded. In the instant case the amended claim of lien was filed long after ninety days from final furnishing of the materials; hence an amendment was held not authorized under that statute. It was further concluded that the statute prohibited an amendment to a claim of lien after the expiration of the period allowed for recording such a claim.<sup>122</sup>

The court next considered whether the lien could be enforced under a theory that the date set forth in the claim of lien stating when the first materials were supplied was, in fact, erroneous, and that the materials in fact had been supplied within forty-five days. Section 84.081(4)(a)<sup>123</sup> permits the enforcement of a lien irrespective of omission of details or errors provided the enforcement is against one who has not been adversely affected by such omission or error. It was held that to permit enforcement the court must determine that the owners have not been adversely affected by the error. Whether the owners were adversely affected by the error was held to be a material issue of fact which precluded the rendition of a summary judgment.<sup>124</sup>

*Finney v. Barber Block Plant, Inc.*,<sup>125</sup> arising under the former act, involved a subcontractor who had abandoned or quit substantial work after default by the general contractor. It was held, in accordance with the statute,<sup>126</sup> that since the nonprivity owner did not file a claim of lien

117. See *Kleinman v. Bal Harbour Towers, Inc.*, 188 So.2d 398 (Fla. 3d Dist. 1966), *rev'd*, 198 So.2d 830 (Fla. 1967).

118. 196 So.2d 486 (Fla. 3d Dist. 1967).

119. 184 So.2d 202 (Fla. 4th Dist. 1966).

120. The notice is required under FLA. STAT. § 84.061(2)(a) (1965).

121. FLA. STAT. § 84.081(4)(b) (1965).

122. 184 So.2d at 204.

123. FLA. STAT. § 84.081(4)(a) (1965).

124. *O'Brian Associates, Inc. v. Tully*, 184 So.2d 202, 204 (Fla. 4th Dist. 1966).

125. 183 So.2d 698 (Fla. 2d Dist. 1966).

126. FLA. STAT. § 84.16 (1961), repealed and replaced by FLA. STAT. § 84.081 (1965).

within ninety days<sup>127</sup> after he quit substantial work, he was barred from asserting a lien. It was also held that the fact that the claimant went on the premises at a later date to affix a two dollar piece of material was not substantial in amount and would not make valid a claim that the lien was timely perfected. The court stated that were the rule otherwise any lien claimant, after the time for filing a claim of lien had expired, could hasten back to the job to furnish an insignificant piece of material and thereby obviate the necessity of timely filing.

*Tassinari v. Chaney*<sup>128</sup> held that the evidence sustained the lienor's claim for extras furnished under the contract. The extras were incurred as a result of changes made in construction.

In *Ray v. Dock & Marine Construction, Inc.*,<sup>129</sup> the court found that both the owners and the contractor were responsible for incomplete and unsatisfactory performance of an oral construction contract. It was thus concluded that both should share expenses of correcting the work. Accordingly, the owners were properly awarded as damages only a portion of the total cost of making the work conform to the contract.

*County National Bank of North Miami Beach v. Fierman*<sup>130</sup> involved a dispute between an assignee of a subcontractor and a judgment creditor of the subcontractor. The court held that the effect of the Mechanics' Lien Law is to make special statutory provisions applicable to the rights of creditors of those engaged in the performance of a contract for the improvement of real property. Therefore, the provisions of the now repealed Accounts Receivable Law<sup>131</sup> are, by its own terms, not applicable to the assignment of an account or account receivable existing by virtue of a contract for the improvement of real property. Therefore the assignment to the bank was valid, and the bank's claim was superior to that of the judgment creditor. In a similar controversy today, the effect of the Uniform Commercial Code<sup>132</sup> should be considered.

*Hughey v. Stevmier, Inc.*,<sup>133</sup> arising under the former law, upheld the one year statute of limitations<sup>134</sup> for enforcing a mechanic's lien, and held that the lienor who did not foreclose within this period of time lost his lien. The court stated that when the right and the remedy are created by the same statute, the limitations of the remedy are treated as limitations of the right.

127. The former statute specified three months; the present one, ninety days.

128. 187 So.2d 376 (Fla. 1st Dist. 1966).

129. 183 So.2d 237 (Fla. 3d Dist. 1966), *cert. denied*, 192 So.2d 489 (Fla. 1966).

130. 188 So.2d 384 (Fla. 4th Dist. 1966).

131. FLA. STAT. ch. 524 (1965), particularly § 524.01(a), now repealed.

132. FLA. STAT. §§ 679.9-101 to 679.9-113 (1967).

133. 190 So.2d 410 (Fla. 2d Dist. 1966), *cert. denied*, 195 So.2d 565 (Fla. 1966).

134. FLA. STAT. §§ 84.21, 84.23(3) (1961), repealed. §§ 84.221 and 84.211 of the present law contain similar provisions.



In *Remington Construction Company v. Hamilton Electric, Inc.*<sup>135</sup> the court stated that an acceptance of a note did not bar the lienor from an action to enforce his mechanic's lien. The subcontractor had taken a note from the contractor prior to institution of the mechanic's lien foreclosure suit. The note was subsequently sued on in a common law action. It was held that this did not bar further prosecution of the mechanic's lien foreclosure, and that the remedies by way of action on the note and foreclosure on the mechanic's lien are merely cumulative, and, until such time as judgment on the note is satisfied, the holder may prosecute a mechanic's lien against the property. The case arose under the former Mechanic's Lien Law, and specifically held that the striking of the defendant's answer for failure to respond to interrogatories, and the entry of default without a prior order directing a response to interrogatories, was reversible error.

*Michel v. Bayshore Marina, Inc.*<sup>136</sup> held that a civil engineer employed to draw plans presumably for the improvement of real estate was not entitled to a mechanic's lien, but that the decree of dismissal should not preclude the possibility of a further action between the parties for damages. The claimant on appeal contended that he was entitled to a statutory lien pursuant to section 85.05 of the Florida Statutes, but since this contention was not made in the trial court, the appellate court correctly refused to decide that issue.

#### IV. FIXTURES AND CROPS—SECURITY INTERESTS, LEGISLATION

##### A. *Generally*

The 1967 Legislature made significant amendments to portions of the Uniform Commercial Code applicable to security interest in fixtures.<sup>137</sup>

##### B. *Description of Encumbered Property; Recording and Notice*

The statute<sup>138</sup> relating to the identity of the encumbered property originally provided that any description of personal or real property is sufficient if it reasonably identifies what is described. The 1967 amendment retains this material but further provides that a description of real estate in an instrument filed to perfect a security interest in crops or goods which are, or are to become, fixtures shall be sufficient only if filing or recording the instrument constitutes constructive notice under other laws of the state applicable to the filing or recording of real estate mortgages.<sup>139</sup>

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135. 181 So.2d 183 (Fla. 3d Dist. 1965).

136. 183 So.2d 294 (Fla. 3d Dist. 1966).

137. Fla. Laws 1967, ch. 67-264, amending FLA. STAT. §§ 679.9-110, 679.9-313, 679.9-401 subsections (2) and (3), and 679.9-402 subsections (1) and (3).

138. FLA. STAT. § 679.9-110 (1965).

139. Fla. Laws 1967, ch. 67-264, § 1, amending FLA. STAT. § 679.9-110 (1965).

A mailing or street address alone is expressly stated not to be sufficient. The addition of this provision is a salutary measure from the view point of the purchaser or mortgagee of real property.

The policy of avoiding possible conflict between provisions of the Uniform Commercial Code and statutes relating to real property is also exemplified in the 1967 amendments relating to the filing or recording of security interests. Florida Statute section 679.9-401, subsection 2, as originally enacted, provided that a filing which was made in good faith at an improper place or not in all the places required by such section was nevertheless effective in regard to any collateral as to which the filing complied with the requirements of such chapter. Such a filing was also effective with regard to collateral covered by the financing statement against any person who had knowledge of the contents of such financing statement. Subsection 3 of the same statute provided that a filing made in a proper place would continue effective although the debtor's residence, place of business, or location of the collateral or its use was thereafter changed.

The 1967 amendment repeated verbatim both sections as originally enacted but added in both subsections "except as provided in subsection 2 of section 679.9-313."<sup>140</sup> Thus, it is clear that the specific provisions relating to the priority of security interests in fixtures govern conflicts in this area and not the general provisions of the Uniform Commercial Code. It thus appears that purchasers and encumbrancers of the real estate will be able to rely on real estate records and will not have to check other records to ascertain outstanding security interests.

The statute relating to the formal requirements of a financing statement<sup>141</sup> was amended to provide that when the financing statement covers crops growing or to be grown, or goods which are or are to become fixtures, the statement must contain a sufficient description of the real estate. So far this is the same as the original statute, but the amendment provides specifically that the mailing or street address is not sufficient.<sup>142</sup> The name of the record owner or record lessee must also be included.<sup>143</sup> Similarly, the form of the financing statement, as set forth in subsection 3 of the statute,<sup>144</sup> specifically states that the real estate should be described by legal description, that the mailing or street address is not sufficient, and that the record owner or record lessee of the real estate should be indicated.

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140. Fla. Laws 1967, ch. 67-264, § 3, *amending* FLA. STAT. § 679.9-401(2) and (3) (1965).

141. FLA. STAT. 679.9-402 (1967).

142. Fla. Laws 1967, ch. 67-264, § 4, *amending* FLA. STAT. § 679.9-402(1) and (3) (1965).

143. *Id.*

144. *Id.*

### C. Priority of Security Interests in Fixtures

Significant and substantial changes were made by the 1967 Legislature in the statute relating to priority of security interests in fixtures. The repeal of subsection 4 of that statute<sup>145</sup> is seemingly significant in that subsection 4, although awkwardly worded and improperly punctuated,<sup>146</sup> accorded priority to a group of persons<sup>147</sup> herein referred to generically as subsequent bona fide purchasers for value without notice of the outstanding security interest. The new statute entirely eliminates these provisions, but for reasons subsequently expressed,<sup>148</sup> it is believed that the rights of such parties under the new provisions are substantially the same as before.

The amended subsection 2 of section 679.9-313 provides that a security interest which attaches<sup>149</sup> to goods which are to become fixtures is invalid against any person with an interest in the real estate at the time the security interest in the goods is *perfected*,<sup>150</sup> or at the time the goods are affixed to the real estate, whichever occurs later, if such person has not in writing consented to the security interest or disclaimed an interest in the goods as fixtures. This is apparently a reversal of the original provision<sup>151</sup> which stated that the security interest, which attaches to goods before they become fixtures, takes priority as to the goods over the claims

145. Fla. Laws 1967, ch. 67-264, § 2, repealing subsections (4) and (5) of FLA. STAT. § 679.9-313 (1965).

146. The repealed subsection (4) read as follows:

(4) The security interests described in subsections (2) and (3) do not take priority over:

(a) A subsequent purchaser for value of any interest in the real estate; or  
 (b) A creditor with a lien on the real estate subsequently obtained by judicial proceedings; or  
 (c) A creditor with a prior encumbrance of record on the real estate to the extent that he makes subsequent advances. [sic]

If the subsequent purchase is made, the lien by judicial proceedings is obtained, or the subsequent advance under the prior encumbrance is made or contracted for without knowledge of the security interest and before it is perfected. A purchaser of the real estate at a foreclosure sale other than an encumbrancer purchasing at his own foreclosure sale is a subsequent purchaser within this section.

The statute had the punctuation indicated, namely a period after "advances" with the following word "If" beginning with a capital "I." This is obviously a mistake in editing as the whole provision makes little or no sense with such punctuation. The official A.L.I. UNIFORM COMMERCIAL CODE version has no period or other punctuation after "advances" and the word "if" begins with a lowercase "i." As thus punctuated, the provision is intelligible.

147. Such persons briefly are: subsequent purchasers for value, subsequent judgement creditors, and prior lien creditors to the extent of subsequent advances. See note 146 *supra* for details.

148. See p. 304 *infra*.

149. FLA. STAT. § 679.9-204 (1965), defines when a security interest attaches; § 679.9-303 and 304 relate to perfection of the security interest. The significance between attachment and perfection generally seems to be this: The security interest is valid between the parties when it attaches; it is also valid against subsequent bona fide purchasers and encumbrancers, if it is perfected before such parties obtain their interests. The precise wording of the statutes relating to attachment, perfection and priorities must be consulted, however. See also FLA. STAT. §§ 679.9-301; 679.9-312 and 679.9-313.

150. See note 149 *supra*.

151. FLA. STAT. § 679.9-313(2) (1965), now amended.

of all persons who have an interest in the real estate except as to subsequent purchasers and creditors set forth in the now repealed subsection 4.<sup>152</sup>

The desirability of giving a prior mortgagee of the real estate priority over a security interest in a subsequent fixture may be questioned, particularly in those instances where the fixture may enhance the value of the real estate and thus increase the security of the prior mortgagee. Of course, if the fixture is replacing a worn out fixture over which the mortgagee's lien had attached, and if the fixture is necessary for the reasonable enjoyment of the premises and the security of the mortgagee, a different argument may be made. The new statute, in any event, seems sufficiently clear and unambiguous in this regard so that litigation in this area should be minimized.

The second paragraph of the revised subsection 2<sup>153</sup> provides that a security interest in goods which are or are to become fixtures takes priority as to the goods over the claims of all that acquire an interest in the real estate subsequent to the perfection of such security interest, or the affixing of the goods to the real estate, whichever occurs later. This is similar to the original section, except that the original section made specific provisions for the subsequent bona fide purchaser, mortgagee, and lien creditor of the real estate. This seeming lack of concern for the subsequent bona fide purchaser or mortgagee suggests a reversal of traditional policy in which the law has favored such parties.<sup>154</sup> However, the express deletion from this statute of the protection afforded a subsequent bona fide purchaser, mortgagee or lien creditor of the real estate probably effects no substantive change at all as to such parties. This is explained in the next paragraph.

The recording provisions of the Uniform Commercial Code provide that the proper place to file in order to perfect a security interest in fixtures is the office and in the record where a mortgage on the real estate concerned would be recorded.<sup>155</sup> Thus, the aforementioned provision according priority to the security interest in fixtures as against subsequent bona fide purchasers of an interest in the real estate will cause no difficulty. The result should be similar to that of the usual priority dispute arising under the recording act. This is so because there will be no subsequent bona fide purchasers of the real estate without notice of the prior security interest in the fixtures. Priority as to security in fixtures as against persons acquiring a subsequent interest in the real estate only

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152. See notes 145-7 *supra* and accompanying text.

153. Fla. Laws 1967, ch. 67-264, § 2, amending FLA. STAT. § 679.9-313(2) (1967).

154. See, e.g., the recording act, FLA. STAT. § 695.01 (1965), which invalidates unrecorded deeds and other instruments affecting title to real property as against subsequent bona fide purchasers and mortgagees without notice.

155. FLA. STAT. § 679.9-401(1)(b) (1967); see also FLA. STAT. §§ 679.9-401(1), 679.9-110 and 679.9-401(2) and (3) (1967), as amended, Fla. Laws 1967, ch. 67-264, § 1. See p. 302 *supra*.

occurs under the amended statute when the security interest is perfected, or the goods affixed, whichever is later. The security interest must be recorded in the county records before the security interest is perfected. After it is so recorded, then, as in recording cases generally, no subsequent party can claim to be a subsequent bona fide purchaser without notice of the security interest. The amended act apparently, however, goes further than simply protecting subsequently acquired bona fide interests in the real estate without notice. Since the statute accords priority to the security interest in the fixtures on the basis of both affixation and perfection, apparently a subsequent purchaser or mortgagee with knowledge of a prior unperfected security interest in the fixtures would nevertheless obtain priority.

#### D. *Removal of Fixtures*

The new subsection 3 of Florida Statute section 679.9-313,<sup>156</sup> relating to removal of the collateral from the real estate by the holder of a security interest in the fixture, is substantially the same as the repealed subsection 5, except that a provision is added requiring the secured party to give reasonable notification of his intention to remove the collateral to all persons entitled to reimbursement.

### V. MORTGAGES

#### A. *Equitable Mortgages*

The case of *First Mortgage Corporation of Stuart v. de Give*,<sup>157</sup> holding simply that substantial issues of fact precluded the rendering of a summary judgment, dealt with the rights of the parties in a mortgage of an equitable interest under a contract to convey. Before delineating those rights, it was necessary to analyze first the various steps in a somewhat complicated transaction.

It was first held that the agreement between the vendor and the vendee, because it appeared that the parties contemplated a subsequent deed of conveyance, was an executory contract and not a deed conveying an absolute one-half interest to the vendee. Noting that the equitable interest of a purchaser under a contract is assignable, the court then considered the effect of the particular assignment. Pursuant to the statutory definition of a mortgage,<sup>158</sup> it was held that the assignment in question, along with the agreement for re-assignment, was in fact the execution of a mortgage by the vendee.<sup>159</sup> Next it was held that a mortgage given by one holding land under an executory contract covers his interest, whatever

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156. Fla. Laws 1967, ch. 67-264, § 2, amending FLA. STAT. 679.9-313(3) (1967).

157. 177 So.2d 741 (Fla. 2d Dist 1965).

158. FLA. STAT. § 697.01 (1965.) "All conveyances . . . for the purpose . . . of securing the payment of money . . . shall be deemed and held mortgages. . ."

159. 177 So.2d at 746 (Fla. 2d Dist. 1965).

it may be, at the date of the mortgage, and that the mortgagee cannot be ousted of his rights by a subsequent rescission or reconveyance by the original parties. Therefore, in the instant case, the vendee's deed back to the vendor, at a date subsequent to his execution of the mortgage, did not operate to cut off the mortgagee's interest in the agreement.<sup>160</sup>

The rights of a mortgagee of a contract to purchase were then delineated. It was stated that such a mortgagee acquires merely the right to complete the purchase if the mortgagor refuses to do so, and the mortgagee takes no greater rights than the purchaser had. In other words, the mortgagee acquires a right to purchase the property for the consideration stipulated in the contract of purchase, and the enforceability of the mortgage depends upon the condition that the contract be kept in force by the subsequent performance of its terms. One of the terms of the contract between the vendor and the vendee was for the vendee to give the vendor a release for services already performed. Apparently the vendee gave no such release, but an affidavit of the vendee simply stated that he (the vendee) never qualified "on either of these grounds for delivery of a deed."<sup>161</sup>

The court stated that in executing a mortgage the purchaser must of necessity be deemed to have given his mortgagee the power to perform for him in all respects. Otherwise, the mortgage would have no value. Thus, although the vendee was no longer personally interested in performance, the mortgage of his equitable interest necessarily included the right to perform for and on his behalf that act (giving a release) as well as all other conditions which the contract required him to perform. Therefore, the subsequent attempted rescission by the vendee in giving a deed to the vendor did not defeat the rights of the mortgagee because the conveyance was specifically made subject to the mortgagee's rights. Further, the conveyance and purported rescission occurred after the execution and delivery of the mortgage and could not cut off the mortgagee's known outstanding equity.<sup>162</sup>

In *Guaranty Mortgage & Insurance Company v. Harris*,<sup>163</sup> the supreme court reversed a decision granting an unperfected pledge of notes and mortgages priority over a subsequent assignment of the same notes and mortgages. In this case, the unperfected pledge was created to secure a loan of money to the holder of the notes and mortgages, the holder agreeing that the parcel of land covered by the notes and mortgages would be posted on its corporation books as collateral security for the "pledgee's" loan.

The notes and mortgages were neither formally assigned nor delivered into the actual possession of the pledgee. The original mortgagors

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160. *Id.*

161. *Id.* at 748.

162. *Id.* at 747.

163. 182 So.2d 450 (Fla. 1st Dist. 1966), *rev'd*, 193 So.2d 1 (Fla. 1966).

were never notified that the indebtedness owed by them and evidenced by their notes and mortgages had been pledged as collateral security. During the one year period of the loan, and at a time when each of the notes and mortgages was in default, the pledgor sold and assigned the notes and mortgages to a third person, who subsequently assigned the notes and mortgages to Guaranty Mortgage & Insurance Company. None of the assignees had either actual or constructive knowledge that the notes and mortgages had theretofore been pledged by the assignor-pledgor as collateral security for indebtedness owed the pledgee.

The chancellor and the district court of appeal had held that the contract between the pledgor and pledgee vested in the latter an equitable interest in the notes and mortgages. The district court of appeal asserted that had there been no assignment of the notes and mortgages, there could be no doubt that the pledgee acquired an equitable right against the notes and mortgages, and that such right was not dependent upon whether the pledge was sufficient in law to constitute an unimpeachable pledge of the instruments themselves.

The question whether an assignee of the notes and mortgages acquired a better position than the original holder was initially answered in the negative. It was pointed out that at the time of the assignment, each of the notes and mortgages was in default. Thus, the district court held that none of the assignees were entitled to protection as a holder in due course of the instrument sued upon.<sup>164</sup> The court cited *Florida Jurisprudence*<sup>165</sup> to the effect that negotiable paper which is overdue carries on its face notice of infirmities and defects, and that one who takes a negotiable instrument after its maturity ordinarily is not entitled to protection as a holder in due course, but that such person holds subject to the defenses based on infirmities in the instrument or defects in the title of the person transferring it.

The supreme court, without disturbing the holding that the assignees were not entitled to the status of holders in due course, nevertheless concluded that the subsequent assignees should prevail.<sup>166</sup> It was stated that the loss should fall on the earlier equitable pledgees, since it was they who made possible the later machinations of the assignor. The failure of the pledgees to secure possession of the instruments, to secure and record an assignment of the obligations, or even to give notice to the obligors, resulted in depriving the subsequent assignees of an opportunity to discover the earlier unperfected security interest. In effect, the earlier pledgees were estopped to deny priority over the later assignees, and the loss should fall on that innocent party who contributed to or made possible the subsequent loss.

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164. 182 So.2d at 453 (Fla. 1st Dist. 1966).

165. *Id.*

166. 193 So.2d 1, 3 (Fla. 1966).

Assuming the good faith of the subsequent assignees (and there was no evidence to the contrary) the supreme court's decision seems the more legally sound in spite of the natural sympathy for an enticed investor relying on rosy representations.

*Clark v. Howard*<sup>167</sup> reaffirmed the proposition that a deed absolute intended as security is in fact a mortgage, although absolute in form, and must be foreclosed in order for the mortgagee to realize upon the property.

### B. *Future Advances*

*Silver Waters Corporation v. Murphy*<sup>168</sup> involved the question of priorities between a mortgage given to secure future advances and a second mortgage executed prior to some of the advances made pursuant to the first mortgage. The statute<sup>169</sup> upholding the validity of a mortgage to secure future advances, whether such future advances are obligatory or otherwise, was given full effect. It was therefore held that the mortgage for future advances had priority to the full extent of all money lent as against the second mortgage, although some of the advances under the first mortgage were made after execution of the second mortgage. The court pointed out that the Florida Statute originally using the words "whether obligatory or otherwise," was amended in 1963 to read "whether obligatory or optional."<sup>170</sup> Thus, the court concluded that the Florida Statute specifically rejected the rule in many states distinguishing between optional and future advances in such mortgages. Under the rule in the other states,<sup>171</sup> the mortgage for future advances does not have priority as to subsequent advances made after notice of a second mortgage when the advances are optional and not obligatory. The court's conclusion that such a distinction between optional and obligatory advances is precluded by the Florida Statute is justified.

### C. *Clogging*

The general rule precluding clogging of the equity of redemption is, of course, followed in Florida. Thus, for example, a deed absolute intended as a mortgage must be foreclosed, and the mortgagor cannot be divested of his interest by the mortgagee's simple act of recording the deed absolute.<sup>172</sup> The anti-clogging rule was applied in *MacArthur v. North Palm Beach Utilities, Inc.*<sup>173</sup> involving a lending of money for the construction of a water supply and sewage disposal system. The agree-

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167. 192 So.2d 302 (Fla. 3d Dist. 1966).

168. 177 So.2d 897 (Fla. 2d Dist. 1965).

169. FLA. STAT. § 697.04(3) (1961). The validity of a mortgage for future advances was also recognized in *Clark v. Howard*, 192 So.2d 302 (Fla. 3d Dist. 1966).

170. 177 So.2d at 901.

171. *Id.* at 900, citing general authority.

172. *Clark v. Howard*, 192 So.2d 302 (Fla. 3d Dist. 1966).

173. 187 So.2d 681 (Fla. 4th Dist. 1966).



ment provided that the loans would be evidenced by notes secured by a first mortgage upon the property. The agreement also contained an option permitting the lender to purchase the water supply and sewage system. The court denied specific performance of the option, holding that the utility agreement was essentially a mortgage transaction and that the option incorporated therein, if given effect, would operate to defeat the mortgagor's right of redemption and was therefore invalid. The anti-clogging rule is of ancient vintage and is often expressed by the maxim, "once a mortgage, always a mortgage."

#### D. *Deficiency Decrees and Foreclosure*

The meaning of the axiom that the discretion to grant deficiency decrees in foreclosure suits is a "sound judicial discretion" was further defined in *Larsen v. Allocca*.<sup>174</sup> In this case, the chancellor had listed a number of factors which he regarded as justifying the denial of a deficiency decree. The appellate court reversed as to the amount for unpaid interest, attorney fees, and court costs.

The appellate court stated that the absence of a down payment, the fact that the purchase was not financed by a lending institution, and provisions of the note and mortgage which postponed payment of installments of principal for five years, were not sufficient reasons for denial of a deficiency. It was pointed out that the foreclosure decree included approximately 5,000 dollars for unpaid interest, attorney fees, and court costs allowable by law. Thus, it was held that even if it be assumed that the reacquired property retained its original value (as found by the chancellor and not disturbed by the appellate court) the motion for deficiency decree should have been allowed as to the additional sum of 5,000 dollars due under the foreclosure decree.

In the previous survey<sup>175</sup> it was pointed out that all (then three) of the district courts of appeal had held that the foreclosure sale price was inconclusive for purposes of determining a deficiency when the mortgagee is the purchaser at a foreclosure sale.<sup>176</sup> Those cases are apparently now overruled by the Supreme Court of Florida,<sup>177</sup> although the statement as to the conclusiveness of the sale price may not have been absolutely necessary for rendering the particular decision.

In *Southern Realty & Utilities Corp. v. Belmont Mortgage Corp.*<sup>178</sup> the chancellor, before confirmation of the sale, was requested to set it

174. 187 So.2d 903 (Fla. 3d Dist. 1966), *cert. denied*, 195 So.2d 566 (Fla. 1966).

175. Boyer & Berger, *Real Property Law*, 20 U. MIAMI L. REV. 313—15 (1965).

176. *Maudo, Inc. v. Stein*, 171 So.2d 403 (Fla. 3d Dist. 1965); *Jonas v. Bar-Jam Corp.*, 170 So.2d 479 (Fla. 3d Dist. 1965); *Builders Fin. Co. v. Ridgewood Homesites, Inc.*, 157 So.2d 551 (Fla. 2d Dist. 1963); *Kurkjian v. Fish Carburetor Corp.*, 145 So.2d 523 (Fla. 1st Dist. 1962).

177. Cases cited note 178 *infra*.

178. 186 So.2d 24 (Fla. 1966), *vacated*, 186 So.2d 815 (Fla. 3d Dist. 1966).

aside because of inadequacy of price. The sale price was 50,000 dollars, and an appraisal gave the market value of the property in excess of 321,000 dollars. The chancellor accordingly set aside the foreclosure sale and ordered a new one.

In reversing the district court of appeal<sup>179</sup> and affirming the chancellor's order, the supreme court noted that this request for setting aside the sale had occurred prior to confirmation of the sale. The court stated that it is both the right and the duty of the chancellor to supervise the process in his court and to protect all the parties from unfairness as well as fraud in its execution. A foreclosure sale is not complete until it is confirmed; therefore it carries no presumption of regularity, and it should not take as strong a showing to justify a chancellor's exercise of discretion to refuse confirmation as it does to set aside a confirmed sale.<sup>180</sup>

The decision approving the chancellor's discretion in refusing to confirm a sale for inadequacy of price, particularly when the mortgagee buys in the property, is certainly justified. However, whether the rule that the confirmed sale price is conclusive between the parties in the determination of a deficiency<sup>181</sup> should be vigorously reasserted may be open to question. Instances may develop where a deficiency decree would appear to be unjust in spite of the fact that less than the mortgage debt might be realized from a sale of the mortgaged property. Nevertheless, until a contrary ruling appears, it seems that the best chance for the mortgagor is in persuading the chancellor to refuse confirmation when the foreclosure price is substantially less than the market value of the mortgaged property.

#### E. *Miscellaneous Substantive Principles*

*Laing v. Gainey Builders, Inc.*<sup>182</sup> reaffirmed the general principles that the assignee of a mortgage and note assigned as collateral security is the real party in interest, that such assignee holds the legal title to the mortgage and note, and that he, not the assignor, is the proper party to file a suit to foreclose the mortgage. Thus, it was held that the assignor in such an assignment for security did not retain sufficient ownership and control of the note and mortgage to accelerate payment and to file suit for foreclosure in his own name.

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179. 172 So.2d 522 (Fla. 3d Dist. 1965), holding that the sale price was not so inadequate as to justify setting aside the sale, and that such sale price would not be conclusive in a subsequent request for deficiency or suit at law on the note for a deficiency judgment.

180. 186 So.2d 24, 25 (Fla. 1966).

181. The Supreme Court, in the instant case, cited *Penn Mut. Life Ins. Co. v. Moscovitz*, 119 Fla. 708, 161 So. 80 (1935), as directly holding that the confirmed sale price is the conclusive test of value; *accord*, *Etter v. State Bank*, 76 Fla. 203, 79 So. 724 (1918); *Jacksonville Loan & Ins. Co. v. National Mercantile Realty & Improvement Co.*, 77 Fla. 825, 82 So. 292 (1919). FLA. STAT. § 702.02(5) (1965), states that "The value of the property sold by the clerk shall be conclusively presumed to be the amount bid therefor and for which the property was sold at the sale. . . ."

182. 184 So.2d 897 (Fla. 1st Dist. 1966).

The rights of the parties when there is an assignment of a mortgage for security, and the danger of relying on professional abstractors without personally checking the recorded documents, were both exemplified in *Housing Authority of the City of Miami v. Macho*.<sup>183</sup> In this case, after an assignment of the mortgage to secure a collateral obligation owed by the mortgagee, the mortgagee repaid the debt without obtaining a re-assignment of the mortgage to himself. At this point the real estate was sold to a purchaser who obtained from the assignee a satisfaction of the mortgage. Later the mortgagee filed a suit for foreclosure and obtained a summary final decree of foreclosure.

The court pointed out that the recorded assignment of mortgage did in fact recite that it was given as security. The fact that the purchaser relied on an abstract of title which listed the assignment without showing its character as collateral was held not to insulate the purchaser from the notice that the public record supplied. Thus, the purchaser was put on notice by the recorded assignment that it was for security, and had he made reasonable inquiry, he would have discovered that the debt secured by the assignment had been discharged, and that the original mortgage debt remained unpaid. Obviously, satisfaction of the unpaid mortgage by the person to whom it had been assigned as security after such debt had been satisfied did not terminate the mortgagee's rights therein. Thus, the purchaser's estate was subject to the mortgage, and the foreclosure was proper.<sup>184</sup>

*Tri-State Enterprises, Inc. v. Berkowitz*<sup>185</sup> held that a conveyance or mortgage of riparian upland carries with it all of the riparian rights appurtenant to the upland. One of such rights in Florida is the preferential right to acquire from the Trustees of the Internal Improvement Fund title to adjacent submerged sovereignty lands. Thus, when the riparian owner of the mortgaged upland exercises and implements his preferential rights to acquire from the state the adjacent submerged land, rendering the original upland no longer water front with full riparian rights, such newly acquired land inures to the benefit of the mortgagee of the upland and is subject to the mortgage lien. In the instant case the rule was applied when the adjacent submerged lands were conveyed by the Trustees of the Internal Improvement Fund to one of the mortgagors.

In *Marucci v. Linder*,<sup>186</sup> a mortgage on the mortgagor's home was cancelled because of constructive fraud. In this case the mortgagor, a woman with little business experience, was induced to purchase a duplex and execute a mortgage thereon. However, unknown to the woman, the

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183. 181 So.2d 680 (Fla. 3d Dist. 1966), *appeal dismissed*, 184 So.2d 916 (Fla. 3rd Dist. 1966).

184. *Id.*

185. 182 So.2d 40 (Fla. 2d Dist. 1966).

186. 177 So.2d 237 (Fla. 2d Dist. 1965).

mortgage covered both the duplex and her adjoining home and furnishings. The court found that the assignees without recourse, to whom the mortgage had been forthwith sold at a substantial discount, were chargeable with notice of such infirmity in the mortgage and hence cancelled it as to the homestead.

#### F. Procedure

In *First Federal Savings & Loan Association v. Consolidated Development Corporation*,<sup>187</sup> a foreclosure decree in county *A*, pursuant to a prayer in the complaint, expressly reserved jurisdiction for determination of any motion for a deficiency decree. Thereafter, the petitioner brought an action in county *B* to recover the deficiency. Subsequently he represented to the circuit court in county *A* that inasmuch as no motion had been made for a deficiency decree, there was no longer any need for retention of jurisdiction of the cause in that court. Whereupon there was entered in the circuit court of county *A* an ex parte order terminating jurisdiction of the cause in that court.

The circuit court of county *B* dismissed the action for a deficiency on the basis that petitioner had selected its forum, and that the respondents should not be subject to further harassment and expense. The district court of appeal in affirming the dismissal concluded that county *A* still had jurisdiction.<sup>188</sup> The Supreme Court of Florida reached the same conclusion and discharged the writ of certiorari.<sup>189</sup>

The supreme court stated that there has been no disturbance of the rule that if a deficiency is sought and the relief is overlooked or not considered, the one entitled thereto may sue for the remainder at law. But the principle, according to the court, would have to be stretched out of form to condone what the petitioner undertook in this case. In effect, the holding is simply that the right to sue at law for a deficiency cannot be exercised in the manner attempted in this case.

In a number of other cases it was held that: appointment of the associate of mortgagee's counsel as special master to perform duties attendant to processing redemption of lots sold pursuant to mortgage foreclosure was unauthorized;<sup>190</sup> a decree pro confesso for foreclosure of a mortgage may be set aside for excusable neglect when the mortgagor had at various stages of the proceeding attempted to notify the court of her intention to contest the suit in person and by counsel, when upon receipt of initial complaint she wrote letters to the court and to the plaintiff's attorney, when upon being advised that a decree had been entered

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187. 195 So.2d 856 (Fla. 1967).

188. *First Fed. Sav. & Loan Ass'n v. Consolidated Dev. Corp.*, 184 So.2d 471 (Fla. 4th Dist. 1966).

189. *First Fed. Sav. & Loan Ass'n v. Consolidated Dev. Corp.*, 195 So.2d 856 (Fla. 1967).

190. *Tri-State Enterprises, Inc. v. Berkowitz*, 182 So.2d 40 (Fla. 2d Dist. 1966).

against her, she properly filed a motion to set aside the default, and when she alleged that she was never notified of the assignment of the mortgage, and that she had made required monthly payments to the original mortgagee;<sup>191</sup> witnesses to a homestead mortgage need not be disinterested witnesses;<sup>192</sup> and the presence of genuine issues of estoppel and other equitable considerations make a summary decree of foreclosure and acceleration erroneous.<sup>193</sup>

## VI. ZONING

### A. Legislation—Agricultural Lands

Legislation in 1967<sup>194</sup> amended the Florida Statute<sup>195</sup> relating to the assessment and zoning of agricultural lands. This section creates a county agricultural zoning board, and provides that such board, in order to promote and assist a more orderly growth and expansion of urban and metropolitan areas, shall on an annual basis zone all lands within the county as either agricultural or nonagricultural. It further provides that no land shall be zoned agricultural unless a return is made which shall state that said lands on January 1st of that year were used primarily for agricultural purposes, and the board is authorized to require the taxpayer or his representative to furnish the board such information as may reasonably be required to establish that said lands were actually used for bona fide agricultural purposes.

The act is not part of a comprehensive zoning scheme, but instead is principally a taxing statute. Thus, it also defines agricultural lands and establishes criteria for assessment of the lands for tax purposes.

### B. Fairly Debatable Rule Still Viable

In the previous survey,<sup>196</sup> *Burritt v. Harris*<sup>197</sup> and *Lawley v. Town of Golfview*<sup>198</sup> were discussed as to their possible effect on the "fairly debatable" rule. In that article, it was pointed out that *Town of Golfview* interpreted the *Burritt* case as casting on the zoning authority the burden of establishing by a preponderance of evidence that the zoning restrictions under attack, "bear substantially on the public health, morals, safety or welfare of the community" if the ordinance is to be sustained.<sup>199</sup> The previous survey expressed the opinion that *Golfview's* interpretation

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191. *Gordon v. Vaughan*, 193 So.2d 474 (Fla. 3d Dist. 1967).

192. *Ross v. Richter*, 187 So.2d 653 (Fla. 2d Dist. 1966).

193. *Althouse v. Kenney*, 182 So.2d 270 (Fla. 2d Dist. 1966).

194. Fla. Laws 1967, ch. 67-117, § 1.

195. FLA. STAT. § 193.201 (1965).

196. Boyer & Berger, *Real Property Law*, 20 U. MIAMI L. REV. 313-39 (1965).

197. 172 So.2d 820 (Fla. 1965).

198. 174 So.2d 767 (Fla. 2d Dist. 1965).

199. *Id.* at 770.

of the supreme court's opinion in *Burritt* was probably exaggerated.<sup>200</sup> Cases decided since publication of that article support the conclusion reached therein.

During the period of this survey, five cases upheld the zoning ordinance on the "fairly debatable" principle. In *Dade County v. Mitchell*,<sup>201</sup> a residential zoning classification was upheld as to an intersection lot, although two existing service stations were on other corners of the intersection. Except for the service stations, the property was predominantly residential. *Dade County v. Epstein*<sup>202</sup> upheld the county commission's refusal to liberalize zoning (contrary to the recommendations of the zoning board of appeals) on the basis of the "fairly debatable" rule, and on the basis that there was substantial evidence to support either decision of the county commissioners. In like manner the "fairly debatable" rule was applied to sustain the zoning in: *Neubauer v. Town of Surfside*,<sup>203</sup> *City of South Miami v. Alvin*,<sup>204</sup> and *John G. Lane Line, Inc. v. City of Jacksonville*.<sup>205</sup>

Of course, some zoning classifications were judicially invalidated during this period. These cases, however, did not specifically indicate that the "fairly debatable" rule had outlived its usefulness or was otherwise being applied differently than it had been applied prior to the *Burritt* case. *Root v. City of South Miami*<sup>206</sup> invalidated a particular residential classification and held that any zoning of the property more restrictive than multi-family residential and semi-professional office use was arbitrary and unreasonable and amounted to confiscatory regulation. The zoning classification did not, however, authorize the use of the property as a gasoline service station. The court cited the *Burritt* and *Golfview* cases, but it also indicated that the instant case was a close situation and that the single family residential classification was almost affirmed on the basis that some of the commercial activity was outside the municipal boundaries. The multi-family residence to the south and the commercial uses across the road, although outside the municipal boundary, influenced the court to hold that a more restrictive classification than that noted above was arbitrary and unreasonable.

*City of Miami v. duPont*<sup>207</sup> held that an inflexible zoning provision restricting the size of boathouses on residential property was invalid as applied to plaintiffs who were developing their property as a large, single

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200. Boyer & Berger, *Real Property Law*, 20 U. MIAMI L. REV. at 313, 340. The "fairly debatable" rule in brief is that the zoning decisions of local authorities will not be disturbed if application of the regulation to the property in question is "fairly debatable."

201. 188 So.2d 359 (Fla. 3d Dist. 1966), *cert. denied*, 194 So.2d 620 (Fla. 1966).

202. 181 So.2d 556 (Fla. 3d Dist. 1966).

203. 181 So.2d 707 (Fla. 3d Dist. 1966), *cert. denied*, 192 So.2d 488 (Fla. 1966).

204. 189 So.2d 386 (Fla. 3d Dist. 1966).

205. 196 So.2d 16 (Fla. 1st Dist. 1967),

206. 190 So.2d 359 (Fla. 3d Dist. 1966), *cert. denied*, 196 So.2d 924 (Fla. 1967).

207. 181 So.2d 599 (Fla. 3d Dist. 1965).

family, estate type complex. The restrictions were so inflexible as to rule out any relationship between the size of the boathouse and the size, location and use of the property involved, or the size and character of the dwelling and other structures thereon.

*Fogg v. City of South Miami*<sup>208</sup> invalidated a prohibition against a drive-in dairy store operation when the city made no showing that the prohibition had any relation to health, morals and general welfare. The city had made exceptions to the prohibition by permitting drive-in operations in the same area for a gasoline service station, a bank and a savings & loan business. It appeared that the principal reason for prohibiting drive-in operations was the desire to promote other businesses on the theory that when shoppers get out of their cars and walk into a store they are also apt to walk into other nearby stores.

In *Metropolitan Dade County v. Jennings Construction Company*,<sup>209</sup> the court held that the principle of res judicata was not applicable because of a change in circumstances, and said that the circuit court should have ordered the county commission to grant the rezoning application made by the landowner.

Of the cases previously mentioned, *Neubauber v. Town of Surfside*<sup>210</sup> re-announces the "fairly debatable" rule with the most vigor. It was stated therein that the appellants had the burden of demonstrating that the zoning ordinance, as applied to their property, was unreasonable and arbitrary. The appellants were required to show that the application of the zoning ordinance had the effect of completely depriving them of the beneficial use of their property by precluding all uses or the only use to which it was reasonably adapted, or that the ordinance had invaded their personal or property right unnecessarily or unreasonably in violation of the Federal or Florida Constitution. The court then stated that the appellants had not met the extraordinary burden with which they were charged.<sup>211</sup>

### C. Discrimination—Sign Ordinance Valid

In *State v. City of Miami*,<sup>212</sup> it was held that a sign ordinance prohibiting outdoor advertising signs within 600 feet of an expressway was not rendered unconstitutional by an exception permitting "point of sale" signs advertising the use, occupant of, or merchandise sold on the premises. The case stated that it did not regard *City of Miami v. Plissner*<sup>213</sup>

208. 183 So.2d 219 (Fla. 3d Dist. 1966).

209. 196 So.2d 33 (Fla. 3d Dist. 1967).

210. 181 So.2d 707 (Fla. 3d Dist. 1966), *cert. denied*, 192 So.2d 488 (Fla. 1966).

211. 181 So.2d at 709 (Fla. 3d Dist. 1966).

212. 193 So.2d 449 (Fla. 3d Dist. 1967).

213. 167 So.2d 620 (Fla. 3d Dist. 1964), affirming without opinion a decision invalidating a Miami ordinance regulating signs adjacent to highways, but citing *Sunad Inc. v. City of Sarasota*, 122 So.2d 611 (Fla. 1960).

or *Sunad, Inc. v. City of Sarasota*<sup>214</sup> as controlling. The court in the instant case, disposed of these precedents as follows: "The *Sunad* case held that aesthetic reasons were insufficient (police power) support for the particular regulations involved there. We do not regard the Plissner case as applicable or controlling in our consideration of the validity of the county ordinance involved here."<sup>215</sup>

In view of the fact that the *Sunad* case did invalidate an ordinance regulating the size of signs and differentiating between "point of sale" and non-point of sale,<sup>216</sup> the differentiation between the instant case and the *Sunad* case seems less than satisfactory. The court simply said that an exception allowing "point of sale" signs in an otherwise valid exercise of the police power has been held to be valid, and cited *Hav-A-Tampa Cigar Company v. Johnson*.<sup>217</sup> Accordingly, the ordinance was upheld.

#### D. Nonconforming Use

In *Bixler v. Pierson*,<sup>218</sup> a house trailer was permitted, after the adoption of a zoning ordinance, to remain as a nonconforming use. It was held that replacement of the original trailer with a new and larger trailer constituted a prohibited alteration, extension and enlargement of a nonconforming structure, and was therefore unauthorized. It was pointed out that "zoning regulations look forward to the eventual elimination of all non-conforming structures and uses by attrition, abandonment and acts of God as speedily as is consistent with proper safeguards for the rights of those persons affected." Thus, substitution of the new house trailer in the instant case would permit perpetuation of the nonconforming structure. Since the substitution had been approved by the zoning director, the court stated that the property owner, if he wished, could "return the old trailer unit to the property so as to restore the original status of affairs."

#### E. Miscellaneous

In accordance with precedent that the zoning power cannot be used to protect against economic competition, *Wyatt v. City of Pensacola*<sup>219</sup> held that a provision delaying the effective date of zoning classification until 1970 for the purpose of restricting competition in an industry was unconstitutional and should have been stricken from the zoning provision.

*City of Miami v. Zorovich*,<sup>220</sup> involving land undergoing transition from a millionaires' residential row with homes facing Biscayne Bay, held

214. 122 So.2d 611 (Fla. 1960).

215. 193 So.2d at 452.

216. *Sunad Inc. v. City of Sarasota*, 122 So.2d 611 (Fla. 1960).

217. 149 Fla. 148, 5 So.2d 433 (1941).

218. 188 So.2d 681 (Fla. 4th Dist. 1966).

219. 196 So.2d 777 (Fla. 1st Dist. 1967).

220. 195 So.2d 31 (Fla. 3d Dist. 1967).



that a particular classification prohibiting motels but authorizing high-rise apartments was valid. The court specifically rejected the argument that a landowner is always entitled to the highest and best use (*i.e.*, the most economically advantageous use to the owner) and noted that if the rule were otherwise, no zoning could ever stand. The concurring opinion<sup>221</sup> berated the city for not making a comprehensive rezoning of the area and said that the city by its failure to consider the entire area had been guilty of spot zoning.

*Allen v. Secor*<sup>222</sup> quite properly held that city officials in passing a zoning ordinance could not be held liable for damages to owners of land adversely affected by the ordinance.

#### F. Procedure

The City of Hollywood, in an attempt to thwart a landowner's plan to erect a filling station, asserted the interesting defense of "zoning in progress" when the landowner brought mandamus.<sup>223</sup> In this case the land was unrestricted, but the developed area was predominately residential. The city asserted that certain actions by the commission in 1958 indicated an attempt to rezone the property as residential, that the advertisement by the planning and zoning board of a public hearing on the question of rezoning to be held at a date subsequent to the beginning of litigation constituted zoning in progress, and that the city had no authority to require its employees to issue the requested building permit. The court stated that no restriction can be placed upon the right of an aggrieved party to petition for the common law writ of mandamus, and that a zoning ordinance must be promulgated in accordance with strict adherence of the requirement of notice and hearing preliminary to the adoption of such regulations. So-called "zoning in progress" or retroactive regulations clearly do not meet such criteria.<sup>224</sup>

*Silver Star Citizens' Committee v. City Council of Orlando*<sup>225</sup> held that in order to get judicial relief plaintiffs must show their right to sue. Accordingly, it was held that where the petition for writ of certiorari did not show that plaintiffs were residents, property owners, or voters of the city, or whether they owned property adjacent to the property which was the subject of the regulations, the petition was properly dismissed.

*Hasam Realty Corporation v. Dade County*<sup>226</sup> reaffirmed the proposition that it is necessary to exhaust administrative remedies before seeking judicial review. In this case it was held that the legal action was

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221. *Id.* at 37 (Justice Barkdull concurring).

222. 195 So.2d 586 (Fla. 2d Dist. 1967).

223. *City of Hollywood v. Pettersen*, 178 So.2d 919 (Fla. 2d Dist. 1965).

224. *Id.* at 921.

225. 194 So.2d 681 (Fla. 4th Dist. 1967).

226. 178 So.2d 747 (Fla. 3d Dist. 1965), *cert. dismissed*, 192 So.2d 499 (Fla. 1966).

prematurely filed where there was a procedure to appeal the decision of the zoning appeals board and an appeal by the landowner under that procedure had been started but had not yet been completed.

The court in *City of Miami Beach v. Breit Bay, Inc.*<sup>227</sup> observed that it is not necessary to exhaust administrative remedies when there are no such remedies available. In this case the landowner had sought a zoning change as a result of changes in the character of the neighborhood. Since the board of adjustment had no authority to effectuate a change in zoning, it would have been useless to seek administrative relief. The case held that evidence sustained the finding that there had been a substantial change in the character of the neighborhood and that the single family residential zoning was not in keeping with but contrary to the most appropriate use of the land.

In *Dade County v. Metro Improvement Corporation*<sup>228</sup> it was held that after the Board of County Commissioners sat as an appellate review body under applicable charter provisions, their actions were subject to review by certiorari in the circuit court for Dade County. Accordingly, it was held that the county could not avoid its charter provisions by ordering the director of zoning unilaterally to rezone the property and bring it back for a second full scale hearing. The court stated that when final action in the nature of rezoning, or denial of rezoning, is taken by the board, then the next procedural step is judicial review.

It is to be noted that the action in *Metro Improvement* was legislative rather than administrative. The original relief sought was a change in the zoning boundary (*i.e.*, rezoning and hence legislative) and not the granting of a variance or exception (administrative). The metropolitan charter,<sup>229</sup> however, envisions lower echelon procedures prior to final action by the Board of County Commissioners even in legislative zoning matters, but provides that decisions of the zoning appeals board as to district boundary changes and changes in zoning regulations shall be considered a recommendation only. The decision in *Metro Improvement* probably does not sanction review of legislative matters by certiorari, but instead can be sustained on the proposition that the county commissioners could not avoid their charter provisions by seeking in effect a rehearing after a final determination.

When the zoning officials act in a legislative, as distinguished from a quasi judicial body, certiorari normally is not the proper method of review. Thus, in *Graham v. Talton*,<sup>230</sup> involving a rezoning order of a county district zoning commission and an affirming resolution by the

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227. 190 So.2d 354 (Fla. 3d Dist. 1966).

228. 190 So.2d 202 (Fla. 3d Dist. 1966).

229. Metropolitan Dade County Code, §§ 33-311, 33-313 and 33-316 (1966).

230. 192 So.2d 324 (Fla. 1st Dist. 1966).

county board of zoning appeals, it was held that the challenged action was legislative in character, and that such action can be questioned only by an appropriate action in the circuit court making a direct attack on the order.

An ordinance prohibiting the keeping of horses on property zoned as residential was invalidated in *Ellison v. City of Fort Lauderdale*<sup>231</sup> on the basis that the city commission did not comply with notice and public hearing provisions of the city charter and statute relating to an amendment of the ordinance. Thus, the arrest and conviction of the petitioner, who placed two ponies on his land for use in connection with a kindergarten, was quashed.

A variance is usually predicated on unnecessary hardship or practical difficulty. In *City of Miami Beach v. Burns*,<sup>232</sup> it was held that the same hardship which was alleged in a prior application for a variance which was granted could not properly be used as a hardship in a second application for a variance on the same property. It may be noted that the first variance, although granted, was never acted upon by the landowner.

## VII. EMINENT DOMAIN

### A. Sales Contracts and Equitable Conversion

Equitable conversion was used by a majority of the First District Court of Appeal to determine the rights of the vendor and purchaser under an executory contract for sale when the land under contract was taken by eminent domain in *Arko Enterprises, Inc. v. Wood*.<sup>233</sup> The sales contract provided that the vendor would secure approval of a sub-division plat by the three interested governmental agencies, construct and install on the land all improvements such as sewers, water, streets and curbs as may be required, and otherwise prepare the land for the construction of residences. Before the vendor complied with its obligation under the contract, the land was acquired by the Housing Authority of the City of Cocoa in an action of eminent domain.

A majority of the court, applying equitable conversion, regarded the purchaser as the beneficial owner from the time the contract was entered into. It was thus concluded that any loss or gain in value from the purchase price should fall on the purchaser. At the time this particular litigation developed, the eminent domain award had been given to the seller. Thus, in working out the equities of the parties, the court held as follows: the purchaser remains liable for the unpaid purchase price, but in computing the amount due the vendor, there shall first be deducted the amount

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231. 183 So.2d 193 (Fla. 1966).

232. 179 So.2d 380 (Fla. 3d Dist. 1965).

233. 185 So.2d 734 (Fla. 1st Dist. 1966).

paid by the purchaser under the contract, plus the amounts received by the vendor as proceeds in the eminent domain proceedings. In addition, there shall be deducted the cost of the improvements that the vendor was obligated to make under the contract, as for example, the cost of constructing all the sewers, water, streets, and curbs as may be required by the requisite governmental agencies. Further, any other expenses that the vendor would have incurred, including, but not limited to, procurement of abstracts of title or title insurance, documentary stamps, attorneys' fees, engineering and other costs incidental to fulfilling its obligation under the contract should also be deducted from the amount owing by the purchaser. Likewise, any deficiency in the amount of land agreed to be conveyed should be compensated for by deducting the value of such land from the agreed purchase price. The ultimate rights of the parties would thus be determined after all the deductions and set-offs have been itemized and any difference noted between their total and the total agreed purchase price.<sup>234</sup>

The case in theory thus puts the parties in the exact situation financially as if the contract had been executed. It is very difficult to do this, however, as a moment's reflection on the projected costs of converting this raw acreage into building lots reveals. Further, the purchaser had intended to make a profit by constructing homes on the lots as surveyed, and he necessarily was deprived of that.

The chief judge, in dissenting,<sup>235</sup> asserted that the doctrine of equitable conversion need not be applied as a matter of law in every case, but that it is a fiction invented by courts of equity to be applied only when courts of justice require its exercise. The chief judge pointed out the relatively small amount involved as a "known item, namely 17,920 dollars and the large amount of the "unknown" costs of the proposed extensive improvements, which admittedly "must be computed upon proof of what it 'might have cost.'"<sup>236</sup> Among the other arguments for non-applicability of equitable conversion was the fact that the subject matter of the sale was improved lots and not raw acreage. The contract provided for a conveyance of blocks of improved lots as they were ready for development.

The dissent thus stated that the subject matter of the sale, the improved lots, never came into being, and that the seller was prevented from improving the property because of the eminent domain proceeding. The dissent thus concluded that it would have been proper to enter a decree placing the parties in status quo, and would have affirmed the decree of the chancellor which required the vendor, who had secured the condemnation award, to reimburse the purchaser the amount paid

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234. *Id.* at 740-741.

235. *Id.* at 741 (Rawls, C.J., dissenting).

236. *Id.* at 742.

upon the execution of the contract together with interest. The effect of this opinion would have been a recognition that the contract became impossible to perform, and was therefore rescinded as a result of the eminent domain proceeding.

In view of the extensive improvements that remained unperformed by the vendor, the difficulty of ascertaining the price thereof and of the additional cost that may have been incurred in the sale of each lot, plus the fact that no improved lots ever came into being, it is believed that the dissent in the instant case is a sounder view.

### B. *Public Purpose and the Necessity of Taking*

A number of cases dealt with aspects of public purpose and public necessity. *Brest v. Jacksonville Expressway Authority*,<sup>237</sup> with one dissent, held that the expressway authority had no power to condemn a tract of land for the purpose of relocating a private railroad track, so that the railroad track parcel could be used in the expressway system. The principle that private property may not be taken for any use other than a public purpose was the basis of the decision.

The dissenting judge stated that the relocation of the railroad is just as an essential phase of the construction of the Jacksonville expressway system as is construction of the roads, bridges, and viaducts which form its integral parts.<sup>238</sup>

*Georgia Southern & Florida Ry. Co. v. Duval Connecting R.R. Co.*<sup>239</sup> held that when the condemnee landowner was contesting the necessity of the taking, it was not proper to require, as a condition to the granting of a stay pending the determination of certiorari, that the landowner bind himself to pay a fee for the condemnor's attorneys should the condemnor's asserted right to condemn not be defeated in the certiorari proceeding. It was stated that such an order attempted to shift to the landowner the possible burden of shouldering a portion of the condemnor's lawyers' fees, and that such provision was contrary to the landowner's right to full compensation.

*Couse v. Canal Authority*<sup>240</sup> dealt with the landowner's right to have a judicial review of an order of taking when the condemnor resorted to the extraordinary supplemental procedure of "quick taking" of possession. Under this procedure the court order vests title and possession in the condemnor, leaving as the only remaining questions to be resolved

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237. 194 So.2d 658 (Fla. 1st Dist. 1967).

238. *Id.* at 661 (Wigginton, J., dissenting).

239. 187 So.2d 405 (Fla. 1st Dist. 1966).

In a related case, *Georgia S. & F. Ry. v. Duval Connecting R.R.*, 193 So.2d 19 (Fla. 1st Dist. 1966), it was held that certiorari would not lie from an interlocutory order of taking in the absence of an actual or final order of taking.

240. 194 So.2d 301 (Fla. 1st Dist. 1967), *cert. denied*, 197 So.2d 841 (Fla. 1st Dist. 1967).

the amount of compensation to be paid the landowner, and, in appropriate cases, a division of the award among various claimants.

The court stated that where such an order of taking is entered, the landowner does not have an adequate remedy by appeal if he is contesting the necessity of the taking. In the instant case, for example, the authority desired to dig out, clear and flood the lands of the petitioner. After this was done, the landowner would not be able to recover his lands as they were prior to the court order. Accordingly, it was held that in such circumstances the court should grant "special dispensation," and it entertained the petition for certiorari.<sup>241</sup>

*City of Miami Beach v. Belle Isle Apartment Corporation*<sup>242</sup> held that owners of an interest in a private road were entitled to compensation upon condemnation of the property for use as a public road. In this case a portion of the road had long been used by owners for their private use.

### C. *Just versus Full Compensation*

In *State Road Department v. Bramlett*<sup>243</sup> the supreme court pointed out that the requirement of paying *full* compensation<sup>244</sup> in Florida to an owner whose land is taken by eminent domain applies only to condemnation by private corporations and individual condemnors and not to condemnations by the state. In condemnation proceedings involving the state, its agencies or subdivisions, the requirement is that the owner be paid *just* compensation.<sup>245</sup>

At issue in the instant case was the right of the owner of a business on leased land to recover compensation for destruction of the reasonable fair market value of the business. In denying recovery for damage to the business, the supreme court stated that just compensation only included recovery for the value of the land, appurtenances, leasehold, and damages to remaining land or property.<sup>246</sup> The Florida Statute<sup>247</sup> permitting recovery for business damage was not applicable because that statute applies only when the business concerned is located on the land adjoining the land taken. In the instant case, the business was on the land taken and not on the adjoining land.

In reaching its decision in the instant case, the court had difficulty with the prior case of *Jacksonville Expressway Authority v. Henry G. Du Pree Company*<sup>248</sup> which allowed the owner compensation for the cost

241. 194 So.2d 301 (Fla. 1st Dist. 1967).

242. 177 So.2d 884 (Fla. 3d Dist. 1965), *cert. denied*, 188 So.2d 819 (Fla. 1966).

243. 189 So.2d 481 (Fla. 1966).

244. FLA. CONST. art. XVI, § 29.

245. FLA. CONST. DECL. OF RIGHTS, § 12.

246. 189 So.2d at 484 (Fla. 1966).

247. FLA. STAT. § 73.10(4) (1963), now FLA. STAT. § 73.071(3) (1965)

248. 108 So.2d 289 (Fla. 1958).

of moving his personal property. It was pointed out that *Du Pree* had applied the "full compensation" requirement, but that this aspect of the case was overruled<sup>249</sup> by *Daniels v. State Road Department*,<sup>250</sup> which made the differentiation noted above as to condemnations by the state or its agencies and those made by private corporations or individuals. The court did not expressly rule on the matter of moving expenses recovered in *Du Pree*, but it declined to extend the doctrine or open the gates to a "stampede into the field of damages in eminent domain proceedings."<sup>251</sup>

#### D. *Business Damages and Other Items of Recovery*

In addition to the *Bramlett* case discussed in the preceding section, issues as to damages were litigated in a number of other cases. *Pensacola Scrap Processors, Inc. v. State Road Department*<sup>252</sup> held that a tenant at will under an oral lease was an owner of the realty in a constitutional sense and was entitled to compensation for the taking of his property by eminent domain. The court held that his damages included those resulting from the loss or cost of removing improvements located on the leased land being condemned.<sup>253</sup> In addition, damages to an established business of more than five years, located on property adjacent to that which was taken,<sup>254</sup> were recoverable.

*State Road Department v. Thibaut*,<sup>255</sup> affirming that a lessee for a term of years is an owner entitled to compensation, held that a lessee under a written lease for a term of years is also entitled to compensation for moving its personal property from the land condemned when there is only a partial taking of the leasehold.<sup>256</sup>

In *Tampa Suburban Utilities Corporation v. Hillsborough County Aviation Authority*,<sup>257</sup> a utility company sought to intervene in a condemnation proceeding. The company claimed compensation for utility lines located in easements not identified with the particular property taken, and compensation also for the deprivation of a substantial number of customers. The case was largely concerned with procedural issues as to intervention but the court also commented on the substantive rights of the parties.

The court pointed out that intervening parties in a condemnation

249. *State Rd. Dep't v. Bramlett*, 189 So.2d 481, 483 (Fla. 1966).

250. 170 So.2d 846 (Fla. 1964).

251. *State Rd. Dep't v. Bramlett*, 189 So.2d 481, 483-484 (Fla. 1966).

252. 188 So.2d 38 (Fla. 1st Dist. 1966), *cert. denied*, 192 So.2d 494 (Fla. 1966).

253. As to moving expenses, *see also* text following note 248 *supra*.

254. *See* FLA. STAT. § 73.071(3) (1965) and note 247 *supra*, and accompanying text for the damage to business statute.

255. 190 So.2d 53 (Fla. 4th Dist. 1966), *cert. denied*, 196 So.2d 922 (Fla. 1967).

256. *See also* cases cited note 248 *supra* as to moving expenses.

257. 195 So.2d 568 (Fla. 2d Dist. 1967).

proceeding have to have an interest in the specific property sought to be condemned. The court then noted that the franchise cases in eminent domain are far from clear-cut, particularly those cases where the franchise may be impaired in value or partially taken, but not entirely taken. It was noted that generally the taking of property and razing of buildings which causes a utility to lose most of its customers is a business loss, and as such constitutes consequential damages which are not compensable unless they are within the scope of the damage to business statute<sup>258</sup> in Florida. The right to intervene was denied.

*Cheshire v. State Road Department*<sup>259</sup> held that landowners were entitled to recover an item representing a real estate appraiser's fees even though the appraiser did not testify in the condemnation proceeding. The theory of the court was that the landowner's award should not be diminished by the costs necessarily incurred in protecting his rights, and that the fee of an appraiser was necessary for the landowner to determine the sufficiency of the value placed upon the property by the court-appointed appraisers.

In *Carter v. State Road Department*<sup>260</sup> the Supreme Court of Florida reaffirmed the validity of the procedure whereby the jury in condemnation proceedings determines the value of the land taken, but does not determine the value of the respective interests or estates in the condemned land. The court, after reaffirming the principle that the owner of a leasehold is an owner in a constitutional sense and entitled to compensation, specifically held that the statutes pertaining to the apportionment of the award<sup>261</sup> were not in violation of the constitution, or in violation of the statute<sup>262</sup> providing that the jury shall try "what compensation shall be made to the defendants for the property sought to be appropriated."

The court construed the above language to mean that the trial court should admit to the jury all pertinent proffered facts touching on the value of the fee and the leasehold and that the jury must evaluate both interests and render an inclusive verdict.<sup>263</sup> The court stated that absent a showing in the record to the contrary, it must be presumed that the trial court observed the legal proprieties and the jury had before it all facts essential to the inquiry. This presumption was maintained notwithstanding the statements made in the argument and in the briefs to the effect that the trial court rejected a proffer by the lessee of evidence of the

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258. FLA. STAT. § 73.071(3) (1965).

259. 186 So.2d 790 (Fla. 4th Dist. 1966), *cert. denied*, 192 So.2d 493 (Fla. 1966).

260. 189 So.2d 793 (Fla. 1966).

261. FLA. STAT. §§ 73.11 and 73.12 (1963), now §§ 73.081 and 73.101 (1965).

262. FLA. STAT. § 73.10 (1963), now FLA. STAT. § 73.071 (1965), with changes in phraseology.

263. 189 So.2d at 796 (Fla. 1966).



value of the lease. The appellate court, it was stated, is necessarily circumscribed by the record of the proceedings below.

The supreme court stated that it found nothing inconsistent in the requirement that the jury try what compensation shall be paid the defendants for their property and the provision requiring that the compensation awarded by the jury be apportioned by the trial court upon its determination of the respective rights of owner and lessee.<sup>264</sup> The value of the fee and leasehold are to be considered by the jury in determining the lump sum award, and then the court apportions such award.

#### E. *Inverse Condemnation*

*State Road Department v. Lewis*<sup>265</sup> upheld as proper procedure an inverse condemnation action in which the trial judge decreed that there had been a taking and then transferred the cause to the law side of the court for the determination of damages. The court stated that although it might have been the better practice for the chancellor to have entered a final decree requiring the road department to institute an eminent domain proceeding at law, the procedure followed has foundation in precedent, and was the most expeditious one.

#### F. *Miscellaneous*

*State Road Department v. Levato*<sup>266</sup> held that permitting the property owners to read into evidence the estimate of value which one of the court-appointed appraisers had earlier reported to the court in pre-trial proceedings violated a former statutory prohibition<sup>267</sup> although the appraiser had died prior to trial, and constituted reversible error. The statute in question provided specifically that:

*The declaration of taking, the amount of deposit and the report of the appraisers appointed by the court, shall not be admissible in evidence in any cause and shall not be exhibited to any jury empaneled for the purposes of assessing the value of any land in condemnation. The appraisers appointed by the court shall be competent witnesses in the cause when said cause is submitted to the jury for the purpose of fixing an award.*<sup>268</sup>

The court concluded that the legislative prohibition was mandatory, but that the property owners could have taken the deposition of the appraiser as an expert witness. In so doing, the appraiser's testimony would have been properly and effectively preserved for the use at the main trial.

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264. *Id.*

265. 190 So.2d 598 (Fla. 1st Dist. 1966), *cert. dismissed*, 192 So.2d 499 (Fla. 1966).

266. 192 So.2d 35 (Fla. 4th Dist. 1966).

267. FLA. STAT. § 74.09 (1963). The present FLA STAT. § 74.081 (1965), prohibits only the declaration of taking and the amount of the deposit from being admissible into evidence.

268. FLA. STAT. § 74.09 (1963) (emphasis added).

In *Lovett v. City of Jacksonville Beach*,<sup>269</sup> the problem involved the running of the statute of limitations on an appeal from a condemnation judgment. The court held that since notice of appeal was filed more than sixty days after judgment was entered, the court had no jurisdiction to hear the appeal with respect to issues finally adjudicated by the judgment, but could consider the issue of the sufficiency of attorney's fees fixed by order entered less than sixty days before the notice of appeal was filed.

## VIII. ESTATES AND OTHER INTERESTS

### A. Homestead

#### 1. LEGISLATION: TAX EXEMPTION

The 5,000 dollar homestead taxation exemption was extended conditionally by the 1967 Legislature to owner-occupiers of co-operative and condominium apartments, such exemption to become effective on January 1 after approval by a majority of the voters of either the House Joint Resolution amending section 7 of article X of the Florida Constitution, to so provide, or after approval of a new constitution containing such a provision.<sup>270</sup>

The statute<sup>271</sup> relating to the rental of a homestead as constituting an abandonment for tax purposes was amended.<sup>272</sup> Whereas until the amendment the statute exempted from its provisions only members of the armed forces whose service is a result of a mandatory obligation imposed by the Federal Selective Service Act, the 1967 amendment includes members of the armed forces who volunteer for service.

The 1967 Legislature has also provided for the recapture of unauthorized homestead tax exemptions.<sup>273</sup> This act creates a lien upon property in an estate of a deceased person who had claimed an exemption for homestead while not a bona fide resident of this state. The Act provides that when an estate of a person is being administered in another state under an allegation that the deceased was a resident of that state, and the estate contains real property located in this state upon which homestead exemption had been allowed for any year or years within ten years immediately prior to the death of the deceased, then within three years after the death of said person the tax assessor shall record a notice of tax lien against the property, and said property shall be subject to the payment of all taxes exempt thereunder, plus six percent interest per year, unless the heirs or representative of the deceased shall furnish competent

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269. 187 So.2d 96 (Fla. 2d Dist. 1966).

270. Fla. Laws 1967, ch. 67-339, § 1, amending FLA. STAT. §§ 192.12 and 192.13 (1965).

271. FLA. STAT. § 192.141 (1965).

272. Fla. Laws 1967, ch. 67-459.

273. Fla. Laws 1967, ch. 67-134.

evidence to the probate court of the state where the decedent allegedly died a resident that the decedent was a bona fide resident of this state during each year of said exemption.

The collection of such taxes shall be in the same manner as the collection of existing ad valorem taxes, and the above procedure in recapturing said taxes shall be supplemental to any existing provisions under the laws of this state. The lien provided for does not attach until said notice of tax lien is filed upon the public records of the county where the property is located, and prior to the filing of such notice, any purchaser for value of the subject property shall take free and clear of such lien.<sup>274</sup>

## 2. GRATUITOUS VOID CONVEYANCES

The homestead case that raised the most issues, *Cahill v. Chesley*,<sup>275</sup> followed the well entrenched principle that a gratuitous conveyance of the homestead is void when it would otherwise defeat the interests of children or lineal descendants. In this case the gratuitous conveyance was to a grandson when his mother, the grantor's daughter, was alive. It was held that both the conveyance to the grandson and the later voluntary reconveyance to his grandmother, the surviving spouse of the original title holder, was void.

After the reconveyance to the widow of the original title holder, the widow conveyed to her daughter and husband reserving a life estate. After the deed to the daughter and husband was executed, the widow executed a deed to the plaintiff, but the deed to the plaintiff was not recorded until after recordation of the deed to the daughter and husband.

The court held that the deeds to the grandson and back to the widow of the original grantor were void. Thus, the widow had only a life estate as a result of the homestead descent provisions,<sup>276</sup> and that was all she could convey to plaintiff. The deed to the daughter and husband reserving a life estate was likewise ineffective, but the homestead descent provisions resulted in the daughter getting a vested remainder anyway. The title of the daughter eventually became vested in her son, the grandson-grantee under the gratuitous void deed, and then was transferred by him to the defendant.

In an effort to overcome the homestead provisions, the plaintiff urged several doctrines by which he hoped to perfect title. The claim of limitations for twenty years<sup>277</sup> was rejected on the basis of *Reed v. Fain*,<sup>278</sup> which emphasized the voidness of the deed, and stated that the legisla-

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274. *Id.*

275. 189 So.2d 818 (Fla. 2d Dist. 1966).

276. FLA. STAT. § 731.27 (1965).

277. FLA. STAT. § 95.23 (1965).

278. 145 So.2d 858 (Fla. 1961).

ture did not intend the twenty year statute of limitations to be applicable to deeds or wills conveying or devising homestead property, and that such statute would be unconstitutional if it were construed in such a manner as to breathe life into an instrument made and executed in contravention of constitutional inhibitions.<sup>279</sup>

In regard to adverse possession, the court pointed out that at the time of conveyance the widow had only a life estate, and then stated that the adverse possession statute<sup>280</sup> was inapplicable.<sup>281</sup> The court's explanation on this point was not too clear. Apparently the void deed to the widow at a time when she had a life estate under the homestead law was an insufficient predicate for the running of adverse possession since ordinarily, adverse possession does not run against a remainderman. The case did not indicate when the life tenant died and when the plaintiff filed his action, but presumably seven years did not elapse between the two events.

The doctrine of estoppel by deed or after-acquired title whereby the grandson would be estopped to deny the title of plaintiff was also rejected. The court pointed out that the 1941 deed from the grandson to the widow was obtained at her "instance and request," and that nothing was done by the grandson which would constitute conduct prejudicial to her. Both parties were said to be charged with knowledge that after the grandfather's death the grandmother had only a life estate. Thus, because the deed was void as a conveyance, because both parties to the deed were charged with knowledge of the true state of title, and because the grandson did not do anything prejudicial to the interest of the grandmother, estoppel by deed was denied.<sup>282</sup>

The argument that plaintiff was a bona fide purchaser for value relying on record title<sup>283</sup> and therefore should prevail over the subsequent title derived through the remainderman was likewise rejected. In this case the deed from the widow to the plaintiff was executed after the widow had conveyed (reserving a life estate) to her daughter and husband. The deed to the plaintiff was recorded after the deed to the daughter and husband was recorded.

The court questioned whether the plaintiff was in fact a subsequent bona fide purchaser for value,<sup>284</sup> and then added that in any event the

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279. *Id.* at 871, repeated in *Cahill v. Chesley*, 189 So.2d 818, 821 (Fla. 2d Dist. 1966).

280. FLA. STAT. § 95.16 (1965).

281. 189 So.2d at 821 (Fla. 2d Dist. 1966).

282. *Id.* at 821-22.

283. The recording act, FLA. STAT. § 695.01 (1965), voids unrecorded instruments as against subsequent bona fide purchasers for value without notice. See generally *BOYER*, FLA. REAL ESTATE TRANSACTIONS, § 26 (1967).

284. 189 So.2d at 822 (Fla. 2d Dist. 1966). The amount of consideration was apparently no more than \$100, and this may have been expended before a conveyance was contemplated.

grantor-grandmother had only a life interest in the property and could not convey any more. If the case were a proper one for the application of the recording act, and the plaintiff, as junior grantee, were a subsequent bona fide purchaser for value without notice of the prior unrecorded conveyance, the plaintiff would prevail although he recorded after recordation of the prior conveyance.<sup>285</sup> The decision, however, is consistent with the rather strong precedent that the various conveyances of the homestead are void under similar circumstances and remain void. How innocent a purchaser might be apparently makes no difference. Further, the recording act can afford no protection on the basis that plaintiff was relying on the recorded void deeds to the grandson and back to the grandmother. The statute protects against unrecorded deeds; it makes no pretense of protecting against recorded but void deeds.<sup>286</sup>

That the purpose of the rule prohibiting gratuitous conveyances of the homestead is to protect only the interests of the children or lineal descendants is illustrated by *Pace v. Woods*.<sup>287</sup> In this case, the husband and wife held title to their homestead as tenants by the entireties. Thereafter the husband and wife executed a deed conveying the property to themselves as tenants in common with no right of survivorship. No actual consideration was given by the wife to the husband for this deed. Upon the death of the wife, she left a will devising her half interest in the property to her son by a prior marriage. The husband then brought an action to set aside the deed as an improper alienation of homestead property.

The court refused to set aside the deed saying that the husband's case lacked merit both in law and in fact. It was pointed out that in those cases where gratuitous conveyances were voided the complaining parties were children of the homestead owner and had a protected interest under the Constitution of Florida. The court stated that it would be a strained interpretation of homestead laws to hold that such laws are designed to protect the head of the household from his own alleged improper alienation of the homestead. Further, if consideration were necessary, the court concluded that consideration could be found in the instant case by the parties to the deed giving up certain legal rights in exchange for others. One valuable legal right lost was the right to succeed to the entire estate by outliving the other tenant. One valuable legal right gained was the right of each tenant to dispose his respective interest in precisely the manner as was done by Mrs. Pace, that is, by devise.<sup>288</sup>

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285. Under the Florida notice type recording act, priority is accorded the subsequent bona fide purchaser if the earlier instrument is unrecorded at the time the bona fide purchaser becomes a subsequent purchaser without notice. There is no race to the courthouse feature in the Florida general recording act, Fla. Stat. § 695.01 (1965).

286. FLA. STAT. § 695.01 (1965). See generally BOYER, FLA. REAL ESTATE TRANSACTIONS, § 26.03 (1967).

287. 177 So.2d 779 (Fla. 3d Dist. 1965).

288. *Id.*

Whether a particular parcel of real estate has the status of homestead depends upon the facts at the time the issue becomes important. Thus, in the case of *In Re Estate of Mahaffey*<sup>289</sup> it was held that the husband's real property was not homestead at the time of his death, and therefore his wife was entitled to dower. The court found that the homestead had been abandoned after the death of the husband's first wife, that his second wife never lived with him on the property but that she lived on her own property, and that he did not contribute to her support.

In a somewhat similar fashion, in *Anderson v. Garber*<sup>290</sup> where title to the land was held in the name of the wife, and she resided thereon with her husband and her three children by a previous marriage, although the husband did not contribute much to the support of the family, and often stayed away for months at a time, the court concluded that the facts did not rebut the presumption that the husband was the head of the family. Therefore, although title was in the wife's name, she was not the head of the family. Therefore, the mortgage executed by her as a free dealer was proper and valid.

In *Commercial Acceptance Corporation v. Barnes*,<sup>291</sup> the court held that a mortgage executed on homestead property but not in the presence of two witnesses was void and unenforceable. There was also considerable evidence of fraud in the case, and the holder of the mortgage and note was held not to be a bona fide purchaser for value.

#### B. Concurrent Estates

Two cases during this period involved the nature of the fiduciary relationship existing between co-tenants. In *Kennedy v. Vandine*,<sup>292</sup> the supreme court recognized that a tenant in common can hold adversely to his co-tenant, and for this and other reasons concluded that a summary judgment was improper because of material factual issues. In this case a wife had sued her husband for separate maintenance in 1947 and obtained a decree that formerly-held entireties property should be conveyed to her as her sole property. A sheriff's deed was executed and recorded pursuant to the decree after the husband had refused to comply. Later the husband obtained an out of state divorce and thereafter returned to the Miami area to live.

After the death of the wife the former husband claimed a one-half interest in the property. The supreme court noted that in some jurisdictions one tenant by the entireties can oust the other of possession so as to start the statute of limitations running. The court found that it was

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289. 194 So.2d 636 (Fla. 2d Dist. 1967).

290. 183 So.2d 693 (Fla. 3d Dist. 1966), *cert. denied*, 188 So.2d 820 (Fla. 1966), *appeal dismissed*, 189 So.2d 631 (Fla. 1966).

291. 179 So.2d 251 (Fla. 1st Dist. 1965).

292. 185 So.2d 693 (Fla. 1966).

unnecessary to decide this issue in Florida, however, because sufficient time had occurred after the divorce of the husband to vest title in the wife if she were in fact holding adversely to him. The court concluded that there were substantial factual issues as to laches and adverse possession.

*Johnson v. Johnson*<sup>293</sup> adhered to the general rule that one co-tenant who acquires a tax title to the property forfeited for non-payment of taxes does not acquire a new independent title but instead holds such title in trust for his co-tenants. It was further held that such right of the co-tenants is not barred after the lapse of twenty years.

### C. Easements

In *Redman v. Kidwell*<sup>294</sup> the court held that access by water was not a reasonable and practicable means of access today, and therefore a landowner whose only other means of access to a highway was over his adjoining owner's land, was entitled to a common law easement of necessity under the statute<sup>295</sup> codifying the common law easement of necessity.

*Casteel v. Malisch*<sup>296</sup> held that a genuine issue of material fact whether another reasonable and practicable way of access existed precluded the rendering of a summary judgment in an action seeking to establish a common law easement of necessity.

The case of *Tallahassee Investments Corporation v. Andrews*<sup>297</sup> involved the question of implied easements when there is a conveyance in reference to a plat. In this case a plat had been filed but the deeds to both plaintiff and defendants, originating from a common source of title, were by metes and bounds without reference to any of the easements appurtenant to the lands delineated on the plat. The court, recognizing that Florida follows the "intermediate" rule<sup>298</sup> as to implied easements in conveyances in reference to a plat, affirmed the trial court's holding that under the circumstances, where there was no reference to the plat in the conveyance, the plaintiff was estopped from denying or maintaining a position inconsistent with the deed under which it eventually derived its title.

In *Watley v. Florida Power & Light Company*<sup>299</sup> a personal injury action, it was held that when the power company had maintained the location of its wires for 40 years, a prescriptive easement was acquired.

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293. 179 So.2d 112 (Fla. 2d Dist. 1965).

294. 180 So.2d 682 (Fla. 2d Dist. 1965), *cert. denied*, 188 So.2d 806 (Fla. 1966), *appeal dismissed*, 189 So.2d 631 (Fla. 1966).

295. FLA. STAT. § 704.01(1) (1965).

296. 189 So.2d 252 (Fla. 3d Dist. 1966).

297. 185 So.2d 705 (Fla. 1st Dist. 1966).

298. See generally BOYER, FLA. REAL ESTATE TRANSACTIONS, § 23.03[3] [d].

299. 192 So.2d 27 (Fla. 1st Dist. 1966).

#### D. *Covenants and Equitable Servitudes*

The case of *Hagan v. Sabal Palms, Inc.*<sup>300</sup> discussed at length the equitable enforcement of covenants running with the land, but the crucial problem dealt with notice. The court simply held that the amended complaint included sufficient facts to withstand an assault by a motion to dismiss, and the case was reversed.

The case does not in fact establish any new or startling principles of the doctrine of notice, but it may indicate a judicial acceptance of the more liberal doctrines in this area. As to constructive notice, it is probable, but not crystal clear, that the covenant was included in a deed of the specific lot by the common grantor to a predecessor in title of the defendant.<sup>301</sup> If this was so, there should be no question but that the grantee, even a remote one, would be charged with constructive notice under the recording act. The court, however, also cited out-of-state authority to the effect that constructive notice is afforded not alone by deeds in the grantee's immediate chain of title, but is also afforded by the common grantor's deeds of other lots in the neighborhood.<sup>302</sup> It is believed that there has been no direct holding in Florida to the effect that deeds out by a common grantor to neighboring land is within the grantee's chain of title and constitutes constructive notice of the content of all that is included in the deeds to such neighboring land.

The court also found that the grantee could have been put on inquiry notice, or as denominated in Florida, "implied actual notice," by the fact that the entire area had been uniformly developed as a residential neighborhood.<sup>303</sup> In addition to the foregoing, the defendant had been warned and given actual notice by the plaintiffs prior to beginning construction. Such actual notice, after the plaintiff had already purchased the land, would probably not be a sufficient basis for enjoining his violation of a covenant if otherwise the defendant had qualified as a bona fide purchaser for value without notice at the time he acquired his deed. Such actual notice, however, if the defendant otherwise is charged with notice, is significant, or may be, in considering the scope of the injunction that ultimately may be imposed on him.

The case of *Thompson v. Squibb*<sup>304</sup> held that an owner of a lot burdened with restrictions for residential use only was not authorized to convey a portion of such lot for use as a road or highway to connect two subdivisions. The court, although recognizing that such restricted land could be taken by eminent domain without compensating other lot owners in the subdivision for whose benefit the restriction was imposed, rejected

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300. 186 So.2d 302 (Fla. 2d Dist. 1966), *cert. denied*, 192 So.2d 489 (Fla. 1966).

301. The suit was to enjoin violation of the covenants.

302. 186 So.2d 302, 312 (Fla. 2d Dist. 1966).

303. *Id.* at 312-313.

304. 183 So.2d 30 (Fla. 2d Dist. 1966).



the notion that an owner of such restricted land could make a voluntary conveyance without liability for breach of covenants. Since no circumstances were shown indicating that the defendant was confronted with imminence of condemnation, but rather that use of the land as a roadway was strictly for private advantage, the injunction against the defendant's use of the land for street purposes was affirmed.

*City of Miami Beach v. Kline*<sup>305</sup> held that property owners were entitled to enforce a covenant limiting the use of the property to golf course purposes, but that an injunction was not authorized prohibiting the city from temporarily depositing trim and cuttings from the golf course on part of the property.

The platting statutes, particularly section 177.08,<sup>306</sup> were used to decide that the land in question was a part of the subdivision and subject to the restrictive covenants in *Coffman v. James*.<sup>307</sup> In this case, a portion of the land included in the subdivision was not subdivided into a number of smaller lots, but it was not marked as being excepted from the plat. The court therefore held that the statute requiring that excepted parcels must be marked "not included in this plat," along with the absence of other provisions on the plat or the recorded restrictions by which a purchaser of property in the subdivision would be put on notice that the subject parcel was excepted from the restrictions and plat, justified the purchasers in relying on the public records so that they were entitled to enforce the restrictions, which were subjectively not intended to be included against the owner of the lot.

In *Staninger v. Jacksonville Expressway Authority*,<sup>308</sup> the court held that in an eminent domain proceeding, the jury should consider the effect of a restrictive covenant in determining the value of the land. The majority, however, held that the probability of removing such a restrictive covenant and the probable cost thereof was inadmissible as being too speculative. A concurring opinion concluded that the jury should also consider the chance or likelihood of the restrictive covenants being removable.

#### E. *Convenants versus Defeasible Fees*

In *Finchum v. Vogel*,<sup>309</sup> the court held that restrictions, coupled with a reverter right in favor of the grantor, its successors and assigns, were not restrictive covenants or equitable servitudes but that each grantee acquired only a fee simple on condition subsequent with the right of re-entry vested in the grantor. Accordingly, it was held that the various grantees were not authorized to enforce by injunction or otherwise the

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305. 189 So.2d 503 (Fla. 3d Dist. 1966).

306. FLA. STAT. § 177.08 (1965).

307. 177 So.2d 25 (Fla. 1st Dist. 1965).

308. 182 So.2d 483 (Fla. 1st Dist. 1966).

309. 194 So.2d 49 (Fla. 4th Dist. 1966).

covenants against each other. The excerpts from the applicable restrictions did not include any statement that they were for the benefit of the various landowners in the subdivision or that they could be enforced otherwise than by the reverter provision.

The case technically can be supported, especially if a Florida statute<sup>310</sup> is not considered, but it illustrates another method by which grantees of real estate may be disappointed by receiving less than they expected. The grantor in this case may release his right of re-entry in respect to specific lots which he has not yet sold, thus obtaining a higher price therefor, and the prior grantees, who were expecting a uniformly restricted subdivision, and presumably paid more for their respective lots as a result of the restrictions, are left powerless to prevent the encroachment of business and commercial activity. As for those grantees, however, it is somewhat surprising that grantees today would be willing to purchase land subject to a reverter right for breach of a use restriction.

The *Finchum* case made no reference to the Florida statute<sup>311</sup> limiting the duration of reverter provisions. It is unfortunate that this statute was apparently overlooked because subsection 7 provides that the statute shall not alter or terminate the restrictions in covenants or forfeiture clauses, but that such restrictions may be enforced by injunction by any person adversely affected. This section does not limit the equitable enforcement of such restrictions to a period of time after the reverter becomes unenforceable. Hence, the statute could be construed, as apparently it was intended, to confer equitable enforcement rights irrespective of whether the reverter is also enforceable, and irrespective also of whether other provisions of the statute are constitutional.<sup>312</sup> Such a construction and result would have led to a better solution in the instant case.

#### F. *Water Law And Boundaries*

Approval of the civil law rule that the owner of any portion of the bed of non-navigable waters may make reasonable use of the surface of the entire lake was reaffirmed in *Hill v. McDuffie*,<sup>313</sup> but was held not applicable to the instant case since the defendants' land was dry a considerable portion of the time and hence not considered a part of the lake bed. Accordingly, the defendants were permitted to maintain a dyke, spillway and dry wells to protect their pasture land so long as such improvements did not cause the water to back up on the other land or to drain the lake below the normal highwater mark.

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310. See note 311 *infra* and accompanying text.

311. FLA. STAT. § 689.18 (1965).

312. *Biltmore Village, Inc. v. Royal Biltmore Village, Inc.*, 71 So.2d 727 (Fla. 1954), held that the provision of the statute limiting the duration of reverter rights was unconstitutional insofar as it applied to reverter rights that were in existence for more than 21 years at the effective date (1951) of the statute.

313. 196 So.2d 790 (Fla. 1st Dist. 1967).

In *Padgett v. Central & Southern Florida Flood Control District*,<sup>314</sup> it was held that when the state conveyed certain reclaimed lands and reserved the right to conduct further drainage operations, and when the exercise of such rights resulted in state-owned lands intervening between the waters and the land previously conveyed, such previously conveyed land was no longer riparian and had no riparian rights. The court also held as an alternative theory that the construction of the levy was a work of drainage or reclamation contemplated in the reservations in the deeds and statutes applicable at the time of the state's previous conveyance, and that the Padgetts' riparian rights, if any, were subject to the right of the district to construct the levy.

In *Trustees of the Internal Improvement Trust Fund v. Lord*,<sup>315</sup> the court held that whether the lands in dispute were formed by accretions to uplands owned by the plaintiff or were lands in place which were the property of the state as either sovereignty or swamp or overflowed lands precluded a summary decree.

In *Carlton v. Central & Southern Florida Flood Control District*,<sup>316</sup> it was held that the boundary between Okeechobee County and Highlands County, under 1917 and 1921 statutes fixing the boundary as the Kissimmee River, intended that the boundary should be the river as it existed in 1917 and 1921 and thereafter, rather than the river as purportedly shown by an 1859 federal survey. The river is now located in the same place as it was in 1917, so the court was not troubled by problems of shifting boundaries.

*Gibson v. Wright*<sup>317</sup> held that the boundary fixed by an original United States Government survey controlled and could not be altered by virtue of a later government survey.

*City of Pompano Beach v. Beatty*<sup>318</sup> held in accordance with established precedent that the original survey as actually run on the ground controls. Therefore, the original markers showing a street to have a width of eighty feet prevailed over the plat showing the street to have a width of one hundred feet.

#### G. Adverse Possession

*Polk v. Kelley*<sup>319</sup> settled a disputed boundary controversy by application of the doctrine of adverse possession. The court found that the defendants and their predecessors in title had sometime prior to 1920, continuously and without interruption exercised all the incidents of ownership over the disputed strip with the intent to claim the right of owner-

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314. 178 So.2d 900 (Fla. 2d Dist. 1965).

315. 189 So.2d 534 (Fla. 2d Dist. 1966).

316. 181 So.2d 656 (Fla. 2d Dist. 1966).

317. 179 So.2d 245 (Fla. 1st Dist. 1965).

318. 177 So.2d 261 (Fla. 2d Dist. 1965).

319. 184 So.2d 494 (Fla. 2d Dist. 1966).

ship and possession. The possession was actual, open, exclusive, hostile and adverse, and therefore the defendants acquired title by adverse possession prior to 1939 when the statute<sup>320</sup> was amended requiring the payment of taxes for adverse possession without color of title.

The court found that nothing had happened since the acquisition of title by adverse possession to divest the adverse possessors of their ownership. The fact that the defendant-adverse possessors did not pay taxes on the disputed strip, or the fact that the plaintiffs who were out of possession did pay taxes on the disputed strip, were not sufficient to divest defendants, or their predecessors in title, of ownership.

*Daniels v. Alico Land Development Company*<sup>321</sup> involved a claim of title by adverse possession to all of an unsurveyed island, although the claimants had color of title to only a portion thereof. There had been some other settlers on the island, and even a school, so that there was considerable difficulty in determining the extent of the actual possession of the adverse possessors. The chancellor held, and the Second District affirmed, that the claimants acquired title by adverse possession without color of title to that portion of the island which was included within the legal description contained in a deed to the claimants' ancestor, the deed being used as evidence to show that portion of the island which was actually occupied by the claimants and their predecessors.

*Brooks v. Taylor*<sup>322</sup> involved land litigation wherein the plaintiffs, in a quiet title suit, showed a proper chain of title to the land, while the defendants relied on a tax deed issued by the Trustees of the Internal Improvement Fund and on adverse possession. The tax deed was held void because of irregularities, and it was also held that the description in the tax deed did not include the plaintiffs' land. The chancellor also found that the defendants had failed to establish the claim of title by adverse possession, and a decree for the plaintiffs was affirmed.

*Seaside Properties, Inc. v. State Road Department*<sup>323</sup> applied Florida Statutes, section 337.31(1) to find that the State Road Department had acquired title by adverse possession by maintaining and keeping in repair a road for four years, and further found that the road had not been abandoned by the state.

The unsuccessful attempt to perfect title by adverse possession under a void deed of homestead in the case of *Cahill v. Chesley*<sup>324</sup> has already been discussed.<sup>325</sup>

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320. FLA. STAT. §§ 95.18 and 95.19 (1965).

321. 189 So.2d 540 (Fla. 2d Dist. 1966).

322. 190 So.2d 205 (Fla. 1st Dist. 1966).

323. 190 So.2d 391 (Fla. 3d Dist. 1966).

324. 189 So.2d 818 (Fla. 2d Dist. 1966).

325. See cases cited note 279 *supra* and following text.

### H. *Dower and Curtesy: Legislation*

The Florida Statute<sup>326</sup> relating to conveyances of various property interests by a guardian was amended to provide for the transfer of the separate property of an incompetent wife under certain conditions.<sup>327</sup> Section (1)(a) of the amended statute provides for the sale of the separate property of an adjudged incompetent wife when the husband's only interest is the right of joinder with respect to conveyances. Such sale is authorized only when there is a need to sell, mortgage or lease such property for the care, support and maintenance of the incompetent wife. Further, the husband must have either deserted the wife, or his whereabouts be then unknown, or without just cause the husband refuses to join in the sale, mortgage or lease of the property. The county judge is authorized to order a sale, mortgage or lease under such circumstances, but the husband must be served in the manner as provided by law.

The other provisions of section (1) of the statute<sup>328</sup> authorizing the guardian of an incompetent wife to join with the husband in conveyances for the purpose of releasing her inchoate right of dower were retained.

The statute<sup>329</sup> providing for an extension of time for the widow to elect dower when litigation develops, or when the time is otherwise extended for suits of creditors or other matters affecting the estate of a decedent, so that the full and complete extent of the estate assets subject to dower may be in doubt was amended in 1967.<sup>330</sup> The amendment changes the style and phraseology but retains the seventy day extension period for filing the claim of dower.

### I. *Dedication: Recovery of Donated Land*

A new act<sup>331</sup> provides for the recovery of donated land within sixty months from the conveyance when a municipality or county fails to use the land for the express purpose for which it was donated. The act provides that if the land was granted without consideration for a specific purpose, and if the grantee or municipality or county failed to use the property for such purpose for a period of sixty consecutive months, that the grantor, if he owns land adjoining such donated land, may make written demand on the municipality or county for return of the land, and a municipality or county may execute and deliver a quit claim deed therefor. Further, if the purpose for which the property was conveyed required

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326. FLA. STAT. § 745.15 (1965).

327. Fla. LAWS 1967, ch. 67-81.

328. FLA. STAT. § 745.15(1)(b) and (c) (1967).

329. FLA. STAT. § 731.35 (1965).

330. Fla. LAWS 1967, ch. 67-398, amending FLA. STAT. § 731.35(2).

331. Fla. LAWS 1967, ch. 67-383.

physical improvement, construction or maintenance thereof, any such municipality or county failing to construct, improve or maintain such property for the period above specified, shall be conclusively deemed to have abandoned the property for the purpose for which it was conveyed.

#### IX. CONVEYANCES: LEGISLATION

Florida Laws 1967, chapter 67-53 requires that deeds and other instruments conveying, encumbering, assigning or otherwise disposing of real estate shall not be recorded unless there appears on such document a statement as to the identity of the person who prepared the instrument.

A documentary surtax equivalent to the former Federal Government documentary stamp tax was enacted by the Florida Legislature and becomes effective on January 1, 1968,<sup>332</sup> the date the federal documentary stamp tax expired. This tax is, of course, in addition to the taxes levied in Florida Statute § 201.02.

The Florida statute<sup>333</sup> relating to the effective time of recording and constructive notice was amended in 1967.<sup>334</sup> The amended statute specifically provides that all instruments which are to be recorded in the official records of the county shall be deemed to have been officially accepted by the said officer and officially recorded, at the time he affixed thereon the consecutive official registry numbers. It is further provided that the instrument shall be notice to all persons at the time of affixing the consecutive official registry number. Further, the sequence of such official numbers shall determine the priority of recordation, the instrument bearing the lower number having priority over any instrument bearing a higher number in the same series. This amendment should make it abundantly clear that the instrument is constructive notice of its true contents from the time of filing with the clerk, and that any subsequent mistake in indexing or transcribing into the records is immaterial so far as constructive notice is concerned.

The Florida statute<sup>335</sup> relating to the validity of acts done under a power of attorney when the principal was dead, but that fact was not known to the agent, was amended in 1967.<sup>336</sup> The amendment relates to servicemen and broadens the coverage of that section relating to a listing in a "missing in action list." The amended statute uses the word "hostilities" in reference to such a list rather than the word "war" as used in the former statute, the amendment thus broadens coverage to include actions in which the United States may not be technically at war.

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332. Fla. Laws 1967, ch. 67-320.

333. FLA. STAT. § 695.11 (1965).

334. Fla. Laws 1967, ch. 67-442.

335. FLA. STAT. § 709.01 (1965).

336. Fla. Laws 1967, ch. 67-453.